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## Confronting Indeterminacy and Bias in Child Protection Law

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# CONFRONTING INDETERMINACY AND BIAS IN CHILD PROTECTION LAW

Josh Gupta-Kagan\*

*The child protection legal system faces strong and growing demands for change following at least two critiques. First, child protection law is substantively indeterminate; it does not precisely prescribe when state agencies can intervene in family life and what that intervention should entail, thus granting wide discretion to child protection agencies and family courts. Second, by granting such discretion, the law permits race, class, sex, and other forms of bias to infect decisions and regulate low-income families and families of color.*

*This Article extends these critiques through a granular analysis of how indeterminacy at multiple decision points builds on itself. The law does not tether permissible interventions to specific types of maltreatment. Minor cases can lead to family separations and even terminations of parent-child relationships. Steps required for reunification can become unrelated to grounds for state intervention. States expend many resources to separate families after failing to spend similar amounts to preserve families.*

*A child protection reform legislative agenda has begun to emerge, but without comprehensively addressing the indeterminacy at the heart of the present legal structure. This Article argues a transformed system must include determinate substantive standards for various stages of child protection cases to limit the system's scope and the potential for biased decisionmaking. The law should define neglect and abuse with precision, both to limit unnecessary state intervention and set maximum levels of state intervention based on the specific maltreatment at issue. The law should require states to spend as much money on helping families stay together as they would on maintaining children in foster care. State action to terminate the legal relationship between parents and children should be limited to situations in which any form of parent-child relationship is harmful to the child.*

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\* Professor of Law, University of South Carolina School of Law. The author would like to thank Jane Spinak and Nancy Polikoff for organizing the “Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being” symposium in June 2021, and all the contributors and speakers at the symposium, for inspiring and informing the ideas in this Article. The author thanks Avni Gupta-Kagan, Clare Huntington, Laura Matthews-Jolly, Jyoti Nanda, Eve Rips, and Michael Wald for helpful comments on earlier drafts, and Gabby Williams for excellent research assistance. Special thanks are due to Judge Leonard Edwards, David Kelly, Solangel Maldonado, Vivek Sankaran, and Kristen Weber for their thoughtful commentary on this Article, to Michael Wald for catalyzing those commentaries, and to James Stone and the entire staff at the *Stanford Law & Policy Review* for organizing those commentaries and the related panel discussion, and for their thoughtful edits throughout the production process. All errors are the author’s.

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## INTRODUCTION

The child protection legal system is at an inflection point. A growing family defense movement fights against state efforts to separate parents from their children. Calls to abolish foster care, analogous to calls to abolish prisons and police, have grown among advocates<sup>1</sup> and academics.<sup>2</sup> Government officials from multiple administrations have cited the need for a dramatic change to, and racial justice in, child protection practice.<sup>3</sup> Federal funding rules now emphasize preventing family separations rather than funding foster care after such separations occur.<sup>4</sup> The very name of the system is subject to renewed debate, with advocates urging use of the “family regulation” or “family policing” system in place of “child welfare.”<sup>5</sup> And calls for reforming the legal (and mostly

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1. See, e.g., *upEND: All Children Deserve to Be with Their Families*, CTR. FOR THE STUDY OF SOC. POL’Y, <https://perma.cc/NTT4-9ZPV> (archived Apr. 23, 2022) (“Thus, the work of the upEND Movement isn’t about reform, it is about ending the current child welfare system; it is about the abolition of child welfare through the creation of new, anti-racist structures and practices to keep children safe and protected in their homes.”); Keyna Franklin, *We Want Policing Defunded in All Forms—Including the Family Policing System*, RISE (June 2, 2021), <https://perma.cc/CTK9-TMXZ> (describing abolition activism in New York City).

2. For instance, Professors Nancy Polikoff and Jane Spinak, together with the *Columbia Journal of Race and Law*, organized a 2021 symposium entitled “Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being.” *The Columbia Journal of Race and Law Announces Its Volume 11 Symposium*, COLUM. J. RACE & L. (Feb. 4, 2021), <https://perma.cc/WS5L-VFUD>; see also Alan J. Dettlaff, Kristen Weber, Maya Pendleton, Reiko Boyd, Bill Bettencourt & Leonard Burton, *It Is Not a Broken System, It Is a System that Needs to Be Broken: The upEND Movement to Abolish the Child Welfare System*, 14 J. PUB. CHILD WELFARE 500, 508-10 (2020); Lisa Kelly, *Abolition or Reform: Confronting the Symbiotic Relationship Between “Child Welfare” and the Carceral State*, 17 STAN. J. C.R. & C.L. 255, 300-19 (2021).

3. See Jerry Milner & David Kelly, *It’s Time to Stop Confusing Poverty with Neglect*, CHILD.’S BUREAU EXPRESS (Dec. 2019/Jan. 2020), <https://perma.cc/MF34-LMN9> (criticizing “small, incremental improvements and minor tweaks” and how child protection professionals “see and judge families that make contact with the system . . . as the ‘other’”); *A Message From Associate Commissioner Aysha Schomburg*, CHILD.’S BUREAU EXPRESS (May 2021), <https://perma.cc/UX3K-P82T> (asserting “that racism and bias have roots deep in the child welfare system”). Milner was Association Commissioner of the Children’s Bureau under President Trump and Schomburg serves in that role under President Biden.

4. See *infra* Part III.B.

5. Dorothy Roberts conceptualized how child protection agencies regulate families. See generally Dorothy Roberts, *Feminism, Race, and Adoption Policy*, in *ADOPTION MATTERS: PHILOSOPHICAL AND FEMINIST ESSAYS* 234 (Sally Haslanger & Charlotte Witt eds., 2005). Recent scholarship from Emma Peyton Williams used the phrase “family regulation system” to describe the legal system involving those agencies and family courts. Emma Peyton Williams, *Dreaming of Abolitionist Futures, Reconceptualizing Child Welfare: Keeping Kids Safe in the Age of Abolition* 14-16 (Apr. 27, 2020) (B.A. thesis, Oberlin College) (on file with the Oberlin College Libraries). The phrase “family regulation system” accurately describes the legal system at issue and I have used it elsewhere. Brianna Harvey, Josh Gupta-Kagan & Christopher Church, *Reimagining Schools’ Role Outside the Family Regulation System*, 11 COLUM. J. RACE & L. 575, 578 n.1 (2021). In this Article, however, I refer to the “child protection system” to emphasize what should be the legal system’s focus and the Article’s

statutory) structure governing state child protective intervention in families have grown, with discrete successes in several state legislatures.<sup>6</sup>

These demands for change follow at least two long-standing critiques of child protection cases which reach family court and separate families.<sup>7</sup> First, child protection law is substantively indeterminate; instead of precisely prescribing when state child protective services (CPS) agencies can intervene in family life and what that intervention should entail, the law grants agencies and family courts wide discretion to regulate and separate families. Second, that wide discretion permits biases (implicit or explicit) to inform decisionmaking, and the present child protection system has long been criticized for perpetuating racial, class, and other forms of injustice. Dorothy Roberts famously described the present system this way: “If you came with no preconceptions about the purpose of the child welfare system, you would have to conclude that it is an institution designed to monitor, regulate, and punish poor Black families.”<sup>8</sup> That is, the indeterminacy at the heart of child protection law is a tool that empowers state authorities to exercise control of low-income and minority families.

This Article extends these critiques through a granular analysis of child protection cases. This analysis demonstrates how the law’s indeterminacy builds through the life of a case and is not limited to the definitions of neglect and removal standards that were the focus of past indeterminacy critiques. In particular, little or no legal tie exists between different types of maltreatment and different interventions. In most states, any kind of neglect or abuse leads to placement of the parent on a child abuse or neglect registry—regardless of any nexus between the maltreatment and future risk to child if that parent works in child care. Any kind of neglect or abuse can lead to any disposition; unlike criminal law (and, increasingly, juvenile delinquency law), there is no legal tie between the type of misconduct and the punishment. Any adjudicated child maltreatment leads to an evolving case planning process in which the steps a parent must take to reunify need not be tethered to the maltreatment which courts adjudicated. Legal obligations on the state to work to keep families together are so vague in substance and weak in practice that states can and do spend tens of

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goal of helping the legal system protect children from severe harm from neglect and abuse without intervening in families more than necessary to achieve that goal.

6. See *infra* Part III.A.

7. Other critiques of the broader child protection system highlight cases which lead to investigation and surveillance, but not separation, of families. *E.g.*, Marsha Garrison, *Reforming Child Protection: A Public Health Perspective*, 12 VA. J. SOC. POL’Y & L. 590, 595-99 (2005); Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL’Y & L. 409, 418-22 (2005); Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485, 1489-97 (2007); Josh Gupta-Kagan, *Toward a Public Health Legal Structure for Child Welfare*, 92 NEB. L. REV. 897, 903-28 (2014). These critiques focus on the broader system’s reactive and often ineffective response to alleged child maltreatment, which includes but is not limited to the legal regulation of agency and family court decisions in cases involving family separations. This Article instead focuses on that legal regulation.

8. DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 6 (2002).

thousands of dollars taking care of children they have removed from parental custody after failing to spend similar sums keeping families together.<sup>9</sup>

When children have extended foster care placements under indeterminate legal standards, the law uses some limited determinate standards to push cases toward permanent family destruction. In particular, the law includes a presumption of seeking termination of parents' and children's legal relationships when children have remained in foster care for fifteen months, and a preference for adoptions (which generally require terminations) over guardianships (a new family arrangement that does not require terminations).<sup>10</sup> These determinate standards have often lacked empirical support and serve to increase state intervention into constitutionally-protected family life.<sup>11</sup>

A legislative agenda to transform the child protection system has begun to emerge, but only piecemeal and without comprehensively addressing the indeterminacy in the present legal structure. Various discrete reforms have been enacted in a small number of states, such as slightly narrowed definitions of neglect, and somewhat strengthened procedural protections for parents who challenge their placement by CPS agencies on child neglect and abuse registries.<sup>12</sup> Congress has revised federal law to encourage state CPS agencies to invest in "prevention" activities.<sup>13</sup> The Stronger CAPTA (Child Abuse Prevention and Treatment Act), passed by the U.S. House in March 2021 and pending in the Senate, nods in the direction of the two critiques, providing funding to study the causes and solutions for racial inequality in the child protection legal system, "including how neglect is defined."<sup>14</sup> In perhaps the most important development, family defense offices have strengthened and the federal government has invested more money in such offices, which emerging research suggests leads to improved outcomes for the entire system.<sup>15</sup> However, comprehensive legislative reform to confront the indeterminacy that reigns in child protection cases and the bias it permits has not yet crystalized.

This Article seeks to expand the agenda for a transformed system to include determinate substantive standards that tether the type of intervention to the type of maltreatment and thus mitigate the potential for inconsistent and biased decisionmaking by agencies and courts. An expanded agenda begins with a goal

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9. See *infra* notes 239-244 and accompanying text.

10. See *infra* Parts III.A.5.d-e.

11. Parental rights to "the care, custody, and control of their children [] [are] perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Accordingly, parents are entitled to a court hearing focused on their fitness before the state may remove their child from their custody. *Stanley v. Illinois*, 405 U.S. 645, 649 (1972). The Constitution protects family integrity even when parents "have not been model parents or have lost temporary custody of their child to the State" through its foster system. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

12. See *infra* Part III.A.

13. See *infra* Part III.B.

14. Stronger Child Abuse Prevention and Treatment Act, H.R. 485, 117th Cong. § 104 (2021).

15. See *infra* Part III.C.

of limiting state intervention in families to severe cases of child maltreatment, which the law should define more precisely. Family separations should only follow intensive efforts to keep families safely together, a standard the law should define more meaningfully than at present. When CPS agencies do intervene, the specific form of maltreatment found should limit the nature and duration of the intervention which may follow, and the law should not permit an evolving set of concerns to keep families separated indefinitely. State action to terminate the legal relationship between parents and children should be limited to situations in which any form of parent-child relationship is harmful to the child, not, as in current law, used when arbitrary time limits are reached or to facilitate the adoption of foster children by new parents when other family arrangements are possible.

Some of these recommendations are ambitious enough that they can only be outlined here—such as precisely delineating different forms of neglect and abuse and tying those forms to different dispositions with a specificity on par with the criminal code. Other proposals are easy enough to explain, but bold in their implications for the legal system—such as the principle that states should expend at least as much money on helping families stay together and reunifying them as they would on maintaining children in foster care, thus ending the disturbing disparities in which states pay foster parents generous monthly stipends after refusing to do the equivalent for parents struggling to take care of their children.

There are several things these proposals do not do. First, they do not eliminate the present child protection legal system. Rather, they seek to focus that system and its most severe interventions on the most harmful forms of maltreatment that system is designed to address. Second, they do not design the alternative structures that would be necessary to provide voluntary and supportive assistance to families outside of the child protection system; that essential work has begun in other forums and must continue.<sup>16</sup> This Article focuses instead on steps needed to narrow the existing system, and, when CPS agencies bring families to court, better regulate agency and family court discretion.

Part I of this Article examines one recent case which illustrates the problems of the legal status quo. The indeterminacy of child protection law allowed a case that began with a low-income mother's inadequate child care to separate a family for an evolving host of reasons that bore little connection to the initial grounds for intervention, and with the state spending more money to keep the family separate than to help the mother with child care arrangements. Timeline pressures ultimately led to the permanent and unnecessary destruction of a family. Part II describes and critiques the indeterminacy at the heart of child protection law and the harms it causes. Part III explores current proposals for changes to this system, and how a comprehensive agenda for addressing indeterminacy remains lacking. Part IV outlines proposals for a more determinate system that limits the situations when CPS agencies and family courts may intervene in families and what that intervention may entail.

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16. See sources cited *infra* note 344.

I. ILLUSTRATING INDETERMINACY AND LIKELY BIAS IN CHILD PROTECTION CASES: *IN RE A.M.*

Two central and related problems feature prominently in present child protection law. First, the substantive law is indeterminate; it does not clearly define when CPS agency and family court intervention is warranted and what that intervention should entail. Second, in the absence of clear substantive limits on that intervention, a variety of biases likely infect decisions regarding which families to intervene in and how. The U.S. Supreme Court recognized these risks in *Santosky v. Kramer*, when, addressing standards for terminating the parent-child relationship, it identified “imprecise substantive standards that leave determinations unusually open to the subjective values of the judge.”<sup>17</sup>

This Part introduces those problems via an examination of a single case, *In re A.M.*, which illustrates how the child protection legal system is infused with indeterminacy throughout the life of a case, and is subject to biases based on the race, class, and other elements of the identity of parents involved in the system.

*In re A.M.* involves a Kansas City area family separated following a single episode of a mother leaving her four-year-old home alone so she could work. That single incident caused no injury to the child but led to an extended separation and, eventually, a termination of the legal relationship between the mother and child.<sup>18</sup> I use this case not to suggest that these outcomes happen in all cases; indeed, the case itself demonstrates that inconsistent responses occur in different jurisdictions.<sup>19</sup> Rather, I use this case to illustrate what the law permits to happen, how those outcomes happen in at least some cases, and how better results depend not on the law but on agencies and courts exercising their discretion differently.

*In re A.M.* is a valuable illustration because it is unexceptional in multiple respects—in the poverty-related conditions which led to a family separation and prevented authorities from reunifying the family, and the failure of legal standards to check authorities’ use of the most severe interventions. Tellingly, Missouri appellate courts saw this case as so mundane that the mid-level Court of Appeals affirmed it per curiam without a published opinion,<sup>20</sup> and the Missouri Supreme Court summarily denied a request for review,<sup>21</sup> reflecting the courts’ view that what happened in this case is both legally permissible and

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17. *Santosky v. Kramer*, 455 U.S. 745, 762 (1982).

18. The public record reflects other examples of families separated and children kept in foster care for extended periods of time on similar fact patterns. See, e.g., Chantel Ross, *After Her Own Experience in Foster Care, Maleeka Jihad Works to Keep Families Intact*, IMPRINT (Oct. 11, 2021, 10:37 AM), <https://perma.cc/GMH4-HKU7> (describing a family with five children removed from their father and kept in foster care for fifteen months when the father left the children alone to work a night shift as a custodian).

19. See *infra* text accompanying notes 262-64.

20. *In re A.M.*, 608 S.W.3d 663 (Mo. Ct. App. 2020) (mem.) (per curiam).

21. *In re A.M.*, 608 S.W.3d 663 (Mo. Ct. App. 2020), *transfer denied* (Nov. 3, 2020), <https://perma.cc/X8X9-ETJZ> (denying parent’s application for transfer from Missouri Court of Appeals to the Missouri Supreme Court).

unremarkable.<sup>22</sup> The case is exceptional in one respect—it garnered media coverage from several local outlets when the parent spoke out after losing her child.<sup>23</sup>

The case began when Ms. M.<sup>24</sup> left her four-year-old daughter home alone when she went to work one night in 2017. The child, A.M., went to a neighbor’s apartment, and the neighbor called the police, who took A.M. into custody.<sup>25</sup> Ms. M. did not deny these facts and admitted she made a mistake in leaving A.M. home alone. She explained that she did not receive any child support from A.M.’s father,<sup>26</sup> limiting her child care options due to cost and, while she had child care resources, she could not find child care for the night in question: “I felt like I had no other choice.”<sup>27</sup>

This incident was the basis of a court finding two months later that Ms. M. had neglected A.M.<sup>28</sup> Missouri law permits courts to enter such findings when parents “neglect or refuse to provide proper support, education which is required by law, medical, surgical or other care necessary for his or her well-being” or when “[t]he child is otherwise without proper care, custody or support.”<sup>29</sup> The publicly-available court records do not further explain the neglect finding; the court presumably concluded that leaving A.M. home alone at night was a failure to provide “care necessary for [] her well-being” or a failure to provide “proper care.”

It is understandable that finding a young child home alone late at night led child protection officials to investigate. But once the situation became clear—a financially stressed parent left a child at home so she could go to work—the next

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22. In his comment to this Article, David Kelly reports “routinely” hearing complaints about similar cases when he worked at the U.S. Children’s Bureau. David Kelly, Commentary, *The Harm of Indeterminacy*, 33 STAN. L. & POL’Y REV. ONLINE (forthcoming 2022).

23. Laura Ziegler, *What the Adoption of One Kansas City Mother’s Child Says About Race in the Child Welfare System*, KCUR (Apr. 1, 2021, 3:00 AM CDT), <https://perma.cc/J28B-HNBJ>; Toriano Porter, *Why Did a Clay County Judge Terminate Parental Rights of Immigrant Mother from Kenya?*, KAN. CITY STAR (updated Nov. 12, 2020, 10:22 AM), <https://perma.cc/3LJB-W443>.

24. This Article uses the parent’s initials, consistent with court documents which do not identify her by name.

25. Ziegler, *supra* note 23; Memorandum Supplementing Order Affirming Judgment at 2, *In re A.M.*, WD83215 (Mo. Ct. App. June 23, 2020).

26. A.M.’s father was \$11,680 in arrears on his child support obligation. Memorandum Supplementing Order Affirming Judgment, *supra* note 25, at 2 n.1.

27. Ziegler, *supra* note 23; Appellant’s Brief at 4-5, *In re A.M.*, WD83215 (Mo. Ct. App. Jan. 27, 2020). Ms. M. once told her child that she left her alone because she had to work to “pay the rent.” Memorandum Supplementing Order Affirming Judgment, *supra* note 25, at 9.

28. The opinion affirming the eventual termination of the legal relationship between Ms. M. and A.M. refers to this finding as “[t]he court took jurisdiction of A.M.” Memorandum Supplementing Order Affirming Judgment, *supra* note 25, at 3. Taking jurisdiction is the jargon for finding that the facts of the case place the family under the court’s jurisdiction—which can occur when parents have neglected a child. MO. REV. STAT. § 211.031(1) (2021).

29. MO. REV. STAT. § 211.031(1)(a)-(b) (2021). This language echoes a separate statutory definition of neglect. MO. REV. STAT. § 210.110(12) (2021).

step could have been different. The state could have assisted Ms. M. in finding stable child care, returned the child home the same day and, with minimal cost to the state and minimal intervention in the family, quickly closed the case.

Instead, authorities used their discretion at multiple stages—discretion granted by substantive indeterminacy in child protection law—to keep the child in its custody and eventually to destroy permanently Ms. M. and her daughter’s legal relationship. One official involved in this case emphasized the indeterminacy of child protection law throughout the life of the case, describing the law this way: “The law, as far as juvenile cases, is not clear cut . . . They’re not like criminal cases where you can say, ‘Well, you’ve proved it, here’s the sentence, off to the department of corrections.’ [These cases] are very subjective . . . .”<sup>30</sup>

This subjectivity first played out in the initial remedy ordered—keeping the child in foster care after the family court determined that Ms. M. had neglected her daughter. The appellate decision in this case does not reflect why A.M. could not have quickly returned to Ms. M.’s care under agency and court supervision to ensure she was not left alone again.<sup>31</sup> The appellate decision does reflect a set of poverty-based challenges—Ms. M., for instance, “was evicted from her apartment and lived with family or friends until May 2018, when she moved into an apartment.”<sup>32</sup> The appellate court does not state why this should be a reason to deny A.M. and her mother the ability to live together, or what connection it had to the reason A.M. was in foster care in the first instance. Whether homelessness generally equals neglect is a point in some dispute between states,<sup>33</sup> but the court in *In re A.M.* offers no discussion as to why homelessness should cause or extend a family separation. *In re A.M.* is far from the only case in which housing challenges contribute to family separations. Federally-reported statistics show inadequate housing is a factor in tens of thousands of children’s

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30. Ziegler, *supra* note 23. The quote is from a supervising juvenile officer in Clay County, Missouri, in the northeastern portion of the Kansas City metropolitan area, where this case was heard.

31. Reciting the procedural history when reviewing the ultimate termination of parental rights, the appellate court simply wrote “the court placed [A.M.] in the custody of the Division and ordered Mother to participate in services to aid in reunification.” Memorandum Supplementing Order Affirming Judgment, *supra* note 25, at 2.

32. *Id.* at 3.

33. At least one state explicitly provides that homelessness on its own is not neglect. WASH. REV. CODE § 26.44.020(19) (2022). Leading institutional players in the field suggest a similar view. *See, e.g.,* CASEY FAM. PROGRAMS, STRONG FAMILIES: WHAT DO WE KNOW ABOUT THE IMPACT OF HOMELESSNESS AND HOUSING INSTABILITY ON CHILD WELFARE-INVOLVED FAMILIES? 1 (2019), <https://perma.cc/3AES-9ULF>. However, at least two states explicitly treat a child’s homelessness as rendering the child “uncared for” or “dependent” and thus subject to placement in foster care. CONN. GEN. STAT. §§ 46b-120(6), 46b-129(j)(2) (2021); COLO. REV. STAT. § 19-3-102(1)(e) (2022). For a critique of the child protection system’s treatment of homeless parents, see Bridget Lavender, *Coercion, Criminalization, and Child ‘Protection’: Homeless Individuals’ Reproductive Lives*, 169 U. PA. L. REV. 1607, 1652-68 (2021).

removals into foster care each year,<sup>34</sup> and one study suggests that it keeps up to 30% of children in foster care from returning to their families.<sup>35</sup>

The subjectivity next played out in the development of Ms. M.'s case plan, which identified the steps she needed to take to rehabilitate and regain custody of her child. Authorities used their discretion to impose a case plan which defined the grounds for intervention broadly, thus permitting greater state intervention and creating obstacles to family reunification. The plan, as described by the appellate court, defined “the condition that led to the court’s assumption of jurisdiction [as] Mother’s failure to provide A.M. a safe and stable home”—not the more precise cause of inadequate child care.<sup>36</sup> In imposing a case plan to address this amorphous problem, the trial court ordered Ms. M. to obtain a drug and alcohol abuse assessment and a mental health assessment, despite no allegation or evidence that the underlying neglect had any relationship to substance abuse or a mental health condition.<sup>37</sup> The case plan expanded the scope of state intervention in another way—it required Ms. M. to hold stable employment as a condition of reunifying.<sup>38</sup> Unemployment is not a ground for finding a parent neglectful let alone removing a child, yet through the case plan employment became a requirement for reunification.<sup>39</sup>

Having expanded the focus of the case beyond the initial incident involving inadequate child care, authorities denied the family the ability to reunify because Ms. M. had not completed the requirements of her case plan.<sup>40</sup> Here, the state child protection agency had an obligation to make “reasonable efforts” to reunify the family.<sup>41</sup> State law defined reasonable efforts as “utiliz[ing] all *available* services related to meeting the needs of the juvenile and the family.”<sup>42</sup> The state

34. The federal government reported 25,658 children removed from their families and placed in foster care with housing as a “[c]ircumstance[] [a]ssociated with [c]hild’s [r]emoval” in fiscal year 2019. U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD’S BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2019 ESTIMATES AS OF JUNE 23, 2020, No. 27, at 2 (2020), <https://perma.cc/X76L-95ZV> [hereinafter AFCARS REPORT].

35. Deborah S. Harburger with Ruth A. White, *Reunifying Families, Cutting Costs: Housing-Child Welfare Partnerships for Permanent Supportive Housing*, 83 CHILD WELFARE 493, 495 (2004). Scholars describe the CPS and homeless services systems as “closely linked.” Jason M. Rodriguez & Marybeth Shinn, *Intersections of Family Homelessness, CPS Involvement, and Race in Alameda County, California*, CHILD ABUSE & NEGLECT, July 2016, at 41, 41. Reductions in housing protections trigger concerns about an increase in family separations via foster care. *E.g.*, Sara Tiano, *Resuming Evictions Could Land Kids in Foster Care, Experts Say*, IMPRINT (May 6, 2021, 5:21 PM), <https://perma.cc/99N5-4PRM>.

36. Memorandum Supplementing Order Affirming Judgment, *supra* note 25, at 11.

37. *Id.* at 2.

38. *Id.*

39. *In re* A.M. is not alone in requiring parental employment. *See, e.g., In re* D.M., 851 S.E.2d 3, 8 (N.C. 2020) (describing trial court as denying reunification when a parent was still “attempting to secure stable housing and employment”).

40. The family court concluded, for instance, that Ms. M. had failed to provide a sufficiently stable home environment. Memorandum Supplementing Order Affirming Judgment, *supra* note 25, at 3-5.

41. 42 U.S.C. § 671(a)(15)(B)(ii); MO. REV. STAT. § 211.183(1) (2021).

42. MO. REV. STAT. § 211.183(2) (2021) (emphasis added).

did not provide any assistance with child care arrangements. The state did insist that Ms. M. obtain a mental health assessment, but as an immigrant,<sup>43</sup> she was ineligible in Missouri for free mental health assessments. The child protection authorities did not offer to pay for this service which they asserted was essential.

Although the state did not provide assistance for Ms. M. to obtain housing, child care, or the mental health assessment, the state did pay for some costs of foster care—under present policies, it pays at least \$450 per month to licensed foster parents so they could take care of a child.<sup>44</sup> That cost does not include child care assistance, which the Missouri Department of Social Services may pay if the “foster parent needs child care due to employment,”<sup>45</sup> nor does it include any potential adoption subsidies that may have been paid by the state to A.M.’s adoptive parents after the termination of parental rights was approved and the adoption finalized.<sup>46</sup> The court case did not explore what could have been accomplished if equivalent funds had been provided to or for Ms. M. In particular, it did not explore the irony that the state offered financial assistance to strangers, including for child care, so they could take care of a child who could have stayed with her mother had the state been willing to provide similar assistance to her.

As Ms. M., who then lived in the Kansas side of the Kansas City metro area,<sup>47</sup> sought to reunify, the state raised new concerns. Ms. M. became engaged to a man who later abused her in the presence of her younger son, born subsequent to A.M.’s removal. The Missouri agency and courts described the fiancé’s violence as continuing “conditions of a harmful nature” for A.M., and thus a failure by Ms. M. to provide a “safe and stable home,”<sup>48</sup> even though Kansas domestic violence counselors had described her as “cooperative” and willing to follow a domestic violence safety plan.<sup>49</sup> At no point did any state authority allege that Ms. M. committed a new act of neglect, and there was never an adjudication that the domestic violence situation made Ms. M. an unfit parent. Notably, Kansas authorities did nothing to intervene in Ms. M.’s relationship with her younger child, declining to exercise their discretion in a manner that Missouri authorities had.

Based on Ms. M.’s perceived failure to remedy the conditions preventing reunification, one Missouri state authority then moved to terminate her parental

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43. She was authorized to remain in the country lawfully through the Deferred Action for Childhood Arrivals, or DACA, program. Ziegler, *supra* note 23.

44. MO. DEP’T OF SOC. SERVS., CHILD WELFARE MANUAL, § 4, ch. 12.8.1 (2021) (listing standard payment rates for foster family care). \$450 per month is the minimum paid by the state to foster parents of children aged five or under. *Id.* The state also pays \$320 per year for clothing, and children classified as having elevated needs come with a higher payment. *Id.*

45. *Id.*

46. *Adoption Subsidy & Subsidized Guardianship*, MO. DEP’T OF SOC. SERVS., <https://perma.cc/EF8S-RECK> (archived Apr. 23, 2022); *see also* 42 U.S.C. § 673(a) (providing standards for federally reimbursed adoption subsidies).

47. Memorandum Supplementing Order Affirming Judgment, *supra* note 25, at 3.

48. *Id.* at 11.

49. Appellant’s Brief, *supra* note 27, at 8-9.

rights. After a trial, the Clay County Family Court terminated her rights, which Missouri appellate courts affirmed.<sup>50</sup> These authorities exercised subjective discretion on multiple topics. The first is whether to give up on reunification and seek to terminate rights at all. Once the state sought to terminate rights, the court had to decide whether Ms. M. had failed to rectify the conditions which brought the child into care.<sup>51</sup> Had those conditions been defined by the precipitating incident—Ms. M.’s leaving her daughter alone while she went to work—the grounds cited by the court would have been irrelevant. But by defining the issue more broadly, the court considered the lack of full compliance with the case plan to determine if she had rectified and if she was likely to do so in the future—inherently subjective determinations.

The termination decision is notable for other factors it did not consider. First, there was no allegation that Ms. M. was a danger to her child. The worst that was said was that she had missed a significant portion of her visits with A.M. (she asserted she missed some of the visits due to the stillbirth of a child and, separately, because she was on bedrest to recuperate from knee surgery) and that after two years separated through foster care, the relationship between her and her child was strained.<sup>52</sup> This was not a case in which the parent had done something so violent or dangerous, or so emotionally toxic that no relationship between parent and child could be sustained. Second, there was no consideration whether a termination of parental rights was necessary to obtain legal permanency for A.M. Even if A.M. never reunified with her mother, other family members had come forward who offered to take care of A.M. and could have done so without terminating A.M.’s legal relationship with her mother.<sup>53</sup> Even if the unrelated foster parents were to raise A.M., they could have pursued guardianship, which would have granted them legal custody without terminating parental rights. The court did not ask, let alone answer, why a termination was necessary.

In the aftermath of the case, media asked whether the state’s destruction of the M. family was influenced by Ms. M.’s identity as a Black, female immigrant from Kenya.<sup>54</sup> These details are irrelevant to what ought to have been the central questions in her case—whether she had neglected her daughter and, if so, how to reunify her family quickly and safely. But participants and observers reasonably

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50. The Missouri Court of Appeals affirmed the termination order in an unpublished memorandum opinion. *In re A.M.*, 608 S.W.3d 663 (Mo. Ct. App. 2020) (mem.) (per curiam). The Missouri Supreme Court declined to hear the case, leaving the Missouri Court of Appeals decision in place.

51. One statutory ground for termination of the parent-child relationship is that the child has been subject to court jurisdiction for one year and “the conditions which led to the assumption of jurisdiction still persist . . . [and] that there is little likelihood that those conditions will be remedied at an early date so that the child can be returned to the parent in the near future.” MO. REV. STAT. § 211.447.5(3) (2021).

52. See Memorandum Supplementing Order Affirming Judgment, *supra* note 25, at 7 (reporting an observation of a single visit which was interpreted to question the remaining strength of Ms. M. and A.M.’s bond).

53. Ziegler, *supra* note 23.

54. *Id.*

question whether her identity influenced the case. A former case worker described Ms. M.'s race as a "red flag" to authorities involved.<sup>55</sup> Given the subjectivity described by another actor in the case,<sup>56</sup> it is certainly possible that implicit biases based on her identity led authorities to be more concerned about Ms. M. than the evidence indicated. After all, in popular culture, leaving a rich, white, suburban child home alone unsupervised is the concept of blockbuster family films,<sup>57</sup> but leaving a low-income black child home alone for much less time was the basis for initiating a foster care case. It is also possible that implicit biases based on Ms. M.'s race made authorities more hesitant to reunify the family as the case progressed than the evidence warranted.

Negative judgments based on Ms. M.'s sex are also possible. At the start of the case, Ms. M. was lawfully employed. To the extent parental employment matters—and there is a strong case it should not—the fact that she was lawfully employed is all that should be relevant. But Ms. M. was then employed as a stripper,<sup>58</sup> which, as her first caseworker put it, is "a line of work people judge."<sup>59</sup>

Sex-based judgments were compounded later in the case when Ms. M. was living with a fiancé who began to abuse her. A full exploration of the troubled relationship between domestic violence and the child protection system is beyond the scope of this Article.<sup>60</sup> For present purposes, it suffices to note that child protection agencies frequently give mothers a "leave ultimatum"<sup>61</sup>—that is,

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55. *Id.*

56. *See supra* note 30 and accompanying text.

57. *HOME ALONE* (Twentieth Century Fox 1990). Tellingly, even when the police became aware of a child left home alone due to parental negligence, the film never raises the prospect of child protective agency involvement, and the film's success suggests audiences did not question this element of the story. *See* Kendra Stanton Lee, *Check Your White Privilege with Home Alone*, VIDEO LIBRARIAN (Dec. 18, 2020, 12:41 PM), <https://perma.cc/M38L-JVGB>.

58. Some media accounts use the term "dancer," surely seeking to avoid any judgment of Ms. M.'s occupation. Porter, *supra* note 23. I use the term "stripper" not to pass any judgment on her or on others in that profession, but to more clearly illustrate how authorities could have judged Ms. M. in part on sex.

59. Ziegler, *supra* note 23.

60. For one brief view, see Leigh Goodmark, *Mothers, Domestic Violence, and Child Protection: An American Legal Perspective*, 16 VIOLENCE AGAINST WOMEN 524 (2010). The child protection system has a history of responding to domestic violence by fathers (and mothers' partners) by treating "mothers as the responsible and blameworthy parent." Joan S. Meier & Vivek Sankaran, *Breaking Down the Silos that Harm Children: A Call to Child Welfare, Domestic Violence and Family Court Professionals 4* (Aug. 16, 2021) (unpublished manuscript), <https://perma.cc/L9LG-9DVD>; *see also* S. Lisa Washington, *Survived and Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. (forthcoming 2022) (manuscript at 26-34), <https://perma.cc/Z5V8-9W6F> (criticizing family court and CPS agency handling of cases involving domestic violence between adults). For a concise call for changing how the child protection system handles such domestic violence concerns, see ALAN DETTLAFF, KRISTEN WEBER, MAYA PENDLETON, BILL BETTENCOURT & LEONARD BURTON, *HOW WE ENDUP: A FUTURE WITHOUT FAMILY POLICING* 16 (2021), <https://perma.cc/B6QH-9ZSY> (calling for an "end [to] the punishment of survivors of intimate partner violence").

61. Goodmark, *supra* note 60, at 526.

leave an abusive partner or lose their children. Such an ultimatum reflects the judgment that leaving is the only proper way to protect children, even though that judgment is subject to question as a general matter,<sup>62</sup> and was questioned by domestic violence counselors in A.M.'s case.<sup>63</sup>

Finally, Ms. M.'s immigration status may have shaped authorities' views of her. Fears of immigrants and a desire to intervene in immigrant families were foundational motivations for the child protection system. Family court founders wrote that "naturally" poor families dominated family courts' dockets and approvingly observed that "[i]n many cases the parents are foreigners, frequently unable to speak English, and without an understanding of American methods and views," reflecting an expectation if not an intention to intervene in immigrant families.<sup>64</sup> This statement followed the "orphan trains," in which children of immigrants (often not, in fact, orphans) were sent from east coast cities to the Midwest.<sup>65</sup> More recently, advocates have raised concerns that families' immigration status is used to further the separation of immigrant families.<sup>66</sup> There were no explicit invocations of that history in *In re A.M.* Nonetheless, her immigration status made her ineligible for certain case plan requirements to be paid for by the state, leaving an impoverished parent facing a demand that she pay for mental health and substance abuse assessments. Rather than require the state to pay for these (probably unnecessary) assessments, or fault the state for failing to make reasonable efforts to reunify the family through its failure to pay for these assessments, the court held this fact against Ms. M. as evidence that she had failed to rectify conditions which brought the child into care.<sup>67</sup> Moreover, when Ms. M.'s deferred action for childhood arrivals status lapsed (also for economic reasons—she lacked \$800 to renew her status immediately), immigration authorities detained her after one of the termination of parental rights hearings<sup>68</sup>—a circumstance which raises questions about how immigration authorities became aware of those supposedly confidential proceedings.

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62. More than two decades ago, the National Council of Juvenile and Family Court judges, wrote that "[m]any children may live safely with non-abusing parents in homes where domestic violence has occurred," and called for nuanced case-specific analysis. SUSAN SCHECHTER & JEFFREY L. EDLESON, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, FAM. VIOLENCE DEP'T, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE & CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE 64 (1999), <https://perma.cc/JNP7-YFZN>.

63. See *supra* text accompanying note 49.

64. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 116-17 (1909).

65. LAURA BRIGGS, TAKING CHILDREN: A HISTORY OF AMERICAN TERROR 133 (2020).

66. See generally SETH FREED WESSLER, APPLIED RSCH. CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM (2011), <https://perma.cc/UE5A-M8ZS>.

67. A similar fact pattern may apply to parents who cannot obtain court-ordered assessments due to their poverty. See Jesse Bogan, *Missouri Foster Parents Get Help from Legislature, But Why Are More Children Coming Into State Care?*, ST. LOUIS POST-DISPATCH (June 6, 2021), <https://perma.cc/QD3A-M76L> (describing one case in which a parent "told the court she'd been trying to get the evaluation done but couldn't find a provider available that accepts Medicaid").

68. Ziegler, *supra* note 23.

## II. SUBSTANTIVE LEGAL INDETERMINACY AND RACE, SEX, AND CLASS INJUSTICE

The subjectivity exercised in *In re A.M.* was not unique to that case. Rather, it is the result of the indeterminacy of child neglect and abuse law at every stage of a foster care case—the vagueness of relevant substantive legal standards that commentators have observed in child neglect and abuse law since at least 1975, when Robert Mnookin and Michael Wald published pathbreaking studies on the topic.<sup>69</sup> Scholars in other fields soon echoed these concerns, writing, for instance, that “[n]owhere are there clear-cut definitions of what is encompassed by the terms” neglect or abuse.<sup>70</sup> The Supreme Court recognized this indeterminacy in 1982.<sup>71</sup> The definition of neglect and abuse—which determines when a host of professionals must report families to child protection agencies, what those agencies must look for when investigating families, when state authorities may remove a child from a parent’s custody, and when family courts may take jurisdiction over a child—remains both broad and vague. Once a family court has determined a parent has neglected or abused a child, indeterminate standards govern most of what follows, including whether the child should be placed in foster care or left at home; what a parent must do before a child in foster care can return home; how the child protection system should address challenges which arise during the life of the case; and when the state should stop working towards reunifying families and towards some other goal. This Part demonstrates the substantive indeterminacy throughout child protection cases by analyzing each decision point in those cases.

This analysis has changed somewhat since critiques of indeterminacy were first raised in the 1970s. Definitions of neglect remain vague, and what interventions are appropriate for which behaviors remain unanswered by the substantive law of child protection. But many states now have clearer standards for when CPS agencies can remove children (when they face some imminent risk of harm and, in some states, when removal is necessary to prevent that harm). The law requires CPS agencies to make efforts to prevent the need for removal.<sup>72</sup> Procedurally, child protection law has much greater specificity. The law now prescribes timelines for when courts must hold initial hearings, and trials on state allegations of abuse or neglect. When children are placed in foster care, the law provides how quickly state agencies must develop case plans and when family

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69. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226; Michael Wald, *State Intervention on Behalf of “Neglected” Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975). As Mnookin’s article’s title indicates, he first applied the term “indeterminacy” to this field of law.

70. See, e.g., JEANNE M. GIOVANNONI & ROSINA M. BECERRA, DEFINING CHILD ABUSE 2 (1979); see also *id.* at xv (arguing that child abuse and child neglect “labels are still ambiguous, and this ambiguity has hampered efforts to understand the problem better through research and to ameliorate it through social intervention”).

71. See *supra* text accompanying note 17.

72. Clare Huntington, *The Child-Welfare System and the Limits of Determinacy*, LAW & CONTEMP. PROBS. 2014, at 221, 221-22 (summarizing changes since 1970s’ critiques).

courts must hold hearings to review the child’s status in foster care.<sup>73</sup> In addition, the law imposes pressures on parents—to achieve reunification within particular timelines or face the likelihood that authorities will seek to terminate their legal relationship with their children.<sup>74</sup> But many procedural rules remain unclear, at least nationally. In particular, significant state-by-state variance exists in the right to appeal certain decisions—like permanency plan changes away from reunification, or decisions to not reunify a family.<sup>75</sup> The absence of interlocutory appeals makes it harder for courts to develop the law necessary to provide substantive guidance to courts in future cases.<sup>76</sup>

This Part also describes the problematic consequences of the substantive indeterminacy which marks child protection law—a legal system that creates highly discretionary decisions which remain subject to multiple forms of bias. As the Supreme Court recognized, parents subject to child protection cases “are often poor, uneducated, or members of minority groups,” so applying vague substantive standards renders those cases “vulnerable to judgments based on cultural or class bias.”<sup>77</sup> Those biases are concerning enough. Moreover, as Mnookin argued in 1975, this indeterminacy leads the legal system to act inconsistently towards children brought to its attention.<sup>78</sup> More recently, as Clare Huntington has compellingly explained, the child protection system remains unable to “accurately identify[] which children should be removed from their homes” on the front end, while timelines for review hearings and permanent

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73. Federal law requires state agencies to develop case plans within sixty days of removing a child. 45 C.F.R. § 1356.21(g)(2) (2020). Federal law further requires states to hold review hearings regarding children in foster care at least every twelve months. 42 U.S.C. § 675(5)(C)(i). Some state statutes require faster case plans or more frequent hearings. *See, e.g.*, 705 ILL. COMP. STAT. 405/2-10.1 (2021) (case plans within forty-five days); S.C. CODE ANN. § 63-7-1680(A) (2021) (case plans within ten days of removal hearing); D.C. CODE § 16-2323(a)(1) (2022) (review hearings every six months); MO. SUP. CT. R. 124.01(b) (requiring dispositional review hearings every 90 to 120 days during a child’s first twelve months in foster care and every six months thereafter).

74. In particular, CPS agencies must, with certain important exceptions, seek a termination of parental rights when children have been in foster care for fifteen of the most recent twenty-two months. 42 U.S.C. § 675(5)(E). Problems with this timeline are discussed in notes 207-215 below and accompanying text.

75. Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Cases Between Disposition and Permanency*, 10 CONN. PUB. INT. L.J. 13, 29-32 (2010) (surveying state statutes and caselaw on appealability of permanency hearing decisions); *see also In re Ta.L.*, 149 A.3d 1060, 1075 n.16 (D.C. 2016) (en banc) (counting sixteen states permitting appeals of permanency plan changes from reunification to adoption as of right, twenty-six states that permit such appeals at the discretion of a trial or appellate court). In recent years, there has been a slight trend towards permitting more immediate appeals. *Id.* at 1073-81 (permitting appeal of permanency plan from reunification to adoption); *State ex rel. K.F.*, 201 P.3d 985, 992-96 (Utah 2009) (permitting appeal of permanency plan from reunification to “individualized permanency”—long-term foster care).

76. Gupta-Kagan, *supra* note 75, at 50.

77. *Santosky v. Kramer*, 455 U.S. 745, 763 (1982).

78. Mnookin, *supra* note 69, at 268-72.

decisions lead to less frequent reunifications and larger numbers of children growing up in state custody.<sup>79</sup>

## A. Substantive Indeterminacy Throughout the Life of a Case

### 1. Substantive Definitions

State statutory definitions of neglect and abuse largely remain indeterminate: Their language is both broad and vague and permits a wide swath of behavior to fall within the scope of child maltreatment, especially neglect. A federal report summarizing state law neglect and abuse definitions accomplishes the task in four pages.<sup>80</sup> These definitions mean the field of child neglect and abuse law has a broad and indeterminate scope, leaving CPS agencies with wide discretion in determining when to intervene. As importantly, state neglect and abuse laws do not establish a hierarchy of more and less severe forms of maltreatment that could be tied to the type of state interventions, and thus do not limit those interventions in less severe cases.

These broad definitions shape the scope of the entire child protection system. Child protection agencies gather allegations of child neglect or abuse from mandatory reporters—who the law requires to make such allegations when they reasonably suspect maltreatment has occurred<sup>81</sup>—and the agencies then screen out allegations which, even if true, would not rise to neglect or abuse, and intervene in the rest.<sup>82</sup> Finding that neglect or abuse has occurred is a prerequisite to further intervention, so the broader the definition of neglect and abuse, the more often those steps will be possible.

The most important substantive definition to examine is neglect because the vast majority of child protection cases involve allegations of neglect, not abuse.<sup>83</sup> Nationally, CPS agencies identify “neglect” as the type of maltreatment at issue for 74.9% of children they deem maltreated after an investigation.<sup>84</sup> Neglect

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79. Huntington, *supra* note 72, at 222.

80. U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD.’S BUREAU, DEFINITIONS OF CHILD ABUSE AND NEGLECT 2-5 (2019), <https://perma.cc/6FM4-8ADY>.

81. *See, e.g.*, S.C. CODE ANN. § 63-7-310(A) (2021) (requiring listed professionals to report to the state CPS agency when they have “reason to believe that a child has been or may be abused or neglected”).

82. U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD.’S BUREAU, CHILD MALTREATMENT 2018, at 6-7 (2020), <https://perma.cc/TGT7-CART>.

83. Consistent with this point, this Article refers to “neglect and abuse” law. This flips the order of those terms as they are most commonly used. *E.g.*, U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD.’S BUREAU, WHAT IS CHILD ABUSE AND NEGLECT? RECOGNIZING THE SIGNS AND SYMPTOMS 1 (2019), <https://perma.cc/JX4G-XZ46>.

84. U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD.’S BUREAU, CHILD MALTREATMENT 2019, at 47 (2021), <https://perma.cc/P9JC-UDDQ> [hereinafter CHILD MALTREATMENT 2019].

similarly accounts for three-quarters or more of cases in which CPS agencies remove children from their families and place them in foster care.<sup>85</sup>

For at least two generations, scholars and advocates have critiqued neglect definitions as featuring unduly “broad, vague language, which would seem to allow virtually unlimited intervention,” as Michael Wald wrote in 1975.<sup>86</sup> This amounted, in Robert Mnookin’s term, to legal “indeterminacy” about when and how family courts and child protection agencies could intervene in family life.<sup>87</sup> The American Bar Association and Institute for Judicial Administration’s Juvenile Justice Standards Project (on which Wald served as a reporter) described state laws as using “extremely broad and vague language,” which “facilitate arbitrary, and even discriminatory, intervention” and interventions which harm children.<sup>88</sup>

The state law definition of neglect at issue in *In re A.M.*—the absence of “proper care”<sup>89</sup>—illustrates that vagueness. Other states’ definitions are similarly vague; limits on the definition come more from requirements that parental conduct risk harm to the child rather than detailed descriptions of the conduct at issue. For instance, South Carolina defines “[c]hild abuse or neglect” to include any failure “to supply the child with adequate food, clothing, shelter, or education . . . , supervision appropriate to the child’s age and development, or health care” that poses a “substantial risk of causing physical or mental injury.”<sup>90</sup> The District of Columbia defines neglect to include a child “who is without proper parental care or control.”<sup>91</sup> New York defines a “[n]eglected child” to be one who has been injured or “is in imminent danger” of injury “as a result of the

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85. The federal Adoption and Foster Care Analysis and Reporting System (AFCARS) lists “circumstances associated with child’s removal” for all children who entered foster care in a given year. Multiple “circumstances” can be listed for the same case. In the most recent year for which data is available, physical abuse was listed in only 13% of removals, abandonment 5%, sexual abuse in only 4%, and parental death or relinquishment 1% each. AFCARS REPORT, *supra* note 34, at 2. The remaining factors all amount to neglect—neglect (63% of cases), parental drug abuse (34%), “caretaker inability to cope” (14%), housing (10%), “child behavior problem” (8%), parental incarceration (7%), parental alcohol abuse (5%), and child disability (2%). *Id.*

86. Wald, *supra* note 69, at 1000. Scholars have echoed this argument ever since. *E.g.*, Colleen Henry & Vicki Lens, *Marginalizing Mothers: Child Maltreatment Registries, Statutory Schemes, and Reduced Opportunities for Employment*, 24 CUNY L. REV. 1, 10 (2021); SHEREEN A. WHITE, IRA LUSTBADER, NICOLE TAYKHMEN, ELISSA GLUCKSMAN HYNE, MAKENA MUGAMBI, JILL HAYMAN, ASHA MENON & MARISA SKILLINGS, *CHILD’S RIGHTS, FIGHTING INSTITUTIONAL RACISM AT THE FRONT END OF CHILD WELFARE SYSTEMS: A CALL TO ACTION TO END THE UNJUST, UNNECESSARY, AND DISPROPORTIONATE REMOVAL OF BLACK CHILDREN FROM THEIR FAMILIES* 4 (2021); Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 123-24 (2013).

87. Mnookin, *supra* note 69, at 230-46.

88. INST. OF JUD. ADMIN. & AM. BAR ASSOC., *JUVENILE JUSTICE STANDARDS PROJECT: STANDARDS RELATING TO ABUSE AND NEGLECT* 52-53 (1981).

89. MO. REV. STAT. §§ 211.031(1)(b), 210.110(12) (2021).

90. S.C. CODE ANN. § 63-7-20(6)(a)(iii) (2021).

91. D.C. CODE § 16-2301(9)(A)(ii) (2022).

failure of his parent . . . to exercise a minimum degree of care.”<sup>92</sup> Federal summaries of state neglect definitions add little detail.<sup>93</sup> These examples define neither what “proper” parental action is, nor what counts as an “injury,” nor what makes a risk of such injury sufficiently “substantial” to make conduct amount to neglect. These examples are consistent with the statutory illustrations Wald chose in 1975.<sup>94</sup>

Case law only somewhat helps define “neglect.”<sup>95</sup> Consider this statement from a leading District of Columbia case: “One cannot determine whether a child’s welfare requires the intervention of the state . . . by simply examining the most recent episode. Rather the judge must be apprised of the entire mosaic.”<sup>96</sup> At best, this “entire mosaic” rule leaves judges focused on chronic conditions or repeated behaviors, and with substantial discretion whether to find neglect. That, in turn, leads to much vagueness about what actually constitutes neglect and variation by jurisdiction (and by caseworker or judge within jurisdictions). At worst, the requirement that family court consider the “entire mosaic” of a family’s life permits wide-ranging invasions of familial privacy without clear evidence that a specific act of abuse or neglect has even occurred.

The American Law Institute’s (ALI) ongoing work to draft a restatement of the law regarding children articulates a somewhat more limited understanding of neglect.<sup>97</sup> Taking “physical neglect” as an example, the ALI defines neglect as a parent failing “to exercise a minimum degree of care” leading to “serious physical harm” or “a substantial risk of serious physical harm.”<sup>98</sup> The ALI

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92. N.Y. FAM. CT. ACT. § 1012(f) (McKinney 2021).

93. “Neglect is frequently defined as the failure of a parent or other person with responsibility for the child to provide needed food, clothing, shelter, medical care, or supervision to the degree that the child’s health, safety, and well-being are threatened with harm.” U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD.’S BUREAU, *supra* note 80, at 2.

94. Wald, *supra* note 69, at 1000-01.

95. Case law has clarified, for instance, that proof of parental drug use alone does not prove neglect and instead must be coupled with proof that a parent’s drug use placed children at risk of imminent harm. *In re Dante M.*, 661 N.E.2d 138, 140-41 (N.Y. 1995). Case law has also clarified mere exposure of a child to domestic violence directed against a parent does not constitute neglect. *Nicholson v. Scoppetta*, 820 N.E.2d 840, 844 (N.Y. 2004).

96. *In re S.K.*, 564 A.2d 1382, 1389 (D.C. 1989) (Schwelb, J., concurring). The “entire mosaic” language is cited repeatedly in District of Columbia abuse and neglect case law. *E.g.*, *In re Te.L.*, 844 A.2d 333, 344 (D.C. 2004); *In re M.D.*, 758 A.2d 27, 33 (D.C. 2000); *In re T.G.*, 684 A.2d 786, 788 (D.C. 1996); *In re A.S.*, 643 A.2d 345, 347 (D.C. 1994); *In re O.L.*, 584 A.2d 1230, 1233 (D.C. 1990). The American Law Institute has endorsed a similar view, calling for “a holistic inquiry into the circumstance of the family.” RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 2.24 cmt. j (AM. L. INST., Tentative Draft No. 2, 2019).

97. *Restatement of the Law, Children and the Law: Status*, AM. L. INST., <https://perma.cc/384J-4SJ2> (archived Apr. 23, 2022). The author joined this project as an advisor in 2021. *Restatement of the Law, Children and the Law: Participants*, AM. L. INST., <https://perma.cc/M6E5-32C6> (archived Apr. 23, 2022).

98. RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 2.24 (AM. L. INST., Tentative Draft No. 2, 2019).

acknowledges the breadth of this definition,<sup>99</sup> and seeks to narrow it through the higher standard for risk of harm,<sup>100</sup> and requiring parental contact to be “far afield from the judgment of a reasonable parent.”<sup>101</sup> The ALI notes that multiple states impose a higher bar on parents, permitting even broader grounds for intervention.<sup>102</sup>

Statutes in about half of states<sup>103</sup> include provisions which seek to distinguish poverty from neglect. A failure to provide “proper parental care or control” is only neglect if that failure “is not due to the lack of financial means of [the child’s] parent, guardian, or custodian.”<sup>104</sup> However, studies of this defense do not indicate that this provision affects many cases. Michele Estrin Gilman concludes that “the poverty defense rarely succeeds unless the court has a nuanced understanding of how poverty is related to neglect, which in turn is sometimes influenced by a judge’s personal ideology.”<sup>105</sup> While positive court decisions do exist,<sup>106</sup> Gilman concludes that “most courts . . . easily find non-economic” grounds to explain parents’ neglect.<sup>107</sup> Notably, courts do so through subjective determinations—what Gilman calls “euphemisms for poverty”—such as “immaturity, nonchalance, poor decisionmaking, inattentiveness, [and] instability.”<sup>108</sup>

Abuse definitions also contain significant breadth and vagueness. Consider the District of Columbia’s definition: Child abuse includes an “infliction of physical or mental injury upon a child,”<sup>109</sup> with “mental injury” defined to include a “harm to a child’s psychological or intellectual functioning.”<sup>110</sup> The outer boundaries of such a definition are not immediately clear. Civil child abuse definitions also typically distinguish between permissible corporal punishment and impermissible abuse with multi-factor tests,<sup>111</sup> though applying those tests

99. *See id.* at § 2.24 cmt. a (“[T]he category of physical neglect covers a wide range of parental behavior.”).

100. *Id.*

101. *Id.* at § 2.24 cmt. i. “Minimum degree of care” imposes a lesser obligation on parents than standards of ordinary care. *E.g.*, *G.S. v. Dep’t of Hum. Servs.*, 723 A.2d 612, 620 (N.J. 1999).

102. RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 2.24 reporter’s note i (AM. L. INST., Tentative Draft No. 2, 2019).

103. Michele Estrin Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495, 520 (2013).

104. D.C. CODE § 16-2301(9)(A)(ii) (2022); *see also, e.g.*, S.C. CODE ANN. § 63-7-20(6)(a)(iii) (2021).

105. Gilman, *supra* note 103, at 523.

106. *Id.* at 525-26 (discussing *State ex rel. S.M.W.*, 771 So.2d 160 (La. Ct. App. 2000)). Notably, the Louisiana Supreme Court reversed that intermediate appellate court decision. *State ex rel. S.M.W.*, 781 So.2d 1223, 1238-39 (La. 2001).

107. Gilman, *supra* note 103, at 527. This reality does not make the poverty defense pointless; Gilman emphasizes that it makes a real impact in some cases. *Id.* at 539.

108. *Id.* at 529.

109. D.C. CODE § 16-2301(23)(A)(i) (2022).

110. D.C. CODE § 16-2301(31) (2022).

111. For instance, permissible corporal punishment is “reasonable in manner and moderate in degree” and does not impose “permanent or lasting damage to the child” or reflect

requires defining phrases such as “reasonable in manner and moderate in degree.”<sup>112</sup> In addition, the category of “abuse” covers any physical or mental injury, regardless of severity, and thus does not permit legal limits on interventions for less severe options.

The vagueness of neglect and abuse definitions is evident by comparing it to criminal codes.<sup>113</sup> While the two bodies of law differ—criminal law centers on punishment and deterrence and usually only addresses intentional acts, while child protection law seeks to protect children and rehabilitate parents, and is less concerned about *mens rea*<sup>114</sup>—the comparison remains apt. Both civil child neglect and abuse law and criminal law seek to regulate a wide range of conduct. Civil child neglect and abuse cases involve allegations of physical abuse, sexual abuse, one parent’s failure to protect a child from physical or sexual abuse by another, parental drug abuse, parental mental illness, medical neglect, educational neglect, and more. Criminal codes cover physical violence, sexual violence, property crimes, drug crimes, public order offenses, and more. But the detail with which state statutes define these two broad sets of behavior is strikingly dissimilar. While states’ criminal codes face justified criticism for overbreadth,<sup>115</sup> they are relatively precise compared with child neglect and abuse statutes. Their comparative length alone illustrates the point. For instance, one state defines civil “child abuse or neglect” in eight paragraphs.<sup>116</sup> That same state devotes an entire statutory title to codifying criminal offenses, including seventeen chapters, most of which include multiple articles.<sup>117</sup>

Civil child abuse statutes fail to distinguish between various levels of severity—a crucial distinction from criminal statutes. Criminal codes include gradations defining multiple levels of severity of assault—often third degree, second degree, first degree, and aggravated assault.<sup>118</sup> Civil child abuse definitions generally include no such gradations; conduct either is neglect or abuse or is not. As a result, a criminal defendant’s specific charge or conviction identifies whether the conduct at issue—and the consequences which follow—are a bar fight or something more severe. But an allegation or adjudication that a

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“reckless or grossly negligent behavior by the parents.” S.C. CODE ANN. § 63-7-20(6)(a)(i) (2021). Other states have similar statutory provisions. *E.g.*, D.C. CODE § 16-2301(23)(B) (2022).

112. S.C. CODE ANN. § 63-7-20(6)(a)(i)(C) (2021); D.C. CODE § 16-2301(23)(B)(i) (2022).

113. The supervising juvenile officer in Clay County, where *In re A.M.* was litigated, made a similar comparison. Ziegler, *supra* note 23.

114. See RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 2.24 cmt. c (AM. L. INST., Tentative Draft No. 2, 2019) (distinguishing criminal and civil child neglect cases).

115. *E.g.*, Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U.L. REV. 351, 352-56 (2019).

116. S.C. CODE ANN. § 63-7-20(6) (2021). The eight paragraphs include sections 63-7-20(6)(a)(i) through (vii) and 63-7-20(6)(b).

117. S.C. CODE ANN. tit. 16 (2021). This count excludes drug offenses, which that state codifies elsewhere. S.C. CODE ANN. tit. 44, ch. 53 (2021).

118. *E.g.*, S.C. CODE ANN. § 16-3-600 (2021). This statute is typical in its description of the severity of harm caused by an assault as defining the different degrees.

parent has physically abused a child does not differentiate excessive corporal punishment from torture. The absence of categorizing cases as more or less severe means that a finding of abuse or neglect fails to point to appropriate dispositions, case plans, or subsequent steps, as the subsections that follow discuss.

## 2. Child Neglect and Abuse Registries

Once a child protection agency determines that a parent has neglected or abused a child, most states place that parent's name on a child neglect and abuse registry. Registries are typically confidential, but employers in certain fields—such as child care; any position in close contact with children; and often any position in contact with other vulnerable populations, such as elder care—can determine if job applicants or current employees are on the registry and certain professional licenses depend on not being on the registry.<sup>119</sup> Registry placements thus seek to protect children and other vulnerable people from potentially harmful adults.

Registry placements themselves are not examples of indeterminacy; state laws tend to be clear that any agency-substantiated maltreatment places a parent on a registry, and keeps them there.<sup>120</sup> Rather, registry placements demonstrate the impact of indeterminate definitions of neglect and placement of all or most substantiated allegations of neglect on registries. The law in its present form imposes economic harms on the families impacted by CPS agencies without a clear connection between administrative or judicial findings of neglect and the consequences that follow.<sup>121</sup>

Registry placements harm families by depriving parents of job opportunities in fields which use registry checks. Those fields are common employers of lower-income individuals, who populate registries.<sup>122</sup> Lost job opportunities can pressure lower-income parents to “seek work in the underground economy,”<sup>123</sup> and, ironically, can hurt children by limiting their parents' employment opportunities. With state agencies substantiating neglect or abuse in more than

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119. See, e.g., Henry & Lens, *supra* note 86, at 5-9 (describing the history of expanding registry checks for child care employment); MO. REV. STAT. § 210.903.2(2) (2021) (placing parents in substantiated child neglect or abuse cases on the family care safety registry, accessible to child care, elder care, and other care providing employers).

120. See, e.g., D.C. CODE § 4-1302.02 (2022) (requiring information regarding alleged abuse and neglect to be retained in registry); D.C. CODE § 4-1302.07(a) (2022) (providing that no substantiated report may be expunged from the registry).

121. Others have criticized the procedures through which many states place parents on child neglect and abuse registries. E.g., Amanda S. Sen, Stephanie K. Glaberson & Aubrey Rose, *Inadequate Protection: Examining the Due Process Rights of Individuals in Child Abuse and Neglect Registries*, 77 WASH. & LEE L. REV. 857, 864-82 (2020).

122. Henry & Lens, *supra* note 86, at 3.

123. *Id.* at 13-14.

650,000 cases annually,<sup>124</sup> the scope of economic harm through these registries is quite large.

The connection between substantiated neglect and protecting children from people hired in child care or similar positions is frequently “tenuous.”<sup>125</sup> Researchers have identified no studies correlating substantiated maltreatment allegations with risk to children when parents are later hired in child care.<sup>126</sup> If an adult has sexually abused a step-child, for instance, that individual may pose a threat to children or vulnerable adults if that person were a child care provider, home health aide, or in another similar position. In those cases, the risk of future abuse outweighs the employment cost to the individual adult. But in less severe cases, the logic of such broad registry placements is hard to decipher and leads to the critique that registry placements punish parents without protecting children.<sup>127</sup> Consider *In re A.M.* The Missouri court did find that Ms. M. neglected her child the night she went to work and left her alone. But it is difficult to see how this action would make Ms. M. a threat to a child if she sought to become a teacher, school bus driver, or child care worker, or a threat to vulnerable elderly individuals if she sought to become a home health aide. The same is true in other scenarios—parents whose substance abuse problem led to neglect last year are not necessarily a threat to others now, especially if they have achieved sobriety. Parents who used excessive corporal punishment on their own children are not likely a threat to other children as a child care worker or school bus driver. Parents who neglected a child as teenagers are likely to be more mature and not a threat to other people’s children by their mid-twenties. Yet placement of all substantiated cases on registries means the legal system harms parents and the children who depend on them without analyzing whether the substantiated maltreatment requires a registry placement.

A small number of states mitigate this problem by creating tiers of maltreatment with different implications for the registry.<sup>128</sup> In California, for instance, cases involving neglect without any substantiated maltreatment that is more specific or severe does not lead to a registry placement.<sup>129</sup> Michigan places child maltreatment into five categories, with only the two most severe leading to

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124. CHILD MALTREATMENT 2019, *supra* note 84, at 36.

125. Henry & Lens, *supra* note 86, at 9. For several examples of registry placements denying parents employment without protecting children, see Scott Pham, “*It’s Like a Leech On Me*”: Child Abuse Registries Punish Unsuspecting Parents of Color, BUZZFEED NEWS (Apr. 27, 2022, 3:31 AM), <https://perma.cc/6236-EHED>.

126. Henry & Lens, *supra* note 86, at 9.

127. See, e.g., DETTLAFF ET AL., *supra* note 60, at 13 (criticizing registries as imposing “permanent punishment”).

128. Henry & Lens, *supra* note 86, at 25.

129. CAL. PENAL CODE § 11170(a)(1)-(2) (West 2022); Henry & Lens, *supra* note 86, at 25.

a registry placement.<sup>130</sup> Similar structures exist in Delaware<sup>131</sup> and Illinois.<sup>132</sup> Under current law, these tiers only impact registry placements. But they demonstrate that categorizing neglect and abuse by severity—something largely lacking from neglect and abuse definitions in the vast majority of states, and from disposition statutes in every state—is possible.

### 3. Removals

Removal decisions are one area where the law is somewhat more determinate than it used to be. In 1975, Robert Mnookin proposed permitting removals only when an immediate and substantial danger to the child exists due to neglect and abuse, and no reasonable alternative means to protect the child.<sup>133</sup> The American Bar Association (ABA) and Institute for Judicial Administration (IJA) Juvenile Justice Project also suggested that the state should not be empowered to intervene in a family except when *necessary* to protect a child.<sup>134</sup> States have partly adopted these standards.<sup>135</sup> There are greater limits on removals without court orders—the child protection equivalent of arrest. In this stage, it is common to have a provision permitting emergency removals *only* when they are necessary to prevent an imminent risk of harm from abuse or neglect.<sup>136</sup> These standards nonetheless leave much room for interpretation. What risk suffices to justify a removal? What is imminent? What alternatives to removal are strong enough that they must be pursued? Little law exists on these questions.

There is also strong reason to believe that these limits do not prevent large numbers of unnecessary family separations. Vivek Sankaran and Christopher Church have documented how more than 25,000 children each year spend less than thirty days in foster care, and that a large subset of these children were likely removed when some other arrangement could have kept them safely with family.<sup>137</sup> Sankaran, Church, and Melissa Carter document how one judge’s

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130. MICH. COMP. LAWS § 722.628d (2022); Henry & Lens, *supra* note 86, at 25.

131. Delaware creates four tiers of child maltreatment and corresponding rules for placement on the registry and length of that placement. DEL. CODE ANN. tit. 16, § 923(b) (2022).

132. Illinois law ties length of registry record retention to severity of maltreatment, placed into three categories. 325 ILL. COMP. STAT. § 5/7.14 (2021).

133. Mnookin, *supra* note 69, at 278; Huntington, *supra* note 72, at 225-26 (describing how this proposal would work).

134. INST. OF JUD. ADMIN. & AM. BAR ASSOC., *supra* note 88, at 75.

135. Huntington, *supra* note 72, at 229-30. More recently, at least one state has moved closer to Mnookin’s removal standard. H.B. 1227, 67th Leg., Reg. Sess. §§ 4-5 (Wash. 2021), Keeping Families Together Act, ch. 211, 2021 Wash. Laws. 1420 (to be codified at WASH. REV. CODE §§ 22.44.056(1), 26.44.050); *see also id.* at § 6 (to be codified at WASH. REV. CODE § 13.34.050(1)(b)) (requiring a court to find “that removal is necessary to prevent imminent physical harm” before ordering a removal).

136. *E.g.*, S.C. CODE ANN. § 63-7-720(A) (2021); D.C. SUPER. CT. R. NEGLECT & ABUSE PROC. 4(b)(2)(B)(i)-(ii), 13(d).

137. Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of*

unusually strict interpretation of removal standards reduced the number of children in foster care in New Orleans dramatically, without any data showing harms to child safety,<sup>138</sup> suggesting that many of those removals were unnecessary.

#### 4. Dispositions

##### a. Whether to Separate Families

One crucial and continuing element of indeterminacy is the absence of any direct legal connection between the specific type of child maltreatment adjudicated and the remedies available. Child protection statutes list various disposition options—ranging from leaving children at home and terminating family court jurisdiction to moving children to another adult’s custody to removing children from their parents and placing them in foster care. Crucially, all of these dispositions are available following any adjudication.<sup>139</sup> The law does not delineate between neglect or abuse which should not lead to removal and that which should. Nor does the law provide clear guidance regarding what type of placement is appropriate when a child is removed from a parent’s custody.

The absence of a substantive connection between the child maltreatment adjudicated and the dispositions available can be traced to the origin of juvenile and family courts. The first statute creating modern juvenile courts—Illinois’s 1899 Juvenile Court Act—gave judges discretion to order a range of dispositions with no provision limiting courts’ discretion regarding which disposition to impose.<sup>140</sup> It provided that whenever a child is “found to be dependent or neglected . . . , the court may” order any listed option.<sup>141</sup> Nothing limited the dispositions available by the type of maltreatment adjudicated.

This indeterminacy has been critiqued, most prominently in the ABA-IJA Juvenile Justice Project, which proposed in 1981 that any disposition be “designed to alleviate the immediate danger to the child, to mitigate or cure any damage the child has already suffered, and to aid the parents so that the child will not be endangered in the future.”<sup>142</sup> That proposal sought to change the status

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*Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 209-10 (2016).

138. Melissa Carter, Christopher Church & Vivek Sankaran, *A Quiet Revolution: How Judicial Discipline Essentially Eliminated Foster Care and Nearly Went Unnoticed*, 12 COLUM. J. RACE & L. (forthcoming 2022) (manuscript at 9-17) (on file with author).

139. *E.g.*, D.C. CODE § 16-2320(a) (2022).

140. Illinois Juvenile Court Act of 1899, 1899 Ill. Laws 133 § 7, reprinted in JUV. & FAM. CT. J., Fall 1998, at 1, 2.

141. *Id.* The statute does not list leaving the child at home as evidence of neglect, but the permissive language—“may”—indicates that the court need not tie its disposition to the type of neglect.

142. INST. OF JUD. ADMIN. & AM. BAR ASSOC., *supra* note 88, at 128.

quo of statutes directing family courts to choose whatever disposition judges believed would serve children's best interest.<sup>143</sup>

States did not follow this recommendation, and indeterminacy remains in disposition statutes, which continue to list a range of disposition options without tying them to any particular underlying adjudication. Any adjudication for anything defined as abuse or neglect—whether severe or mild—can lead to an order removing a child from the child's family, as the facts of *In re A.M.* reflect. Ironically, even those states that distinguish between more and less severe maltreatment for purposes of their registries<sup>144</sup> do not do so for disposition; any adjudication can lead to any disposition.<sup>145</sup>

The indeterminacy at disposition presents a stark comparison with criminal law. Criminal codes not only define different offenses with varying levels of severity, but they also assign different consequences to those different levels. This principle is second nature in criminal court—the severity of punishment is very limited for a defendant convicted of misdemeanor assault and battery in the third degree, and less limited for a defendant convicted of assault and battery in the first degree or aggravated assault.<sup>146</sup> As a result, whether the state can prove a defendant guilty of a more severe offense is an issue of great consequence and helps determine a proportionate response to crime. Similarly, in the large number of cases resolved via plea bargaining, whether a defendant pleads guilty to a more or less severe offense is a—often *the*—critical point negotiated by the state and defense. Absent a legal connection between adjudicated child neglect or abuse and dispositions courts may impose, both the specific type of maltreatment and the state's evidence of it are less relevant.

*In re A.M.* illustrates these principles at work. The neglect at issue—leaving a child home alone in a single instance so the parent, who lacked child care, could work—is not a particularly severe form of neglect. The parent perpetrated no violence against the child, there was no allegation that the parent's conduct harmed the child, and there was no allegation that this was a repeated instance. Moreover, Ms. M's error in judgment was likely informed by financial desperation—a need to work and a fear of eviction—rather than a more deeply rooted and problematic condition, such as substance abuse or a serious and untreated mental health condition. If anything resembling a criminal code existed, this conduct would have been the equivalent of a misdemeanor, if it violated the law at all. Yet Ms. M. and A.M. faced the same consequence—A.M.'s removal and placement in foster care—as would have been likely in the case of severe abuse.

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143. *Id.* at 129 (“The standard proposed herein specifically rejects the ‘best interest’ test. In its place, the standard provides that the goal of the disposition is to protect the child from the specific harm justifying intervention.”).

144. See *supra* notes 128-32 and accompanying text.

145. E.g., MICH. COMP. LAWS § 712A.18 (2022).

146. E.g., S.C. CODE ANN. § 16-3-600 (2021).

### b. Where to Place Children Once Families Are Separated

When children are ordered removed, little law governs where family courts may order them placed. Federal law disfavors congregate care,<sup>147</sup> but there is no federal substantive provision creating any hierarchy between kinship placements and placing a child in a foster home with strangers. Federal law only requires states to “consider” giving preference to kin when determining where to place children that they separate from parents.<sup>148</sup> Some states explicitly preference kinship placements in their statutes or case law,<sup>149</sup> but these states are the exceptions, as most states simply list possible placement options with no hierarchy among them.<sup>150</sup> Even where placement hierarchies exist, vague substantive standards such as “good cause”<sup>151</sup> or weaker<sup>152</sup> often permit courts to divert from those hierarchies.

The general absence of a strong legal preference for kinship placements is glaring. Social science evidence shows the value of kinship placements over others.<sup>153</sup> Children in kinship foster care have significantly more stable placements—they are less likely to have to leave their initial placement for another temporary placement and less likely to experience multiple moves from one foster placement to another.<sup>154</sup> In addition, children in kinship care are more

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147. Federal funding rules now limit reimbursement for congregate care facilities by imposing a set of requirements on such facilities and procedures for placement in them. 42 U.S.C. § 672(k)(2)-(4).

148. 42 U.S.C. § 671(a)(19).

149. See ARIZ. REV. STAT. ANN. § 8-514(B) (2021) (creating “order for placement preference”); FLA. STAT. § 39.521(3) (2021) (creating placement hierarchy of parents, other kin, and agency custody); MISS. CODE ANN. § 43-21-609(b) (2022) (same); OR. REV. STAT. § 419B.192(1) (2021) (preference for kinship placement); S.C. CODE ANN. § 63-7-1680(E)(1) (2021) (requiring agency placement plan to give “preference” to a kinship placement absent “good cause to the contrary”); W. VA. CODE § 49-4-604(c) (2020) (providing “sequence” of dispositional options to consider); *In re J.W.*, 226 P.3d 873, 881 (Wyo. 2010) (finding “a compelling preference” for “placement with nuclear or extended family members”); WASH. REV. CODE § 13.34.130(3) (2022) (requiring placement with a relative absent a risk to the “health, safety, or welfare of the child”).

150. See, e.g., D.C. CODE § 16-2320(a)(3)(A) (2022) (disposition statute that does not preference kinship placements); GA. CODE ANN. § 15-11-212(a)(2) (2021) (same); ME. STAT. tit. 22, § 4036(1) (2021) (same); MO. REV. STAT. § 211.181.1 (2021) (same); MONT. CODE ANN. § 41-3-438(3) (2021) (same); OHIO REV. CODE ANN. § 2151.353(A) (West 2021) (same); 42 PA. CONS. STAT. § 6351(a) (2021) (same).

151. S.C. CODE ANN. § 63-7-1680(E)(1) (2021).

152. Arizona courts have ruled that family courts need not even make a best interest finding in diverting from placement hierarchies; the court need only “include placement preference in its analysis of what is in the child’s best interest.” *Antonio P. v. Ariz. Dep’t of Econ. Sec.*, 187 P.3d 1115, 1118 (Ariz. Ct. App. 2008).

153. Judge Leonard Edwards aptly summarizes some of this data in his comment to this Article. Leonard Edwards, Commentary, *Comments on “Confronting Indeterminacy and Bias in Child Protection Law”* by Josh Gupta-Kagan, 33 STAN. L. & POL’Y REV. ONLINE (forthcoming 2022).

154. See, e.g., Eun Koh, *Permanency Outcomes of Children in Kinship and Non-Kinship Foster Care: Testing the External Validity of Kinship Effects*, 32 CHILD. & YOUTH SERVS. REV. 389, 390 (2010) (collecting studies); *id.* at 393, 396 (reporting findings in his five-state study

likely to feel that they belong with the family they live with than children in non-kinship care.<sup>155</sup> Moreover, placement decisions early in a case may effectively decide the child's permanent family—if reunification does not occur, then the long-standing foster parent is likely first in line to become an adoptive parent or guardian.<sup>156</sup>

In the absence of substantive legal standards preferencing kinship care over placement with strangers, and with statutes that include a category for placing children in agency custody,<sup>157</sup> child protection agencies have wide discretion to determine where foster children live. That discretion has led to wide variation in the proportion of foster children placed with kin—ranging in one year from 2% in one state to 46% in another.<sup>158</sup> A strong kinship placement preference can increase those rates to as high as two-thirds or more.<sup>159</sup>

The absence of a meaningful kinship placement preference came to light via the death of Ma'Khia Bryant, a Black foster child in Ohio (a state with no kinship placement preference<sup>160</sup>) shot to death by police during an incident outside her non-kinship foster home.<sup>161</sup> After the CPS agency removed Ma'Khia from her mother, it placed her with her grandmother, where she stayed for the next sixteen months. But when her grandmother's landlord discovered Ma'Khia was there, he evicted the family. Rather than help the grandmother defend against the eviction or obtain alternative family housing, or even permit the grandmother to

with matched samples); Marc A. Winokur, Graig A. Crawford, Ralph C. Longobardi & Deborah P. Valentine, *Matched Comparison of Children in Kinship Care and Foster Care on Child Welfare Outcomes*, 89 FAMILIES SOC'Y 338, 341-42 (2008).

155. Eun Koh & Mark F. Testa, *Propensity Score Matching of Children in Kinship and Nonkinship Foster Care: Do Permanency Outcomes Still Differ?*, 32 SOC. WORK RSCH. 105, 115 (2008).

156. When reunification is not possible, the National Council of Juvenile and Family Court Judges has adopted a preference for “adoption by the relative or foster family with whom the child is living.” BARBARA SEIBEL, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, ADOPTION AND PERMANENCY GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 14 (2000).

157. *E.g.*, D.C. CODE § 16-2320(a)(3)(A) (2022); GA. CODE ANN. § 15-11-212(a)(2)(B) (2021); MO. REV. STAT. § 211.181.1(2) (2021).

158. U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD.'S BUREAU, REPORT TO CONGRESS ON STATES' USE OF WAIVERS OF NON-SAFETY LICENSING STANDARDS FOR RELATIVE FOSTER FAMILY HOMES 6-7 (2011), <https://perma.cc/EF8J-PJ4D>.

159. See Leonard Edwards, *Relative Placement: The Best Answer for Our Foster Care System*, 69 JUV. & FAM. CT. J., no. 3, 2018, at 55, 59 (describing Allegheny County, Pennsylvania); Edwards, *supra* note 153, at 7 (asserting that “[s]everal model counties have demonstrated that they can place children with relatives in over 80% of their dependency cases”).

160. See *supra* note 150 and accompanying text.

161. The facts in this paragraph are taken from the *New York Times*' exhaustive account of her case. Nicholas Bogel-Burroughs, Ellen Barry & Will Wright, *Ma'Khia Bryant's Journey Through Foster Care Ended with an Officer's Bullet*, N.Y. TIMES (May 8, 2021), <https://perma.cc/H7BF-WLPY>. For a critique of the handling of kinship care in Ma'Khia's case and an argument to “exhaust all other options” before placing a child with strangers, see Vivek Sankaran, *Ma'Khia Bryant's Story Reveals Flaws in Foster Care System*, IMPRINT (May 31, 2021, 7:00 PM), <https://perma.cc/5ENV-3EVW>.

take the children into a hotel temporarily while she sought alternatives—all steps a meaningful kinship placement preference might have required—the agency took Ma’Khia away from her grandmother and placed her with strangers. A series of short-term placements followed, ultimately leading to the turbulent final placement and death at the hands of police. The case did not need such a tragic end to underscore the point that the law did not protect Ma’Khia’s ability to live with her grandmother rather than strangers.

## 5. What Happens Once a Child Is in Foster Care?

### a. What Should a Case Plan Require a Parent to Do?

When a child enters foster care, federal law requires CPS agencies, jointly with the parent,<sup>162</sup> to create a “case plan . . . for assuring that . . . services are provided to the parents, child, and foster parents in order to improve the conditions in the parents’ home [and] facilitate return of the child to his own safe home.”<sup>163</sup> The case plan defines what parents must do to reunify with children and how CPS agencies monitor parents’ actions, and is thus “a critical stage in the proceeding with profound long-term implications for all that follows.”<sup>164</sup> When a case plan addresses the issues that keep a parent and child from reunifying and progress is clearly measured, what happens subsequently in court is “anti-climactic.”<sup>165</sup> But “[a]n ill-advised case plan not only wastes money; it wastes the most precious commodity in the field: time.”<sup>166</sup> Poor case plans can require parents to do unnecessary tasks—tasks that slow down reunification or, if parents fail to complete them, prevent reunification entirely. Case plans that fail to address the actual cause of maltreatment could lead to a recurrence of maltreatment after reunification.

These requirements provide another example of a determinate procedural requirement—create a case plan within a set time frame<sup>167</sup>—coupled with substantive indeterminacy—the case plan should be about “facilitat[ing]” reunification,<sup>168</sup> with little elucidation of what the plan should or should not include. Federal regulations require simply that a case plan must “[i]nclude a description of the services offered and provided . . . to reunify the family.”<sup>169</sup> State laws and policies make clear that case plans should both describe “the

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162. 45 C.F.R. § 1356.21(g)(1) (2020).

163. 42 U.S.C. § 675(1).

164. Martin Guggenheim, *How Family Defender Offices in New York City Are Able to Safely Reduce the Time Children Spend in Foster Care*, 54 FAM. L.Q., no. 1, 2020, at 1, 31.

165. *Id.* at 12; see also LEONARD EDWARDS, REASONABLE EFFORTS: A JUDICIAL PERSPECTIVE 21 (2014) (ebook) (describing case planning as “integral”).

166. Guggenheim, *supra* note 164, at 31.

167. U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD.’S BUREAU, CASE PLANNING FOR FAMILIES INVOLVED WITH CHILD WELFARE AGENCIES 2 (2018), <https://perma.cc/FB79-M2NZ> (summarizing state case plan requirements).

168. 42 U.S.C. § 675(1)(B).

169. 45 C.F.R. § 1356.21(g)(4) (2020).

problems that led to the family’s involvement” in foster care “and the services that will be provided to the parents to address those problems”—but without limits on how those “problems” and “services” should be defined.<sup>170</sup> At least one state’s case law provides that case plan services should not “consist of ‘a litany of required services . . . not related to the conditions that eventually gave rise to the dependency adjudication.’”<sup>171</sup> But even this case cautioned that the conditions leading to state intervention must not be read “narrowly.”<sup>172</sup>

It is thus effectively up to CPS agencies drafting case plans and family courts approving them to determine what is required for a family to reunify, because the law does not tether case plan requirements to the neglect or abuse that was actually adjudicated. This can result in agencies setting a standard for reunification higher than the standard for removal, with parents required to take steps that are often about finances (obtain a job and housing, for instance) or other issues unrelated to the reason for the child’s presence in foster care. This substantive indeterminacy permits what occurred in *In re A.M.*—a case about a parent’s single instance of poor judgment in the face of inadequate child care to grow into a case about providing a “safe and stable home” more generally, and a long list of requirements before reunification could occur, like a mental health assessment, that bore little connection to the underlying incident.<sup>173</sup> A more determinate standard would require a closer connection between the specific neglect or abuse adjudicated and the requirements for reunification.

#### b. When Should a Court Reunify a Family?

Reunification of families separated through foster care is the default goal of every foster care case and the most common outcome for any child placed in foster care.<sup>174</sup> Federal law requires states to hold hearings to determine “whether . . . the child will be returned to the parent,” but does not provide a

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170. See U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD.’S BUREAU, *supra* note 167, at 3 (noting no principles to limit issues identified as the “problems” that need to be addressed).

171. *In re Child of E.V.*, 634 N.W.2d 443, 447 (Minn. Ct. App. 2001) (quoting *In re Welfare of M.A.*, 408 N.W.2d 227, 236 (Minn. Ct. App. 1987)). Some commentators suggest that there should be a connection between the reason for a removal of a child to foster care and the services called for in the plan. Judge Leonard Edwards, for instance, writes that a case plan “must identify the problem which caused the removal as well as the goals and services which will enable the parent to remedy *those problems*.” EDWARDS, *supra* note 165, at 51 (emphasis added). Perhaps tellingly, no authority is cited for that proposition.

172. *In re Child of E.V.*, 634 N.W.2d at 447 n.3 (quoting *In re Welfare of D.D.K.*, 376 N.W.2d 717, 721 (Minn. Ct. App. 1985)). In addition, this case only arose in a later termination of parental rights appeal, *In re Child of E.V.*, 634 N.W.2d at 445, meaning the over-broad case plan was in effect until then.

173. See *supra* notes 36-43 and accompanying text.

174. Reunification accounted for 47% of all exits from foster care in fiscal year 2019. The next most frequent outcome, adoption, accounted for 26% of all exits. AFCARS REPORT, *supra* note 34, at 3.

substantive standard for when courts should order reunification to occur<sup>175</sup>—another example of procedural clarity with little substantive guidance, which leaves CPS agencies and family courts with wide discretion to reunify or not as they deem appropriate.<sup>176</sup>

Long-standing case law provides modest guidance—the question of whether to reunify a family should bear some connection to the maltreatment that forms the basis of the original foster care placement. In 1899, the high court of New York State addressed when parents and children are legally entitled to reunify in *In re Knowack*.<sup>177</sup> A key fact was uncontested—the original ground for removal of the Knowack children from their parents “has been fully and absolutely removed.”<sup>178</sup> The New York Court of Appeals ordered the family reunified, explaining that the power to intervene in family life is “limited by the necessities of the case.”<sup>179</sup>

Despite the “necessities” language, *In re Knowack* left open questions. If a parent’s unfitness has only been partly—not “fully and absolutely”—rehabilitated, should reunification occur? If one form of unfitness is adjudicated, but the state agency is concerned about another form, is rehabilitation of the first issue sufficient to require reunification? How exactly is the “necessit[y]” for state custody defined? Nearly one and a quarter centuries later, these questions remain largely in the discretion of CPS agencies and family court judges.<sup>180</sup> Again, *In re A.M.* is illustrative, as the issues that authorities cited to avoid reunification were distinct from the lack of child care and Ms. M.’s decision to leave her child alone so she could go to work. No law required a new finding of neglect for authorities’ concern about domestic violence in that case, and no law required the conditions imposed upon her be proven to connect to the underlying “necessity” of family separation.

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175. 42 U.S.C. § 675(5)(C).

176. Some state statutes impose some standard—such as California’s which requires reunification after a child spends eighteen months in foster care unless the state shows “that return of the child . . . would create a substantial risk of detriment to the child’s safety, protection, or physical or emotional well-being.” CAL. WELF. & INST. CODE § 366.22(a) (West 2022); see also *Georgeanne G. v. Superior Ct. of L.A. Cnty.*, 53 Cal. App. 5th 856, 864, 870 (Ct. App. 2020) (describing this standard “as a fairly high one” and applying it to overturn a trial court decision keeping a child in foster care).

177. 53 N.E. 676 (N.Y. 1899).

178. *Id.* at 676-77. The record further revealed “that the children are all anxious and desirous of returning to the home of their parents.” *Id.* at 677.

179. *Id.* at 678.

180. See, e.g., Clare Ryan, *Children as Bargaining Chips*, 68 UCLA L. REV. 410, 440 (2021) (describing Connecticut reunification statute as “giv[ing] the court significant discretion to require the parent to alter their behavior, living conditions, and other aspects of their lives before reunification”).

c. When Should a Court Change a Child's Permanency Plan from Reunification to Something Else?

When reunification does not occur, child protection law requires family courts to determine whether to keep working towards or give up on reunification. Decisions to shift away from reunification signify the determination that reunification is unlikely and a new permanent family structure is required, and trigger changes to other agency legal obligations.<sup>181</sup> Agencies must make reasonable efforts to achieve whatever the permanency plan is. When it is reunification, agencies must work “to make it possible for a child to safely return to the child’s home.”<sup>182</sup> But once a court changes the plan away from reunification, the agency’s legal obligation changes; it must now “complete whatever steps are necessary to finalize the permanent placement of the child.”<sup>183</sup>

This decision also illustrates the procedural clarity and substantive indeterminacy that marks child neglect and abuse law—state courts must hold permanency hearings whenever a child is in foster care for at least one year, and these hearings must determine what a child’s permanency plan ought to be—generally, reunification, adoption, or guardianship.<sup>184</sup> But—beyond the implication from these procedural timelines that reunification efforts should be time-limited—the law does not prescribe a substantive standard for when family courts should move away from reunification. To illustrate what actions this permits courts to take, one Pennsylvania appellate court approved shifting a permanency plan away from reunification based on subjective judgment about how a parent’s obesity affected his ability to raise his children.<sup>185</sup>

Absent clear law regarding when to shift away from reunification, CPS agencies and courts have significant discretion. In *In re A.M.*, Ms. M. recalled feeling blindsided in a meeting with a caseworker, who had lauded her progress in previous meetings but suddenly advocated for a switch to adoption (complete with terminating her parental rights).<sup>186</sup> Her surprise is understandable. The law provides no standard for when authorities should move away from reunification as a goal. In her case, authorities were concerned less about the absence of child care that led to the child’s initial placement into foster care than about other factors.<sup>187</sup> The law’s indeterminacy permitted authorities to use those concerns to stop working to reunify Ms. M. and her daughter.

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181. See Gupta-Kagan, *supra* note 75, at 35-40 (describing wide ranging impacts of permanency plan changes).

182. 42 U.S.C. § 671(a)(15)(B)(ii).

183. 42 U.S.C. § 671(a)(15)(C).

184. 42 U.S.C. § 675(5)(C).

185. Memorandum Supplementing Order Affirming Judgment at 13-15, *In re Z.B.*, J-S27002-21 (Pa. Super. Ct. Dec. 1, 2021)

186. Ziegler, *supra* note 23.

187. See *supra* notes 48-51 and accompanying text.

## d. What Should a Permanency Plan Be if Not Reunification?

One area where the law does not suffer from indeterminacy relates to what permanency plans should be if not reunification. Federal law generally provides for two permanency options<sup>188</sup> other than reunification—termination of the parent-child relationship and creation of a new parent-child relationship through adoption, or creation of a family with guardianship, which grants the guardian legal custody but does not terminate the parent-child relationship<sup>189</sup>—and favors adoption. Federal statutory law requires<sup>190</sup> a CPS agency to determine that “[b]eing returned home or adopted are not appropriate permanency options for the child” before pursuing guardianship.<sup>191</sup> This hierarchy is visible in *In re A.M.* Even assuming that the child could not return to her mother, it was not clear that terminating the parent-child relationship was necessary because the authorities could have pursued guardianship. The appellate court decision affirming the termination did not consider whether termination was necessary to achieve permanency with either caretaker, nor did relevant state law require such consideration.<sup>192</sup>

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188. The law also recognizes “another planned permanent living arrangement” (APPLA). 42 U.S.C. § 675(5)(C). APPLA generally means remaining in foster care without any permanent family relationships until the child turns eighteen (or in some states, twenty-one) and emancipates from foster care, as about 20,000 young adults do every year. AFCARS REPORT, *supra* note 34, at 3. The law disfavors APPLA—courts can only select it after ruling out other options, and only if the child is sixteen or older. 42 U.S.C. § 675(5)(C). APPLA’s disfavored status rests in research associating growing up in foster care with a range of poor outcomes, including less post-secondary education, employment, and housing stability, and more public assistance use and criminal justice system involvement. *See, e.g.*, MARK E. COURTNEY, AMY DWORSKY, ADAM BROWN, COLLEEN CARY, KARA LOVE & VANESSA VORHIES, MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 26, at 6 (2011), <https://perma.cc/QU39-5UEC>.

189. Federal law defines guardianship as “a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and decisionmaking.” 42 U.S.C. § 675(7).

190. This requirement is for state agencies to be able to receive federal reimbursement for some costs of guardianship subsidies. The provision preferencing adoption appears in a section governing state agency eligibility for federal support of any subsidies paid to guardians. 42 U.S.C. § 673(d)(1)(A).

191. 42 U.S.C. § 673(d)(3)(A)(ii); *see also* 42 U.S.C. § 675(1)(F)(i) (requiring case plan for a child with a goal of guardianship to include “a description of [] the steps that the agency has taken to determine that it is not appropriate for the child to be . . . adopted.”). Four states have statutes stating an explicit preference for terminating the parent-child relationship and pursuing adoption over guardianship. CAL. WELF. & INST. CODE § 366.26(b) (West 2022); FLA. STAT. § 39.621(3) (2021); LA. CHILD. CODE ANN. art. 702(C) (2021); MINN. STAT. § 260C.513(a) (2021). At least two states list permanency with kinship caregivers—whether through guardianship or adoption—as preferable to permanency with someone else. ARK. CODE ANN. § 9-27-338(c) (2020); MD. CODE ANN., CTS. & JUD. PROC. § 3-823(e)(1) (West 2022). But these states must still follow the federal hierarchy and rule out adoption before being able to access federal financial support for guardianship subsidies.

192. Memorandum Supplementing Order Affirming Judgment, *supra* note 25, at 10-14;

This legal hierarchy exists despite data demonstrating that guardianships are just as stable and permanent in practice as adoptions are,<sup>193</sup> and that adoption disruptions (like guardianship disruptions) occur in a significant percentage of cases.<sup>194</sup> Moreover, guardianships are less invasive because they do not require terminating parent-child relationships, which is itself an important value. The federal Children's Bureau recognized this evidence in a 2021 guidance document.<sup>195</sup> The Children's Bureau wrote that "[c]hildren have inherent attachments and connections with their families of origin that should be protected and preserved whenever safely possible."<sup>196</sup> The Children's Bureau went further, suggesting both that adoption and termination of parental rights should be reserved for cases when those steps are necessary for children's safety, and that potential adoptive parents should be counseled to seek guardianship:

Pre-adoptive families who wish to sever the child's family connections for any reason other than safety should receive training and supportive counseling to understand the impact that will have on the child. Decisions for adoption finalization should be contingent upon whether the family will in fact support what is best for the child in preserving connections.<sup>197</sup>

This guidance does not explicitly question the statutory hierarchy of adoption over guardianship (and the Children's Bureau could not frontally assault on the statute it is charged with implementing), but it questions the foundations of that hierarchy.

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MO. REV. STAT. § 211.447.7 (2021).

193. See, e.g., CAL. DEP'T OF SOC. SERVS., REPORT TO THE LEGISLATURE ON THE KINSHIP GUARDIANSHIP ASSISTANCE PAYMENT (KIN-GAP) PROGRAM 5, 15 (2006) (finding that that 5.9% of children who left foster care to subsidized guardianship subsequently re-entered foster care and noting that some of these re-entries might be "positive," such as a re-entry to facilitate reunification with a parent). Mark F. Testa, *The Quality of Permanence—Lasting or Binding? Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption*, 12 VA. J. SOC. POL'Y & L. 499, 526-27 (2005) (finding in Illinois that guardianship does not render a child's placement any less stable than adoption). The federal government summarized research as showing no statistically significant differences in the number of children who re-entered foster care after a guardianship compared with after an adoption. U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD.'S BUREAU, SYNTHESIS OF FINDINGS: SUBSIDIZED GUARDIANSHIP CHILD WELFARE WAIVER DEMONSTRATIONS 18-20 (2011).

194. Data is summarized in U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD.'S BUREAU, DISCONTINUITY AND DISRUPTION IN ADOPTIONS AND GUARDIANSHIPS 3-6 (2021), <https://perma.cc/4TE9-KVDF>. 10 to 25% of pre-adoptive placements disrupt before adoptions are finalized, *id.* at 6, and up to 10% of adopted children (in finalized adoptions) re-enter foster care, *id.* at 4.

195. U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAM., CHILD.'S BUREAU, ACYF-CB-IM-21-01, ACHIEVING PERMANENCY FOR THE WELL-BEING OF CHILDREN AND YOUTH 2 (2021), <https://perma.cc/KNS6-G7G9> [hereinafter ACHIEVING PERMANENCY].

196. *Id.* at 2.

197. *Id.* at 19.

e. When Should a Court Terminate the Legal Relationship Between Parents and Children?

Child protection law has grown more determinate in one area that is both procedural and substantive—the controversial<sup>198</sup> federal rule requiring, with certain exceptions, state child protection agencies to seek to terminate parent-child relationships<sup>199</sup> when children have been in foster care for fifteen of the previous twenty-two months.<sup>200</sup> This provides both a procedural rule—initiate a process for a court to consider such terminations—and a strong substantive nudge that after fifteen months in foster care authorities should move away from reunification and towards termination and adoption.<sup>201</sup> Consistent with this nudge, terminations are frequent—courts terminate the legal relationship between parents and about one quarter of all children who enter foster care, and most of these terminations happen within two years of entering foster care.<sup>202</sup>

This more determinate rule (and the similarly determinate preference for adoption over guardianship) cannot be separated from its context in an indeterminate legal structure. A child spending time in foster care under indeterminate standards triggers application of the more determinate rules, which transform a case into the most severe form of state intervention in families.

*In re A.M.* illustrates the impact of the 15-of-22 month rule. In that case, authorities filed a termination petition consistent with this timeline,<sup>203</sup> with a key player reportedly stating on that timeline: “This isn’t going anywhere, I’m going to reach out to my lawyer to talk about TPR.”<sup>204</sup> That quote encapsulates the message of the 15-of-22-month rule—if a parent has not been able to reunify (or come close to doing so) on that timeline, reunification is so unlikely that pursuing a termination is the presumptive next step.

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198. This rule has attracted increasing criticism. *See infra* note 315 and accompanying text. This Article proposes replacing it with much more restrictive grounds for terminating parent-child relationships. *Infra* Part V.F.

199. Such actions are frequently referred to as “termination of parental rights” or TPR cases. *E.g.*, *Santosky v. Kramer*, 455 U.S. 745, 750, 760, 765 (1982). I use the phrase “terminate parent-child relationships” for several reasons. First, it more completely encapsulates what is terminated—both parents’ rights to their children, but also children’s relationship with their parents—and a crucial question in any termination case is whether terminating both parts are necessary, especially because parental rights can be limited without terminating children’s legal relationship with their parents. Second, it is occasionally the technical statutory term used. *See, e.g.*, D.C. CODE § 16-2353 (2022) (“Grounds for termination of parent and child relationship.”).

200. 42 U.S.C. § 675(5)(E).

201. Adoptions and terminations are closely linked; a termination of one parent-child relationship permits the creation of a new one through adoption.

202. ACHIEVING PERMANENCY, *supra* note 195, at 8-9.

203. The child was removed in September 2017 and the termination petition filed in February 2019—seventeen months later. Federal regulations define the fifteen-month timeline as beginning upon the date the child is “considered to have entered foster care,” 45 C.F.R. § 1356.21(i)(1)(i)(A) (2020), which in turn is defined as sixty days after a child’s removal. 42 U.S.C. § 675(5)(F); 45 C.F.R. § 1355.20 (2020).

204. Ziegler, *supra* note 23.

The 15-of-22-month rule does have some limitations which add indeterminacy. First, its scope remains vague; exceptions include anytime the child is living with a relative and any other “compelling reason” can support an exception.<sup>205</sup> Second, this rule does not actually require terminations to occur. Rather, it requires agencies to *file* for terminations,<sup>206</sup> saying nothing about how courts should respond to such filings.

Despite this remaining indeterminacy, the 15-of-22-month rule represents a rare case of providing substantive guidance, and, like the law’s preferencing of adoption over guardianship, this substantive rule has garnered well-justified criticism. As state agencies and family courts increased their use of terminations in the 1990s, critics established that this increased use undermined the goals of achieving permanency, because adoptions did not keep pace with terminations, and the result was an increasing number of legal orphans—children who had no legal parent (due to a termination) and no new parent (because no adoption occurred).<sup>207</sup> Seeking terminations based on a child’s time in foster care rather than the likelihood of adoption increases the risk that the terminations would simply create legal orphans. Indeed, between 2010 and 2019, the federal government reported 89,800 more terminations than adoptions—meaning courts terminated the parent-child legal relationship without creating a new parent-child relationship for 89,800 children.<sup>208</sup> And a large number of children remain in foster care with their legal relationship with their parents terminated and not adopted by new parents—73,200 in 2020.<sup>209</sup> Such critics recommended two important principles to limit terminations: (1) no termination should occur unless the state can prove “a high probability for adoption exists” (presumably through the identification of a prospective adoptive family) and (2) that “termination is necessary to promote the child’s welfare.”<sup>210</sup>

Recent federal guidance expands the concerns about using termination too frequently. Following these concerns about overuse of terminations, advocates have begun seeking a repeal of the 15-of-22-month rule,<sup>211</sup> and the federal government has issued guidance urging state authorities to limit that rule by using exceptions to it.<sup>212</sup> The federal guidance advises states against wide use of terminations in multiple ways: States should work “to expand family

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205. 42 U.S.C. § 675(5)(E)(ii).

206. 42 U.S.C. § 675(5)(E).

207. Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 132-34 (1995).

208. U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD.’S BUREAU, TRENDS IN FOSTER CARE AND ADOPTION: FY 2010-FY 2019, at 1 (2020), <https://perma.cc/CF9Y-QAH7>. Statistics were calculated based on subtracting the total number of adoptions for those years from the total number of terminations. In percentage terms, 14% of all children who were subject of terminations were not subsequently adopted.

209. ACHIEVING PERMANENCY, *supra* note 195, at 16.

210. Guggenheim, *supra* note 207, at 135.

211. *See infra* note 315 and accompanying text.

212. ACHIEVING PERMANENCY, *supra* note 195, at 3.

relationships, not sever or replace them,”<sup>213</sup> and states should consider safety and children’s relationships “rather than the number of months spent in foster care, or even a child’s new attachment to resource [foster] parents,”<sup>214</sup> and “not to place timeliness before the substance of what best supports familial relationships and the best interest of the child.”<sup>215</sup>

## 6. Reasonable Efforts to Preserve and Reunify Families

Since 1980, Congress has required states to make “reasonable efforts” to prevent children’s entry into foster care and to reunify them with their families when the agencies removed them.<sup>216</sup> Congress’s goal was straightforward—ensure children did not enter foster care when they could have remained safely with their families, and for CPS agencies to work expeditiously to reunify families when a removal was required, and thus keep the number of children in foster care relatively low.<sup>217</sup> However, Congress did not define the phrase “reasonable efforts,” leaving an indeterminate standard to perform ambitious goals.<sup>218</sup>

Other sources of law did not fill the gap. The Children’s Bureau—the federal sub-agency charged with implementing federal child protection statutes—has also declined to promulgate regulations offering any further definition of reasonable efforts.<sup>219</sup> Some state legislatures have adopted reasonable efforts definitions, but those “typically restate the federal language with the addition of more general terms,” providing courts with “little guidance.”<sup>220</sup> Reasonable

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213. *Id.* at 10.

214. *Id.* at 11.

215. *Id.* at 22. This reference to timeliness came in the context of a discussion of termination timeliness, and a reference to 42 U.S.C. § 675(5)(E), which includes the 15-of-22-month rule.

216. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 101, 94 Stat. 500, 501 (codified as amended at 42 U.S.C. § 671(a)(15)).

217. *In re James G.*, 943 A.2d 53, 69-70 (Md. Ct. Spec. App. 2008) (describing legislative intent); see also Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. TOL. L. REV. 321, 324-25 (2005) (noting congressional record of concerning numbers of children staying in foster care rather than reunifying quickly); Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State’s Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT’L L.J. 259, 269-72 (2003) (describing goal of ensuring minimum quality of family preservation and reunification services).

218. In 1997, Congress modestly amended the reasonable efforts statute to emphasize that “the child’s health and safety shall be the paramount concern” in a reasonable efforts finding. Adoption and Safe Families Act, Pub. L. No. 105-89, § 101, 111 Stat. 2115, 2116 (1997) (codified at 42 U.S.C. § 671(a)(15)(A)) (“Clarification of the reasonable efforts requirement.”); Bean, *supra* note 217, at 326. Beyond offering this truism, however, the statutory text did not further specify what “reasonable efforts” meant, leaving a largely indeterminate standard in place.

219. Title VI-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 63 Fed. Reg. 50058, 50073 (Sept. 18, 1998). The resulting federal regulations do not offer a definition of “reasonable efforts.” 45 C.F.R. § 1356.21(b), (d) (2020).

220. EDWARDS, *supra* note 165, at 29.

efforts rarely become the subject of appellate case law, with parents' attorneys rarely raising challenges.<sup>221</sup> The result is indeterminacy; "reasonable efforts" remains undefined and described by courts as "amorphous."<sup>222</sup>

In the federal statutory scheme, federal reimbursements to state CPS agencies depend on state court judges finding that the agencies made reasonable efforts.<sup>223</sup> That is, state courts' reasonable efforts decisions determine whether a state agency will receive federal funding,<sup>224</sup> creating an incentive for judges to find in the affirmative so that state agencies do not lose federal funds.<sup>225</sup>

This mix of an indeterminate substantive standard and incentives to help state CPS agencies obtain federal funding has rendered reasonable efforts a weak accountability tool. Federal evaluations of state efforts reveal a dysfunctional system. The federal Child and Family Services Reviews—close federal reviews of a random sampling of state CPS agency case files—found that states failed in 51% of cases to make adequate efforts to reunify families.<sup>226</sup> Agencies frequently failed to provide adequate trauma-informed services (especially to assist parents, many of whom have experienced traumas) as well as basic assistance with transportation and visitation.<sup>227</sup> Agencies failed in 58% of cases to assess parents' service needs adequately.<sup>228</sup>

Despite that epidemic of failures to make reasonable efforts, state family courts fail to hold CPS agencies accountable.<sup>229</sup> In one detailed 2005 Michigan survey, 90% of judges stated that they "rarely" or "never" made findings that the agency failed to make reasonable efforts—a pattern inconsistent with the breadth of reasonable efforts failures documented by federal authorities.<sup>230</sup> And a shocking 40.5% of judges "admitted to having at some time made affirmative findings when DHS had failed to make reasonable efforts."<sup>231</sup> A set of older

221. Leonard Edwards, *Ignoring Reasonable Efforts: How Courts Fail to Promote Prevention*, IMPRINT (Dec. 5, 2018, 7:00 AM), <https://perma.cc/36AF-ND3F>.

222. *E.g.*, *In re Shirley B.*, 18 A.3d 40, 53-54 (Md. 2011) (quoting *In re Shirley B.*, 993 A.2d 675, 710 (Md. Ct. Spec. App. 2010)).

223. 45 C.F.R. § 1356.21(b)(1)(ii), (b)(2)(ii) (2020).

224. *In re James G.*, 943 A.2d 53, 76 (Md. Ct. Spec. App. 2008).

225. Some state legislatures have codified a prohibition on courts considering federal funding in reasonable efforts decisions. *E.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 3-816.1(d) (West 2022). Those legislatures doth protest too much; this codification suggests a concern that courts would, in fact, do exactly what was prohibited.

226. ACHIEVING PERMANENCY, *supra* note 195, at 13.

227. *Id.*

228. *Id.* at 14.

229. Sankaran & Church, *supra* note 137, at 210; *see also* Deborah Paruch, *The Orphaning of Underprivileged Children: America's Failed Child Welfare Law & Policy*, 8 J.L. & FAM. STUD. 119, 136 (2006) ("[J]udicial findings of reasonable efforts [are] often made by judges by rote.").

230. MUSKIE SCH. OF PUB. SERV., CUTLER INST. CHILD & FAM. POL'Y, AM. BAR ASSOC., CTR. ON CHILD. & THE LAW, MICHIGAN COURT IMPROVEMENT PROGRAM REASSESSMENT 105 (2005).

231. *Id.* The survey asked judges: "How often do you make affirmative findings when you believe [the agency] failed to make reasonable efforts?"

studies in multiple jurisdictions reached similar conclusions.<sup>232</sup> One retired judge has candidly faulted other judges who avoid making a findings of no reasonable efforts for fear of depriving CPS agencies of federal funds,<sup>233</sup> and a range of states have formal partnerships between judicial branches and CPS agencies to maximize federal funds.<sup>234</sup> More recently, federal officials have written that “evidence remains scarce based on . . . court observation work conducted across the country by Court Improvement Programs . . . that either reasonable efforts determination [to prevent removal and, when a child is in foster care, to finalize the permanency plan] is treated with the rigor or seriousness required under the law.”<sup>235</sup>

Even deeper levels of failure are evident. Cases reveal one determinate element of reasonable efforts—they entail efforts by the child protection agency, not efforts by the state generally. This focus allows child protection agencies to convince judges that they have made reasonable efforts even when the state as a whole fails to provide interventions deemed essential to help families. For instance, the Maryland Court of Appeals affirmed a finding that the agency made reasonable efforts to reunify even when it failed to arrange for or offer specific services the trial court deemed necessary.<sup>236</sup> The court sympathized with the CPS agency for being “at the mercy of [other] agencies” that lacked funding to provide services to the parent, at least when the agency made a “good faith attempt” to arrange services.<sup>237</sup> Similar attitudes prevail in multiple states.<sup>238</sup> This approach permits a state as a whole to chronically underfund housing, mental health care, child care, and more, and then use that underfunding as an excuse for CPS agencies to avoid helping families.

This approach is evident in *In re A.M.*, in which the state, through agencies *other than* the CPS agency, refused to pay for services the family court and CPS agency deemed essential, such as a mental health assessment. The impoverished

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232. Sankaran & Church, *supra* note 137, at 227; *see also* ANNIE E. CASEY FOUND., ADVISORY REPORT ON FRONT LINE AND SUPERVISORY PRACTICE 47 (2000) (observing that reasonable efforts obligations are “very rarely addressed” in New York City family courts); EDWARDS, *supra* note 165, at 102 (“Judges are often reluctant to make ‘no reasonable efforts’ findings.”).

233. Edwards, *supra* note 221.

234. Sankaran & Church, *supra* note 137, at 227-29.

235. Jerry Milner & David Kelly, *Reasonable Efforts as Prevention*, ABA CHILD L. PRAC. TODAY (Nov. 5, 2018), <https://perma.cc/6ZMD-SKP3>. From 2017-2021, Milner was Associate Commissioner of the Children’s Bureau and Kelly was special assistant to the associate commissioner, and a child welfare program specialist for the federal court improvement program. *Id.*

236. *In re Shirley B.*, 18 A.3d 40, 55 (Md. 2011).

237. *Id.* at 55-56.

238. *See* EDWARDS, *supra* note 165, at 65-66 (collecting sources, critiquing this practice, and encouraging courts to “base any conclusion on what is reasonable, not what the agency currently has at its disposal” and to “encourage the creation of new services”). *But see In re S.A.D.*, 555 A.2d 123, 128 (Pa. Super. Ct. 1989) (“Under the reasonable efforts requirement, agencies can be required to provide services that are normally the province of other agencies.”).

parent could not pay for them and the appellate court expressed no concern about whether the agency had made reasonable efforts and instead held the parent responsible for not being able to obtain these services. The Missouri family court could have ordered the state to pay for these services for Ms. M.—but the reasonable efforts standard as currently understood did not require it to do so.

The problem is deepened by exploring how CPS agencies spend money on foster families, but not the families that the agencies separate. When CPS agencies remove children from their parents and place them in foster care, they offer monthly subsidies to foster parents to take care of those children. Those monthly rates must “cover the cost of . . . food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals, [and] liability insurance with respect to a child.”<sup>239</sup> This list features some high-cost items—housing (“shelter”) and child care (“daily supervision”)<sup>240</sup>—and foster parent subsidies are accordingly significantly larger than benefits offered directly to parents. For instance, in Texas, foster families receive a minimum of \$812 per month, up to \$2,773 per month depending on the needs of the child.<sup>241</sup> When Texas pays Temporary Aid to Needy Families (TANF) benefits, it amounts to a fraction of what it spends on foster children—closer to \$100 per child rather than \$812 or more.<sup>242</sup>

While states pay these generous sums to support children’s needs *after* separating them from their families, the indeterminate reasonable efforts standard, as it is applied in the vast majority of courts, fails to require states to pay comparable funds *prior* to family separations or to reunify families. Inadequate housing is a frequent reason agencies separate children from their parents and a frequent barrier to reunification,<sup>243</sup> yet CPS agencies do not generally provide comparable assistance to parents.<sup>244</sup> Under the principle discussed above, they do not have to—housing, for instance, is another agency’s responsibility.<sup>245</sup> So families are left to watch agencies pay significant sums of

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239. 42 U.S.C. § 675(4)(A).

240. *Id.*; see also U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD’S BUREAU, CHILD WELFARE POLICY MANUAL § 8.3(B)(3), <https://perma.cc/Z69P-FMW2> (providing that CPS agencies may incorporate child care costs into foster care maintenance payments or pay child care providers directly).

241. *24-Residential Child Care Reimbursement Rates*, TEX. DEP’T OF FAM. & PROTECTIVE SERVS., <https://perma.cc/5AE6-QJUV> (archived Apr. 23, 2022). Monthly rates in the text are calculated by multiplying daily rates listed by the Department by thirty.

242. The more children a family has, the worse the disparity gets; an extra child leads to only \$72 more per month in TANF benefits. *TANF Cash Help*, TEX. DEP’T HEALTH & HUM. SERVS., <https://perma.cc/K8M3-CQJE> (archived Apr. 23, 2022).

243. See *supra* notes 34-35 and accompanying text.

244. I have identified one court that has challenged this disparity in dicta in a decision more than thirty years ago. See *In re Nicole G.*, 577 A.2d 248, 250 (R.I. 1990) (“[G]iven the cost of subsidizing foster care for multiple children, it seems likely that cash disbursements for housing assistance will be more cost effective in the long run.”).

245. Judge Leonard Edwards, compiling reasonable efforts decisions nationally, reports that most states lack any appellate case law on the question of when, if ever, reasonable efforts include provision of housing assistance to parents. EDWARDS, *supra* note 165, at 45-46.

money to separate them—including funds to support the housing costs of strangers granting physical custody of their children—while the agencies are excused from paying similar sums or housing assistance to prevent removals or reunify.<sup>246</sup>

*In re A.M.* illustrates the bitter irony of the disparity between funds paid to support children separated from their families and those paid to support them with their families. Ms. M. needed assistance providing child care for her child so she could work. The cost of such occasional child care, even overnight child care,<sup>247</sup> would likely be less than the cost of foster care maintenance payments, coupled with other costs of foster care (including court costs, and the costs of treating the emotional trauma caused the child by the separation). Indeed, the state’s financial outlays in that case seem absurd—the state imposed the trauma of a family separation on a young child and then paid hundreds of dollars a month to support that child in foster care when for a similar cost it could have kept the child safely with her mother and avoided that trauma.

These dynamics reflect more than the indeterminacy of the reasonable efforts standard. They reflect a legal and policy structure that fails to support children and families (especially those who are low-income) adequately and then responds reactively, invasively, and often ineffectively when families have difficulty raising their children.<sup>248</sup> But it is the indeterminacy of the reasonable efforts standard that has made child protection law’s nominal commitment to making strong efforts to support families an all-too-often empty promise.

## B. Consequences of Substantive Indeterminacy

In the absence of determinate substantive legal standards about when and how to intervene in families, child protection agencies have wide discretion to decide which cases they file and prosecute and agencies and courts have wide

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246. Even in the relatively few courts that impose an obligation to assist families with housing, courts note that “[t]he form of assistance may vary” and may include a range of assistance that falls short of subsidizing housing. *Wash. State Coal. for the Homeless v. Dep’t of Soc. & Health Servs.*, 949 P.2d 1291, 1295 (Wash. 1997); *see also In re Nicole G.*, 577 A.2d at 250 (describing “stopgap” assistance in the form of a security deposit and “first few months’ rent”); *In re Burns*, 519 A.2d 638, 649 (Del. 1986) (noting agency could have kept parent—herself a minor—and her child in a foster home for six months rather than separate mother and child).

Providing housing assistance to families who are subject to CPS agency interventions could create a perverse incentive to trigger such interventions to obtain that assistance; broader-based housing assistance would be the ideal solution. *See Harvey et al.*, *supra* note 5, at 593-95 (describing such incentives in reference to the Family Unification Program housing assistance). Until such broader-based housing assistance is available, those perverse incentives are preferable to separating families due to housing difficulties.

247. Overnight childcare is quite possible. The Utah Supreme Court referenced it as a means of helping both “children at risk of abuse or neglect, and . . . families in need.” *In re S.T.*, 928 P.2d 393, 395 (Utah Ct. App. 1996). Other examples exist. *E.g.*, Alfred Lubrano, *Montco Nonprofit Offers Free In-Home Overnight Child Care to Low-Income, Single Mothers*, PHILA. INQUIRER (updated Feb. 5, 2022), <https://perma.cc/4JA9-GM6C>.

248. *E.g.*, *Huntington*, *supra* note 7, at 1489-97.

discretion to determine which children to remove, what steps to demand of families subject to court jurisdiction, and whether or when to reunify families. Legislatures have effectively delegated these essential policy questions to agencies and family courts to answer through individual cases. As Michael Wald wrote in 1975, indeterminate legal standards “increase the likelihood that decisions to intervene will be made in situations where the child will be harmed by the intervention,” and ensures interventions will occur following subjective decisions of individual case workers and judges, which implicit biases may infect.<sup>249</sup> The results of indeterminacy also include a national system which fails to achieve its core goals and tremendous inconsistency in practice from one jurisdiction to another.

### 1. Child Protection System Fails to Achieve Its Core Goals

Historic critiques of the child protection system remain strong. Robert Mnookin argued that the legal system failed to consistently identify children that needed the system’s intervention for their safety,<sup>250</sup> and that criticism remains.<sup>251</sup> The legal system continues to remove many children who could be better served elsewhere.<sup>252</sup> Measured by the legal system’s own decisions, it intervenes in literally millions of families without taking any action to help children, providing a coercive intervention in the lives of disproportionately poor, Black, and Indigenous families without any concomitant benefit.<sup>253</sup> Michael Wald recently estimated that this describes 80% of all CPS agency investigations.<sup>254</sup> Simultaneously, the legal system continues to miss much maltreatment which occurs. The Fourth National Incidence Study of Child Abuse and Neglect (NIS-4), released in 2010, highlighted the study’s consistent finding that children identified as maltreated by CPS agencies “represent only the ‘tip of the iceberg.’”<sup>255</sup> Moreover, the child protection system fails to protect a relatively steady number of children from death attributed to child neglect or abuse (though

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249. Wald, *supra* note 69, at 1001-02.

250. Mnookin, *supra* note 69, at 268-72.

251. Huntington, *supra* note 72, at 221.

252. See generally Sankaran & Church, *supra* note 137 (describing how the current legal system fails children who spend less than thirty days in foster care).

253. Each year, CPS agencies investigation allegations of maltreatment regarding about 3.5 million children. CHILD MALTREATMENT 2019, *supra* note 84, at 18. CPS agencies consider a small minority of these children—about 650,000 every year—to actually be maltreated. *Id.* at 20. And agencies place only a minority of these children in foster care each year. *Id.* at 90.

254. Michael S. Wald, *Replacing CPS: Issues in Building an Alternative System*, 12 COLUM. J. RACE & L. (forthcoming 2022) (manuscript at 4) (on file with author).

255. ANDREA J. SEDLAK, JANE METTENBURG, MONICA BASENA, IAN PETTA, KARLA MCPHERSON, ANGELA GREENE & SPENCER LI, U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD.’S BUREAU, FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS 2-2 (2010), <https://perma.cc/727K-MWEF>.

the number of such cases, less than 2,000 annually, represents a small fraction of the millions of neglect and abuse allegations reported to CPS agencies).<sup>256</sup>

## 2. Inconsistency across jurisdictions and time

Substantive indeterminacy also permits remarkable inconsistency in child protection practice across jurisdictions and time. Leading studies show only a “weak relationship” between the severity of abuse and the likelihood that authorities removed a child from an abusive family.<sup>257</sup> Federal data shows wildly different legal system actions in different states. Consider, for instance, the rate by which state CPS agencies consider children to be neglect or abuse victims—the rate is 6.4 times higher in New York than New Jersey, 7.0 times higher in South Carolina than North Carolina, 6.2 times higher in Oregon than Washington, 3.3 times higher in Illinois than Missouri, and 4.6 times higher in Iowa than Missouri.<sup>258</sup> Consider also the percentage of children deemed victims who state agencies separate from their families and place in the foster system—that figure ranges from 5.3 to 50.6%. It is 19.7% in North Dakota but 50.6% in South Dakota; 16.8% in Vermont but 37.5% in New Hampshire; and 18.2% in Texas but 35.6% in California.<sup>259</sup> Rates of foster care placements and terminations of the parent-child relationship also vary significantly from one metro area to another; for instance, nearly 10% of all children in Maricopa County, Arizona (Phoenix) will be placed in foster care at some time in their childhoods, compared about 2% in Cook County, Illinois (Chicago).<sup>260</sup> It strains credulity to suggest that the rate of neglect or abuse, or the rate of severe maltreatment necessitating foster care varies this substantially by jurisdiction. And, even within states, where the same body of law applies, practice and outcomes vary significantly from county to county.<sup>261</sup>

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256. Child fatalities attributed to child maltreatment have ranged from 2.23 to 2.50 per 100,000 children over the past five years. CHILD MALTREATMENT 2019, *supra* note 84, at 54. Those rates are relatively steady compared to the 1970s, suggesting a failure of the modern child protection system—which expanded dramatically from the 1970s to the 1990s—to save children’s lives. Gupta-Kagan, *supra* note 7, at 911. The data suggests that, if anything, child fatality rates have increased, though that may reflect changes in data tracking rather than an actual difference in fatalities. *Id.* at 911-12.

257. DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 146 (2d ed. 2004).

258. Federal publications report the number of child victims identified by each state agency, per 1,000 children in that state. CHILD MALTREATMENT 2019, *supra* note 84, at 37. For the states noted in the text the rates are: New York 16.7, New Jersey 2.6, South Carolina 16.8, North Carolina 2.4, Oregon 15.6, Washington 2.5, Illinois 11.8, Missouri 3.5, and Iowa 16.0. *Id.*

259. *Id.* at 90.

260. Frank Edwards, Sara Wakefield, Kieran Healy & Christopher Wildeman, *Contact with Child Protective Services is Pervasive But Unequally Distributed by Race and Ethnicity in Large US Counties*, 118 PROC. NAT’L ACAD. SCI. U.S., no. 30, 2021, at 1, 3.

261. E.g., *Patchwork Protection: Inconsistency and Inequity in Child Welfare Policies Across North Carolina*, CAROLINA PUB. PRESS (June 2021), <https://perma.cc/XRX4-UDL5>.

*In re A.M.* is again illustrative. The case began when the family lived in a Missouri suburb of Kansas City, but after A.M.'s removal, Ms. M. relocated to a Kansas suburb.<sup>262</sup> There, Ms. M. raised another child with her fiancé, and Kansas authorities were aware of concerns arising from the fiancé's domestic violence against Ms. M., but saw progress and no need to remove the younger child.<sup>263</sup> Missouri authorities, however, used the same facts to justify not only a continued separation of A.M. and Ms. M., but the termination of their legal relationship.<sup>264</sup> No legal differences between the two states are apparent to explain these drastically different interventions. Rather, differences in Kansas and Missouri authorities' application of indeterminate standards do so.

Rate of child maltreatment substantiations and removals also varies across time, reflecting that child protection agency orientations rather than child protection law shape outcomes. In twenty states, rates of substantiating maltreatment changed more than 20% (up or down) from 2015 to 2019.<sup>265</sup> Rates of foster care placements have also changed dramatically over time within certain states, declining from 21.6 per 1,000 children in Washington D.C. in 2004 to 5.2 in 2019, while increasing in West Virginia from 10 to 20.2.<sup>266</sup> This phenomenon is most dramatically visible in foster care panics, in which "a frenzied push toward removal of children from their homes follow[s] the highly publicized death of a child."<sup>267</sup> The short-term pressure to remove more children in response to such tragedies, despite the harms of doing so,<sup>268</sup> is intuitive. But the spikes (and eventual drops) in agency interventions in families reflects substantive law that is broad and vague enough to permit wide fluctuations in agency actions from one point in time to another.

### C. Unequal Application of Child Protection Law

The child protection system is not simply inconsistent across jurisdictions; stark disparities exist based on which families the child protection system intervenes. Racial disparities in the child protection system are well-established, and a growing set of academic and activist work decry the present system as fundamentally racist.<sup>269</sup> While disparities between Black and White children are

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262. Memorandum Supplementing Order Affirming Judgment, *supra* note 25, at 3.

263. *Id.* at 3, 11 n.6.

264. *Id.*

265. CHILD MALTREATMENT 2019, *supra* note 84, at 37.

266. Anthony Bald, Joseph J. Dolye, Jr., Max Gross & Brian Jacob, *Economics of Foster Care* 5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29906, 2022), <https://perma.cc/NM89-52YB>.

267. Stephanie K. Glaberson, *Coding Over the Cracks: Predictive Analytics and Child Protection*, 46 FORDHAM URB. L.J. 307, 322 (2019).

268. *Id.* at 322-23; see also, e.g., Daniel Heimpel, *In Aftermath of Latest Child Death, L.A. Contends with Potential Foster Care Panic*, IMPRINT (Aug. 13, 2019, 6:24 AM), <https://perma.cc/XS9H-STP6> (describing pressure for increased removals in one jurisdiction and the phenomenon elsewhere).

269. E.g., ROBERTS, *supra* note 8, at 6, 9; Dettlaff et al., *supra* note 2, at 501-08;

somewhat smaller than they used to be, Black children remain overrepresented in foster care.<sup>270</sup> Across childhoods, CPS agencies place 10-12% of Black children and 11-15% of American Indian/Alaska Native children in foster care for some period of time compared with only 5% of White children.<sup>271</sup> Black families are also disproportionately the subjects of more invasive actions at multiple stages of child protection cases—compared to White families, Black families are more frequently reported to CPS agencies, more frequently subject to investigations, more frequently the subject of CPS agency-substantiated allegations, more frequently removed, less frequently reunified, and more frequently spend a longer time in foster care, and these disparities are consistent across both time and jurisdictions.<sup>272</sup> While some scholars have suggested Black families have greater aggregate needs due to disproportionate poverty and systemic racism, and that these needs explain their disproportionate presence in foster care, other studies find racial disparities remain even when controlling for family poverty and the level of risk CPS caseworkers believed to exist.<sup>273</sup>

Other overlapping demographic categories also lead to unequal odds of one's family becoming subject to the child protection system. CPS agencies and family courts overwhelmingly intervene in low-income families.<sup>274</sup> Nancy

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Gwendoline M. Alphonso, *Political-Economic Roots of Coercion—Slavery, Neoliberalism, and the Racial Family Policy Logic of Child and Social Welfare*, 11 COLUM. J. RACE & L. 471, 474-77 (2021); Martin Guggenheim, *How Racial Politics Led Directly to the Enactment of the Adoption and Safe Families Act of 1997—The Worst Law Affecting Families Ever Enacted by Congress*, 11 COLUM. J. RACE & L. 711, 713-16 (2021).

270. In 2020, Black children accounted for 15.3% of the under 18 population, but 25.1% of children in foster care, creating a “disproportionality index”—“the level at which groups of children are present in the child welfare system relative to their proportion in the general population” of 1.65. *Disproportionality Rates for Children of Color in Foster Care Dashboard (2010-2020)*, NAT'L COUNCIL JUV. & FAM. CT. JUDGES (2022), <https://perma.cc/8XB2-NFW3>. Disparities are even larger for indigenous children, who are represented in foster care at 2.68 times their proportion of the general population. *Id.*

271. Christopher Wildeman & Natalia Emanuel, *Cumulative Risks of Foster Placement by Age 18 for U.S. Children, 2000-2011*, PLOS ONE, Mar. 2014, at 1, 5.

272. Dettlaff et al., *supra* note 2, at 501-02. The disparities are vividly illustrated in graphs showing the cumulative likelihood in twenty large metropolitan counties of CPS agencies determining a child was neglected or abused, placing a child in foster care, or terminating a parent-child relationship. Black children had the “highest cumulative risk of each of these events across all counties.” Edwards et al., *supra* note 260, at 2; *see also id.* at 3 (displaying racial disparities data graphically).

273. *See, e.g.*, Alan J. Dettlaff, Reiko Boyd, Darcey Merritt, Jason Anthony Plummer & James D. Simon, *Racial Bias, Poverty, and the Notion of Evidence*, 99 CHILD WELFARE, no. 3, 2021, at 61, 63-67, 73 (collecting and discussing studies); Dettlaff et al., *supra* note 2, at 505-06 (collecting and discussing studies); Stephanie L. Rivaux, Joyce James, Kim Wittenstrom, Donald Baumann, Janess Sheets, Judith Henry & Victoria Jeffries, *The Intersection of Race, Poverty, and Risk: Understanding the Decision to Provide Services to Clients and to Remove Children*, 87 CHILD WELFARE no. 2, 2008, at 151, 161-63 (controlling for income and risk assessments, finding CPS agency more likely to separate Black families); *see also* DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 36-46 (2022) (responding to arguments attempting to justify racial disparities).

274. *See, e.g.*, Kelley Fong, *Child Welfare Involvement and Contexts of Poverty: The*

Polikoff has summarized the research showing a likelihood that families headed by LGBTQ parents face disproportionate levels of intervention by CPS agencies.<sup>275</sup> Precise statistics are hard to come by because few studies track the sexual orientation of parents,<sup>276</sup> but one study found that Black LGBTQ parents were four times as likely as heterosexual Black parents to lose custody of their children.<sup>277</sup> Disparate outcomes for children of parents with disabilities are also well established; 19% of all foster children have parents with disabilities, well above the percentage for all children.<sup>278</sup> Immigrant families have long been subject to particular focus for child protection system intervention.<sup>279</sup>

Crucially, the vague standards discussed in Part II.A create opportunities for various actors' implicit biases to create or exacerbate these long-standing disparities.<sup>280</sup> The breadth and vagueness of neglect definitions, for instance, lead to "highly subjective" decisionmaking.<sup>281</sup> Vague child protection laws put into practice are "particularly vulnerable to biased decisionmaking that frequently increases the risk of error and secondary harm to these already disenfranchised families."<sup>282</sup> As the Washington Supreme Court observed in 2022, these vague standards are particularly "susceptible to class-and race-based biases."<sup>283</sup>

The likelihood of implicit biases infecting discretionary decisionmaking is particularly apparent upon an examination of how agencies and courts make decisions in crowded neglect and abuse dockets. Leah Hill has documented how, in crowded urban family courts, "[i]mpatience seem[s] the order of the day,"

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*Role of Parental Adversities, Social Networks, and Social Services*, 72 CHILD. & YOUTH SERVS. REV. 5, 5-6, 8 (2017) (noting and analyzing well established "link between poverty and child welfare involvement").

275. Nancy D. Polikoff, *Neglected Lesbian Mothers*, FAM. L.Q., Spring 2018, at 87, 91-96.

276. *See id.* at 90.

277. Kathi L.H. Harp & Carrie B. Oser, *Factors Associated with Two Types of Child Custody Loss Among a Sample of African American Mothers: A Novel Approach*, SOC. SCI. RSCH., Nov. 2016, at 283, 291.

278. Elizabeth Lightfoot & Sharyn DeZelar, *The Experiences and Outcomes of Children in Foster Care Who Were Removed Because of a Parental Disability*, 62 CHILD. & YOUTH SERVS. REV. 22, 22-23 (2016).

279. *See supra* text accompanying notes 64-66.

280. This critique is common in regards to the family court standards. *See, e.g.*, Anne L. Alstott, Anne C. Dailey & Douglas NeJaime, *Psychological Parenthood*, 106 MINN. L. REV. (forthcoming 2022) (manuscript at 2-3) (on file with author) ("[T]he vague best interests standard has allowed prejudice and bias—based on race, class, gender, marital status, sexual orientation, gender identity, religion, and disability—to influence decision-making processes in ways that undervalue children's relationships with their close parental caregivers.").

281. Henry & Lens, *supra* note 86, at 24.

282. Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 222 (2013); *see also* Amy Mulzer & Tara Urs, *However Kindly Intentioned: Structural Racism and Volunteer CASA Programs*, 20 CUNY L. REV. 23, 29-30 (2016); Vivek Sankaran, *With Child Welfare, Racism Is Hiding in the Discretion*, IMPRINT (June 21, 2020, 11:00 PM), <https://perma.cc/7TAR-SRQV> ("Discretion is the rule. And when such wide discretion exists, we know that both implicit and explicit bias can significantly affect the decisions that are made.").

283. *In re K.W.*, 504 P.3d 207, 219 (Wash. 2022).

leading to quick hearings and decisions in tension with standard notions of due process.<sup>284</sup> High caseloads lead to routine practices which can reflect “a very real value judgment about litigants” who populate family court dockets without taking sufficient time to deliberate about the evidentiary support for such judgments.<sup>285</sup> Even when authorities make decisions slowly and carefully, they make those decisions in a context in which a range of professionals with similar training and more power than the families at issue.<sup>286</sup> That cohesiveness among many of the professionals involved, coupled with vague substantive standards, insulation from public oversight via confidentiality,<sup>287</sup> and the “provocative situational context” of seeking to protect children all contributes to group-think among this professional group.<sup>288</sup> It should be no surprise that decisions made in this institutional context under substantively vague standards lead to the disparities at issue in America’s child protection system.

### III. CURRENT REFORM LANDSCAPE

Calls for reforming or abolishing the present child protection legal system abound. The trend—supported by federal reforms, scholars, advocates, and the burgeoning family defense movement—is to seek to limit CPS agencies’ intervention in family life, and especially to limit family separations. This trend finds support in a range of social science evidence documenting the harms caused by separating children from parents, and the relatively worse outcomes of doing so compared with keeping families together.<sup>289</sup>

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284. Leah A. Hill, *Do You See What I See? Reflections on How Bias Infiltrates the New York City Family Court—the Case of the Court Ordered Investigation*, 40 COLUM. J.L. & SOC. PROBS. 527, 529 (2007).

285. *Id.* at 541. Hill discussed a discrete issue—when family courts would appoint a CPS agency to investigate families in private custody cases—but her point applies more broadly.

286. Melissa L. Breger, *Making Waves or Keeping the Calm?: Analyzing the Institutional Culture of Family Courts Through the Lens of Social Psychology Groupthink Theory*, 34 LAW & PSYCH. REV. 55, 70 (2010).

287. For a critique of confidentiality laws in CPS cases, see generally Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1 (2010).

288. Breger, *supra* note 286, at 78.

289. A full exploration of these findings is beyond the scope of this Article. Others have collected studies documenting the harms of family separations. *E.g.*, Vivek Sankaran, Christopher Church & Monique Mitchell, *A Cure Worse than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161, 1165-69 (2019); Shanta Trevedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 527-52 (2019). When these harms outweigh the harms of leaving children in their families remains a subject of empirical debate. One study found that children placed in foster care for any length of time were three times more likely to be arrested, convicted, and imprisoned as adults than were similarly at-risk children left with their parents. Joseph J. Doyle, Jr., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 J. POL. ECON. 746, 748 (2008); *see also* Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1607 (2007) (suggesting that children placed in foster care may have had higher delinquency rates, higher

These calls have focused on a variety of goals. Many seek a stronger safety net for families, including, for instance, more housing supports.<sup>290</sup> Scholars have contributed to these calls by studying the connection between anti-poverty policies and the scope of the child protection system, finding, for instance, that increased earned income tax credits, fighting evictions, a higher minimum wage, and expanded health care access can all reduce the number of allegations of child maltreatment made to CPS agencies.<sup>291</sup> Other reforms seek to make incremental changes in state legislative schemes. Federal funding laws were reformed in 2018, seeking to change how state agencies behave without changing the legal standards that govern them in family court proceedings.<sup>292</sup>

This section will outline these reform efforts. Most importantly, this outline will show that none of the reform efforts thus far fully address the substantive indeterminacy at the core of child neglect and abuse proceedings. Finally, this section will contrast existing reforms with analogous reform trends in the juvenile justice system—which go further in imposing substantive determinacy throughout the life of delinquency cases. Such detailed and determinate reforms, tying specific types of conduct by parent to specific interventions by the state, is called for in the child neglect and abuse system.

#### A. Incremental Statutory Reform

A small set of state legislative changes use more determinate substantive rules to narrow the scope of the child protection legal system, albeit incrementally. Advocates have also begun seeking more dramatic legislative reforms that would similarly limit CPS agencies' and family courts' interventions in family life.

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teen birth rates, and lower earnings than did similarly at-risk children left with their parents). Another study using a similar methodology in a different jurisdiction reached opposite conclusions. Max Gross & E. Jason Baron, *Temporary Stays and Persistent Gains: The Causal Effects of Foster Care*, 14 APPLIED ECON., Apr. 2022, at 170, 170-71. A recent paper, including authors of those two studies reaching competing conclusions, summarized the unclear state of the research. Bald et al., *supra* note 266, at 5-7.

290. *E.g.*, Dettlaff et al., *supra* note 2, at 511.

291. Nicole L. Kovski, Heather D. Hill, Stephen J. Mooney, Frederick P. Rivara, Erin R. Morgan & Ali Rowhani-Rahbar, *Association of State-Level Earned Income Tax Credits With Rates of Reported Child Maltreatment, 2004-2017*, 27 CHILD MALTREATMENT (forthcoming 2022) (manuscript at 7), <https://perma.cc/V3JY-YS8J>; Lindsey Rose Bullinger & Kelley Fong, *Evictions and Neighborhood Child Maltreatment Reports*, 31 HOUSING POL'Y DEBATE 490, 500, 505-09 (2021); Emily C.B. Brown, Michelle M. Garrison, Hao Bao, Pingping Qu, Carole Jenny & Ali Rowhani-Rahbar, *Assessment of Rates of Child Maltreatment in States with Medicaid Expansion vs States Without Medicaid Expansion*, JAMA NETWORK OPEN, June 2019, at 1, 6-8; Kerri M. Raissian & Lindsey Rose Bullinger, *Money Matters: Does the Minimum Wage Affect Child Maltreatment Rates?*, 72 CHILD. & YOUTH SERVS. REV. 60, 65-66 (2017). Despite the titles of some of these studies, *e.g.*, Brown et al., these studies do not measure actual child maltreatment. Rather, they study the rate of reported *suspicions* of child maltreatment and thus the perceptions of possible maltreatment, especially by mandatory reporters who make the majority of such reports.

292. *See infra* Part III.B.

First, several states have begun to narrow the definitions of neglect. In 2021, Texas enacted the furthest reaching statute, defining neglect to require a parent to show “blatant disregard for the consequences of [an] act or failure to act that results in harm to the child or that creates an immediate danger to the child’s physical health or safety.”<sup>293</sup> Requiring a “blatant disregard” for the consequences of an act could narrow the definition’s scope. A.M.’s mother may have left A.M. home alone, but she did so in order to work and due to a lack of child care and she would thus at least have an argument that this conduct did not show a “blatant disregard” for her daughter. Requiring an existing harm or an “imminent” risk of harm could also narrow the scope of neglect, as the imminence requirement is typically reserved for emergency removals, not defining neglect.

States have also narrowed the definition of neglect in at least two discrete fact patterns. Starting in 2018, several states have adopted legislation intended to protect families from child protection intervention when parents permit children to engage in “independent activity”—colloquially known as “free-range parenting.”<sup>294</sup> These statutes followed several high-profile cases which demonstrated how broad existing neglect definitions could be stretched. In North Augusta, South Carolina, Debra Harrell let her 9-year-old play in park while she worked at a McDonald’s. The park was well-populated and the child had a cell phone in case of emergency, but Ms. Harrell was arrested and her child placed in foster care for almost three weeks.<sup>295</sup> In Silver Spring, Maryland, Danielle and Alexander Meitiv were accused of neglecting their 10- and 6-year-old children whom they permitted to walk home from a park alone. The CPS agency determined they had not neglected their children, but only after they successfully appealed a neglect finding from one incident and, after a second incident several months later, police held the children for five hours and the agency investigated the family for two months.<sup>296</sup> Similar cases have been documented elsewhere,<sup>297</sup> and legislators have publicly noted how their families faced intervention when they permitted their children to play unsupervised.<sup>298</sup> Several fact patterns

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293. H.B. 567, 87th Leg., Reg. Sess. § 5 (Tex. 2021); TEX. FAM. CODE ANN. § 261.001(4) (West 2021).

294. E.g., Donna De La Cruz, *Utah Passes ‘Free-Range’ Parenting Law*, N.Y. TIMES (Mar. 29, 2018), <https://perma.cc/GM6S-2RE8>.

295. Diana Reese, *South Carolina Mom Who Left Daughter at Park Sues TV Station*, WASH. POST (Aug. 14, 2014), <https://perma.cc/J2KT-CZ4W>. The charges were eventually dropped. Eva Moore, *SC Senator Tests Waters with ‘Free Range Parenting’ Bill*, FREE TIMES (Columbia, S.C.) (updated May 16, 2019), <https://perma.cc/Q86G-S8EJ>.

296. Donna St. George, *‘Free Range’ Parents Cleared in Second Neglect Case After Kids Walked Alone*, WASH. POST (June 22, 2015), <https://perma.cc/RF6H-3KCB>.

297. E.g., Kari Anne Roy, *How Letting My Kid Play Alone Outside Led to a CPS Investigation*, DALL. MORNING NEWS (Sept. 25, 2014, 5:22 PM CDT), <https://perma.cc/AA24-2HX2>; KHOU Staff, *Mom Charged with Abandonment Said Kids Were Never Out of Sight*, KHOU\*11 (July 17, 2015, 11:00 PM CDT), <https://perma.cc/QUB3-5BZM>.

298. Let Grow Staff, *Two States Pass ‘Childhood Independence’ Laws That Ensure It Is Not Neglect for Kids to Play Outside*, LET GROW, <https://perma.cc/6Z69-PQCJ> (archived Apr. 23, 2022) (noting Nevada Assemblywoman Alexis Hansen’s eight and ten year old

evoked calls for racial and class justice—parents without easy or affordable child care options, including parents of color, leaving children in a park while they worked<sup>299</sup> or within eyesight in a mall food court while they interviewed for a job.<sup>300</sup>

A growing state legislative trend seeks to narrow neglect definitions to exclude these situations from the definitions of neglect. Utah enacted the first “independent activity” bill in 2018, excluding from the definition of neglect a parent who permits a child “of sufficient age and maturity to avoid harm or unreasonable risk of harm, to engage in independent activities.”<sup>301</sup> Lawmakers expressed concern that neglect statutes were broad enough to encompass a child playing in a park alone.<sup>302</sup> Texas and Oklahoma followed suit in 2021 and Colorado followed suit in 2022,<sup>303</sup> with legislation pending in other states.<sup>304</sup>

Other states have narrowed the definition of neglect as it relates to marijuana usage, consistent with trends towards marijuana legalization.<sup>305</sup> In 2021, New York amended its marijuana laws to provide that marijuana use does not amount to neglect “without a separate finding that the child’s physical, mental or emotional condition was impaired or is in imminent danger of becoming impaired.”<sup>306</sup> Texas similarly enacted legislation prohibiting its CPS agency from removing children based solely on a parent’s marijuana use “unless the department has evidence that the parent’s use of marihuana has caused significant impairment to the child’s physical or mental health or emotional development.”<sup>307</sup> Still, most states that have legalized marijuana have not

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grandchildren were the subjects of a 911 call when permitted to play outside alone).

299. See *supra* note 295 and accompanying text.

300. KHOU Staff, *supra* note 297.

301. S.B. 65, 62d Leg., General Sess. § 3 (Utah 2018); UTAH CODE ANN. § 80-1-102 (51)(b)(iv) (West 2022).

302. De La Cruz, *supra* note 294.

303. H.B. 567, 87th Leg., Reg. Sess. §§ 3, 5, 6 (Tex. 2021); TEX. FAM. CODE ANN. §§ 161.001(c)(6), 261.001(4)(B)(ii), 262.116(a)(6) (West 2021); H.B. 2565, 2021 Reg. Sess. § 1 (Okla. 2021); OKLA. STAT. tit. 10A, § 1-1-105(49)(b) (2021); H.B. 22-1090, 73d Gen. Assemb., 2d Reg. Sess. § 1 (Colo. 2022) (to be codified at COLO. REV. STAT. § 19-1-103(100)).

304. *E.g.*, S. 288, 124th Gen. Assemb., Reg. Sess. (S.C. 2022); S.B. 143, 81st Leg., Reg. Sess. (Nev. 2021).

305. One study concludes that marijuana legalization leads to at least a 10% reduction in children separated from their families and placed in foster care. John Gardner & Bright Osei, *Recreational Marijuana Legalization and Admission to the Foster-Care System*, 60 ECON. INQUIRY (forthcoming 2022) (manuscript at 3, 20), <https://perma.cc/RYL6-KTRX>. The authors attribute that reduction both to the direct effect of legal changes—authorities no longer viewing parental marijuana use as neglect—and to behavioral changes such as parents substituting marijuana use for alcohol and harder drugs and thereby reducing maltreatment. *Id.* at 3, 12.

306. S. 854A, 2021-2022 Reg. Sess. § 58 (N.Y. 2021); N.Y. FAM. CT. ACT § 1046(a)(iii) (McKinney 2021).

307. H.B. 567, 87th Leg., Reg. Sess. § 6 (Tex. 2021); TEX. FAM. CODE ANN. § 262.116(a)(7) (West 2021).

included such explicit statutory language prohibiting CPS agencies or family courts from considering marijuana use alone to be neglect.<sup>308</sup>

Second, Washington State enacted the “Keeping Families Together Act” in 2021,<sup>309</sup> tightening limits on removals. Following Mnookin’s call for somewhat more determinate standards for removing children, the Washington legislature required probable cause that a child would face an “imminent physical harm” and “would be seriously injured” but for a removal.<sup>310</sup> Moreover, that imminent harm must “outweigh[] the harm the child will experience as a result of removal.”<sup>311</sup> The legislature stated its intent was “to safely reduce the number of children in foster care and reduce racial bias in the system by applying a standard criteria for determining whether to remove a child”<sup>312</sup>—explicitly seeking to respond to the criticisms outlined in Part II.

Third, New York has enacted reforms to limit the likelihood that its child neglect and abuse registry would harm low-income parents’ ability to find employment without protecting children from abuse or neglect. New York law now requires hearing officers in administrative appeals of registry placements to determine if the maltreatment is “relevant and reasonably related” to the registry’s protective purposes.<sup>313</sup>

Fourth, Washington State enacted reforms making terminations of parent-child relationships somewhat more difficult in 2022. The new statute requires the CPS agency to discuss guardianship as an option whenever a child has lived with a foster family for six months, prohibits moving children out of kinship placements because kin do not want to adopt the child (and thus terminate the parent-child relationship), and requires consideration of guardianship as an option when a court considers a termination petition.<sup>314</sup>

Reform advocates have articulated a range of other specific proposals. They include repealing the Adoption and Safe Families Act, especially its 15-of-22-month rule.<sup>315</sup> Other discrete proposals include: strengthening the reasonable

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308. See Megan Conn, *As New York Legalizes Marijuana, Parent Advocates Push Child Welfare Agencies to Adapt*, IMPRINT (May 11, 2021, 4:54 AM), <https://perma.cc/H5Z2-CJVE> (describing New York’s statute as “[u]nlike most states that previously enacted [marijuana legalization] laws” in that it explicitly “challenges the assumption that [marijuana use] is, by itself, evidence of irresponsible parenting,” while other states legalized marijuana but have not changed child neglect definitions to account for the drug’s legal status).

309. H.B. 1227, 67th Leg., Reg. Sess. § 1 (Wash. 2021).

310. *Id.* at §§ 4-5, Keeping Families Together Act, ch. 211, 2021 Wash. Laws. 1420 (to be codified at WASH. REV. CODE §§ 26.44.056(1), 26.44.050); see also *id.* at § 6 (to be codified at WASH. REV. CODE § 13.34.050(1)(b)) (requiring a court to find “that removal is necessary to prevent imminent physical harm” before ordering a removal).

311. *Id.* at § 9 (to be codified at WASH. REV. CODE § 13.34.065(5)(a)(ii)(B)(III)).

312. *Id.* at § 2.

313. S. 7506-B, 2019-2020 Reg. Sess. Part R § 1 (N.Y. 2020); N.Y. SOC. SERV. LAW § 424-a(e)(viii) (McKinney 2022).

314. H.B. 1747, 67th Leg., Reg. Sess. §§ 1-2 (Wash. 2022); WASH. REV. CODE §§ 13.34.145(7)(b), 13.34.180(1)(f) (2022).

315. *E.g.*, REPEAL ASFA, <https://perma.cc/XC9P-5T3L> (archived Apr. 23, 2022); DETLAFF ET AL., *supra* note 60, at 9; Richard Wexler, *We Don’t Need the Adoption and Safe*

efforts requirement by changing it to “active efforts,” the more demanding phrase required for Indian children in the Indian Child Welfare Act;<sup>316</sup> requiring CPS agencies to give a child protection-specific version of *Miranda* warnings to families during their investigation; and permitting judges to adjourn cases in contemplation of dismissal—a less invasive step when cases do proceed to court.<sup>317</sup>

## B. Federal Funding Reform

Congress enacted federal funding reforms with the goal of keeping families together and preventing unnecessary family separations through the Family First Prevention Services Act.<sup>318</sup> The Act seeks to achieve these goals not through changing any of the minimum federal requirements for handling individual cases in state family courts, but by permitting state agencies to access federal funds to work with “candidates for foster care.”<sup>319</sup> However laudable its goals, the Act seeks to achieve them through a mechanism that cements CPS agencies’ roles in intervening in families. The Act’s funding for prevention services is only accessible once a family is referred to CPS agencies and deemed a candidate for foster care.<sup>320</sup> Moreover, Family First makes no changes to the substantive standards which govern state action to separate families—the definition of neglect, removal requirements, and actions to take after removal. All of the other topics discussed in Part II.A are no more determinate after Family First than they were before.

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*Families Act to Shorten Foster Care Stays*, IMPRINT (Apr. 30, 2021, 9:04 AM), <https://perma.cc/9F4C-RAW2>; Kathleen Creamer & Chris Gottlieb, *If Adoption and Safe Families Act Can’t Be Repealed, Here’s How to At Least Make It Better*, IMPRINT (Feb. 9, 2021, 7:00 PM), <https://perma.cc/PJ26-M738>; Shanta Trivedi, *Adoption and Safe Families Act Is the ‘Crime Bill’ of Child Welfare*, IMPRINT (Jan. 28, 2021, 6:44 PM), <https://perma.cc/YHZ7-ZVBW>. These recent calls echo lonelier calls from earlier years. See, e.g., Victoria Copeland, *Centering Unacknowledged Histories: Revisiting NABSW Demands to Repeal ASFA*, 16 J. PUB. CHILD WELFARE 1, 1-6 (2022) (describing National Association of Black Social Workers’ 2003 call to repeal ASFA). A new publication, the Family Integrity & Justice Quarterly, devoted its inaugural issue to “The Harm of the Adoption and Safe Families Act.” FAM. INTEGRITY & JUST. Q., Winter 2022, <https://perma.cc/33RU-DT9Q>.

316. Dettlaff et al., *supra* note 2, at 512-13; WHITE ET AL., *supra* note 86, at 27-28.

317. Marco Poggio, *NY Public Defenders Ask Leaders To Protect Parental Rights*, LAW360 (Feb 19, 2021, 4:46 PM EST), <https://perma.cc/NNZ3-MMMR>.

318. Family First Prevention Services Act, Pub. L. No. 115-123, div. E, tit. VII, 132 Stat. 232 (2018) (codified as amended in scattered sections of 42 U.S.C.); see also U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD.’S BUREAU, NO. ACYF-CB-PI-18-09, STATE REQUIREMENTS FOR ELECTING TITLE IV-E PREVENTION AND FAMILY SERVICES AND PROGRAMS 2 (2018) (stating a goal of preventing “the trauma of unnecessary parent-child separation”).

319. 42 U.S.C. § 671(e).

320. DETTLAFF ET AL., *supra* note 60, at 21-22; see also Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 COLUM. J. RACE & L. 767, 797-804 (2021) (explaining how the Family First Act perpetuates CPS agencies’ role in surveilling and regulating families).

### C. Legal Representation

Perhaps the most important reform in child protection law and practice is the increase in quality legal representation for parents and, secondarily, for children. Vigorous family defense offices have become important fixtures in many jurisdictions' child protection systems, with research demonstrating that they help limit children's time in foster care without creating safety harms for children.<sup>321</sup> Several states have also strengthened children's right to legal representation.<sup>322</sup> And the federal government has made funding available for parents' and children's legal representation.<sup>323</sup> The importance of these developments is difficult to overstate. Any functioning legal system needs vigorous advocacy for all parties to ensure decisions are fully informed and as accurate as possible,<sup>324</sup> and to enforce individuals' substantive and procedural rights.<sup>325</sup>

Nonetheless, even the strongest advocates are limited by the laws under which they advocate. Consider *In re A.M.* It is possible that particularly strong advocacy for the parent<sup>326</sup>—challenging the grounds for intervention, and breadth of the case plan, and seeking reunification sooner—could have led to an outcome that did not destroy the family at issue. But under existing law, the courts could have reached the same conclusion. As essential as improved legal representation is, it does not erase the problems of substantive indeterminacy.

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321. Lucas A. Gerber, Yuk C. Pang, Timothy Ross, Martin Guggenheim, Peter J. Pecora & Joel Miller, *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 CHILD. & YOUTH SERVS. REV. 42, 52 (2019); Mark E. Courtney & Jennifer L. Hook, *Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*, 34 CHILD. & YOUTH SERVS. REV. 1337, 1340-43 (2012).

322. The National Association of Counsel for Children has documented these changes on its "Right to Counsel Campaign" website. *E.g.*, Press Release, Nat'l Assoc. of Couns. for Child., *Victories for Children's Right to Counsel Surge Across the Country: NACC Looks to Continue Momentum Across States* (May 17, 2021), <https://perma.cc/7SMN-LMGE>.

323. U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD.'S BUREAU, CHILD WELFARE POLICY MANUAL § 8.1B Question 30 (2019), <https://perma.cc/9USG-X2CH>.

324. For a federal endorsement of this point, see U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD.'S BUREAU, NO. ACYF-CB-IM-17-02, HIGH QUALITY LEGAL REPRESENTATION FOR ALL PARTIES IN CHILD WELFARE PROCEEDINGS 1 (2017), <https://perma.cc/F66V-9WVE> (emphasizing "the importance of high quality legal representation in helping ensure a well-functioning child welfare system").

325. Vivek Sankaran makes this point plainly in his comment to this Article, emphasizing that strong family defenders are needed to enforce any more determinate legal standards that legislatures enact. Vivek Sankaran, Commentary, *Without Effective Lawyers, Do More Determinate Legal Standards Really Matter?*, 33 STAN. L. & POL'Y REV. ONLINE (forthcoming 2022).

326. I do not opine on the quality of representation in the actual case, as the available public record includes only the appellate court decision and media summaries, not information about trial court level advocacy.

#### D. Abolition

Some advocates and academics have called for abolition of the present child protection system,<sup>327</sup> and the child protection system fits well within existing frameworks for abolition of certain legal systems. Dorothy Roberts defines abolitionist projects as those targeting systems which “can be traced back to slavery and the racial capitalist regime it relied on and sustained.”<sup>328</sup> Second, the “system functions to oppress black people and other politically marginalized groups.”<sup>329</sup> Third, abolitionist projects “imagine and build a more humane and democratic society that no longer relies on caging people to meet human needs and solve social problems.”<sup>330</sup> The present child protection legal system’s roots in slavery are well-established by Roberts and others,<sup>331</sup> as are the continued harms it imposes on the disproportionately Black, Indigenous, and poor families the system impacts. Applied to the child protection law and legal systems, an abolitionist approach must “imagine and build” a legal system “that no longer relies” on widespread surveillance, foster care, and termination of parent-child relationships.

Abolition, however, does not necessarily mean that the state would never separate children from their parents. Abolitionists tend to discuss such separations as appropriate only in quite narrow circumstances, especially those involving sexual abuse or severe physical abuse.<sup>332</sup> Imposing clear substantive standards on when the child protection and family court system can intervene, and what shape that intervention takes, is essential to keeping those legal systems limited to the most severe cases.<sup>333</sup>

#### E. Analogous Reforms in Juvenile Justice Are Further Developed

Analogous indeterminacy has marked a close relative of child neglect and abuse law—juvenile delinquency law. Delinquency and child neglect and abuse jurisdiction have the same historic roots; the first juvenile court was created to

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327. See sources cited *supra* note 2.

328. Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 12 (2019).

329. *Id.* at 7.

330. *Id.* at 7-8. Kristen Weber’s comment to this Article similarly seeks “to imagin[e] and build[] the world we want to live in.” Kristen Weber, Commentary, *Transforming Requires Ending the Carceral Logic of the Child Welfare System*, 33 STAN. L. & POL’Y REV. ONLINE (forthcoming 2022).

331. *E.g.*, Alphonso, *supra* note 269, at 474-77.

332. Wald, *supra* note 254, at 2 (acknowledging “some level of coercive intervention, including placement in foster care, will remain necessary in some situations,” even if those situations represent the minority of current cases).

333. Indeed, some abolitionist conversations involve specific reform proposals for within family court cases. See Ashley Albert & Amy Mulzer, *Adoption Cannot Be Reformed*, 12 COLUM. J. RACE & L. (forthcoming 2022) (seeking to end adoption and preference guardianship); Shanta Trevedi & Matthew Fraidin, *A Role for Communities in Reasonable Efforts to Prevent Removal*, 12 COLUM. J. RACE & L. 1, 16-17 (2022) (primary prevention as part of reasonable efforts).

handle both categories of cases.<sup>334</sup> And, as in child neglect and abuse cases, in delinquency cases, “juvenile courts imposed indeterminate nonproportional dispositions.”<sup>335</sup> As in child neglect and abuse cases, any disposition was available for any adjudication. A child could be released after being convicted of murder or incarcerated after being convicted of disorderly conduct.<sup>336</sup>

However, juvenile delinquency law has several notable features which child protection law lacks, which both underscore the substantive indeterminacy at the core of child protection law and may point the way towards legal changes to reduce that indeterminacy. First is that delinquency uses the criminal code to define when delinquency courts obtain jurisdiction, providing a more precise legal formulation of what can justify state intervention in families.<sup>337</sup>

Second, the trend in delinquency law is to use the criminal code’s specificity to create more determinate maximum consequences for particular offenses. In a growing list of states, whether a court may incarcerate a child, for how long a state may incarcerate a child, for how long a child may be placed on probation, and even whether the state may prosecute (rather than divert) a child is increasingly spelled out in juvenile delinquency codes, tied to the specific conduct that has been adjudicated or charged.<sup>338</sup>

Third, juvenile justice reformers have used the specific list of criminal charges available to authorities to target specific provisions that do not need to exist. In the aftermath of a highly-publicized incident of excessive force by a police officer seeking to arrest a child for the crime of “disturbing schools,” the South Carolina legislature dramatically narrowed the definition of that offense.<sup>339</sup> In light of evidence regarding extreme racial disparities in enforcement of public disorderly conduct in public schools, one U.S. district court enjoined such enforcement.<sup>340</sup> In both instances, advocates and policymakers can use the

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334. Illinois Juvenile Court Act of 1899, 1899 Ill. Laws 133 § 7, *reprinted in* JUV. & FAM. CT. J., Fall 1998, at 1, 2.

335. BARRY C. FELD, *THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZING OF JUVENILE JUSTICE* 136 (2017).

336. Josh Gupta-Kagan, *Beyond “Children Are Different”: The Revolution in Juvenile Intake and Sentencing*, 96 WASH. L. REV. 425, 433-38 (2021).

337. *See supra* Part III.E. Notably, the one area where juvenile justice law goes beyond the criminal code has led to the most sustained criticism: juvenile justice law encompasses “status offenses,” law violations that are only violations when committed by a child. These violations, such as “incurability,” are vaguely defined, potentially leading to excessively broad grounds for state intervention. *E.g.*, S.C. CODE ANN. § 63-19-20(9) (2021). That indeterminacy, and the harms it has led to in practice, has inspired multiple generations of criticism, and federal funding legislation limiting when status offenses can lead to the most invasive forms of state intervention. Note, *Ungovernability: The Unjustifiable Jurisdiction*, 83 YALE L.J. 1383, 1402-05 (1974); 34 U.S.C. § 11133(a)(23)(C)(iii)(I)-(II).

338. Gupta-Kagan, *supra* note 336, at 469-80.

339. S. 131, 122d Gen. Assemb., Reg. Sess. (S.C. 2018); S.C. CODE ANN. § 16-17-420 (2021). For the background to this reform, see generally Josh Gupta-Kagan, *The School-to-Prison Pipeline’s Legal Architecture: Lessons from the Spring Valley Incident and Its Aftermath*, 45 FORDHAM URB. L.J. 83 (2017).

340. *Kenny v. Wilson*, No. 16-cv-2794, 2021 WL 4711450, at \*18 (D.S.C. Oct. 8, 2021). The case is on appeal to the U.S. Court of Appeals for the Fourth Circuit.

specific offenses of the criminal code to debate and decide whether enforcing some offenses runs counter to public policy.

These reforms have been used to limit the scope of the juvenile delinquency system and especially its ability to incarcerate children. These reforms impose statutory maxima—rather than mandatory minimum consequences—and presumptions against certain more invasive steps (like prosecution rather than diversion or incarceration) based on the offense at issue.<sup>341</sup> The next section will outline how analogous reforms in the child protection system can more specifically define the conduct that system can address, and limit the interventions which follow based on the underlying form of child maltreatment.

#### IV. LEGAL REFORM TO CONFRONT INDETERMINACY AND BIAS

This Part will outline ideas for legislative reforms for child neglect and abuse cases in state family courts. These ideas will seek to identify a more determinate set of substantive standards throughout the life of a family court case that would limit CPS agency and court discretion and focus agency and family court intervention on the relatively small number of cases which require that intervention for children's safety. These limits are also intended to limit space for agency or court biases to lead to disparate treatment by the race, sex, immigration status, disability, or sexual orientation of the parents or children involved in cases. This Part builds on earlier proposed reforms such as Robert Mnookin's call for removals only when children face the imminent risk of some significant harm and removal is necessary to mitigate that risk adequately,<sup>342</sup> and Michael Wald's call for neglect to be defined more narrowly through a focus on the harm caused by different actions,<sup>343</sup> as well as the more recent set of reforms discussed in Part III. In particular, it builds on juvenile justice reforms discussed in Part III.E which identify maximum interventions based on the type and severity of the delinquent act at issue.

The ideas in this Part seek to impose determinate substantive standards on all of the essential stages of a case discussed in Part II.A. A central aspect of this effort is to impose limits on permissible state intervention based on the specific type of neglect or abuse at issue. The proposals in this Part seek to ensure the underlying grounds for state intervention are precisely defined, and the type and scope of interventions which follow are directly related to the type of neglect or abuse adjudicated. This Part also proposes methods to address the range of problems discussed in Part I.A, including the absence of kinship placement hierarchies, and the weakness of existing understandings of the reasonable efforts requirements.

Several categories of reforms are beyond the scope of this Article. First, limiting CPS agencies' surveillance and regulation of families outside of family

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341. Gupta-Kagan, *supra* note 336, at 469-80.

342. *See supra* text accompanying note 133.

343. *See supra* text accompanying note 86.

court cases is the topic of a wide body of research beyond this Article's scope.<sup>344</sup> Second, this Article will not address the essential role of high quality legal representation for all parties, especially parents, in achieving good outcomes.<sup>345</sup> This Article focuses on the substantive legal standards that such representation can enforce, and suggests that stronger and clearer standards can lead to even more positive impacts from vigorous representation.

#### A. Defining Neglect and Abuse

Calls for narrowing definitions of neglect and abuse are not new, but the best way to do so remains unclear. In the 1970s, Michael Wald recommended defining neglect more narrowly based on the specific harms caused by parental conduct, and balancing those harms with the harm of state intervention in the family.<sup>346</sup> The American Bar Association and Institute of Judicial Administration (on which Wald served as reporter) similarly recommended limiting CPS system intervention to situations causing or likely causing "serious harm" to children.<sup>347</sup> Wald and the ABA/IJA's proposals, however, did not specifically define prohibited conduct—intervention was warranted when a child faced a substantial risk of imminent "serious physical injury as a result of conditions created by his/her parents or by the failure of the parents to adequately supervise or protect him/her."<sup>348</sup> The "conditions created" phrase is no more specific than existing neglect definitions, and the work done in these standards to narrow the scope of the child protection system rests on the elevated harm requirement. Nor did the ABA/IJA propose the creation of different levels of neglect or abuse.

This Article endorses narrowing the definition of neglect by level of harm and proposes going further. State legislatures should adopt civil child neglect and abuse codes comparable in their detail to state criminal code and which create

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344. For instance, a selection of such scholarship was featured at Columbia Law School's recent Strengthened Bonds symposium. *E.g.*, Charlotte Baughman, Tehra Coles, Jennifer Feinberg & Hope Newton, *The Surveillance Tentacles of the Child Welfare System*, 11 COLUM. J. RACE & L. 501 (2021); Harvey et al., *supra* note 5; Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 COLUM. J. RACE & L. 639 (2021); Michael S. Wald, *Beyond CPS: Building a New System to Protect and Promote the Safety and Development of Children*, 12 COLUM. J. RACE & L. (forthcoming 2022); Caitlyn Garcia & Cynthia Godsoe, *Divest, Invest, and Mutual Aid*, 12 COLUM. J. RACE & L. (forthcoming 2022).

345. *See supra* Part III.C.

346. Wald, *supra* note 69, at 1005.

347. The ABA and IJA repeatedly used the phrases "serious harm" and "severe harm" throughout its proposed standards. *See* INST. OF JUD. ADMIN. & AM. BAR ASSOC., *supra* note 88, at 4 ("In general, coercive intervention is limited to situations where the child has suffered, or is likely to suffer, serious harm."); *id.* at 52 (stating the law "should authorize intervention only where the child is suffering or there is a substantial likelihood that the child will imminently suffer, serious harm"); *id.* at 65 (permitting intervention in cases involving "disfigurement, impairment of bodily functioning, or other serious physical injury as a result of" neglect).

348. *Id.* at 65.

tiers of severity analogous to degrees of criminal offenses. Those tiers of severity should be tied to maximum consequences.

Common fact patterns should be defined in greater detail than current definitions of neglect—such as when actions caused by parental substance abuse amount to neglect, or what facts coupled with parental incarceration is neglect. These specific definitions of neglect should exclude several fact patterns that fall into current broad neglect statutes but should not warrant state intervention. These fact patterns include children engaged in independent activities and parents legally using marijuana, areas that state legislatures have begun reforming,<sup>349</sup> and should also include inadequate housing, inadequate child care, marijuana use (even if illegal), in utero drug exposure (without other evidence of danger to the child), and children’s exposure to domestic violence between adults. All of these actions by themselves do not reflect a level of parental unfitness that would justify involuntary state intervention in families.<sup>350</sup>

Two important differences between a proposed code of child neglect and abuse and existing criminal codes exist. First, while criminal law is appropriately focused on an individual’s *mens rea*, child neglect and abuse law should remain focused on the specific behaviors at issue and their impacts on children. A parent who intends no harm yet struggles so much with an infant that the baby is diagnosed with failure to thrive and is at risk of lasting developmental harms may still be neglectful. Second, the lesser focus on *mens rea* is appropriate because the purpose of the intervention differs; where the criminal justice system seeks to punish and deter crime, the child protection system seeks to protect children from maltreatment by their parents, support parents when possible,<sup>351</sup> and help rehabilitate parents when necessary so they can raise their children safely.

While fully drafting child neglect and abuse codes of comparable specificity to criminal law is a project beyond the scope of this Article, there are several existing sources of law that can help with the task. Criminal law already distinguishes degrees of assault and battery based on the degree of injury caused or attempted;<sup>352</sup> similar degrees of harm could distinguish levels of physical abuse. Further definitions could distinguish excessive corporal punishment from more severe abuse which reflects a parent’s reckless inability to control their anger rather than a disciplinary purpose.

In addition, states which have already created tiers of neglect and abuse for purposes of their child protection registries provide a starting point for a more detailed code.<sup>353</sup> Such tiers can be tied to maximum types of intervention; the

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349. See *supra* notes 306-308 and accompanying text.

350. These factors might amount to parental unfitness when other evidence is present as well. See, e.g., *supra* note 95.

351. Kristen Weber’s comment to this Article outlines what such support should entail—ensuring access to high quality and affordable health care, affordable housing, and other community-based supports. Weber, *supra* note 330.

352. E.g., S.C. CODE ANN. § 16-3-600 (2021).

353. See *supra* notes 128-32 and accompanying text.

lowest tier of maltreatment would not generally authorize family separations, for instance.

The left alone fact pattern in *In re A.M.* can illustrate how the law can distinguish types of neglect with some specificity. Current law, as tentatively restated by the ALI, would declare leaving a young child home alone for several hours as neglect because it imposes a substantial risk of serious physical harm to the child.<sup>354</sup> But the risk of harm only addresses part of the issue. Several other variables are relevant to determining if state intervention is needed to protect the child and, if so, what type of intervention: the reason the child was left alone,<sup>355</sup> the age of the child, the child's means of seeking assistance if needed, for how long the child was left alone, and the frequency with which a child is left alone. A more precise delineation of child maltreatment could account for these variables. The most severe form of leaving a child unsupervised would require proof that the parent did so to engage in unnecessary or harmful behavior, repeatedly, for extended periods of time, when the child could not seek assistance if needed (due to age or otherwise). Those factors suggest a high risk of repeating the behavior and a higher risk of harm to the child when they were left alone, and thus a greater need for state intervention. The lowest tier would have opposite facts—leaving the child alone to work or pursue some other necessary activity, involving a somewhat older child, who was left alone once, for a limited time. The facts of *A.M.* would be in between—but closer to—the lower tier: a parent who left the child home alone to work, who did so once, where the child could go to a neighbor for help, though the child appeared to be left alone for an extended time, and was young to be left alone. Proving the more severe form could authorize a family separation when efforts to prevent such separation proved fruitless and no reasonable alternatives were available. Proving only the less severe form would permit agency supervision but not authorize such a drastic intervention.

Defining specific forms of neglect and abuse this precisely would permit progress towards several goals. First, and most importantly, more specific definitions of neglect aid in narrowly tailoring the state intervention in families. Tailoring principles will be discussed regarding case plans and dispositions in the sections that follow,<sup>356</sup> but a prerequisite to applying such principles is the ability to identify a specific type of neglect or abuse. Once that is done, interventions must be tailored to that specific maltreatment, not something else.

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354. The ALI offers an illustration of a parent leaving a three-year-old home alone for four hours. RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 2.24 illustration 2 (AM. L. INST., Tentative Draft No. 2, 2019).

355. Giovannoni and Becerra describe this as a “crucial” factor in determining what response is appropriate. GIOVANNONI & BECERRA, *supra* note 70, at 246. Dorothy Roberts relays one case in which a toddler was left alone briefly in a park when a babysitter left the park for her car. Rather than recognizing the absence of any troublesome reason regarding the mother's child care arrangements, this case led to criminal citation for child neglect, a particularly invasive investigation, and agency oversight under threat of family separation. ROBERTS, *supra* note 273, at 13-21.

356. *See infra* Parts V.C-D, F.

For instance, the neglect at issue in *In re A.M.* was relatively minor, and defining it precisely permits the growth of statutes that would prohibit such minor neglect from leading to family separations and terminations of parent-child relationships.

Second, and relatedly, a crucial element missing from existing child protection law is an identification of more or less severe forms of maltreatment. Existing categories are simply too broad to permit such categorization—physical abuse can mean excessive corporal punishment or repeated torture, and neglect can mean leaving a child home when child care plans fall through or causing a failure to thrive diagnosis and risk of lasting developmental harm in an infant. The more specifically the law identifies different types of maltreatment, the more effectively it can place different categories of maltreatment into tiers of severity. For some fact patterns, a focus on the extent of harm may suffice. Physical abuse could, for instance, be defined analogously to criminal assault and battery codes, in which the primary means to distinguish degrees of crimes is by the severity of injury caused or threatened.<sup>357</sup> Other categories may depend on the precise conduct at issue; causing an infant to fail to thrive is a more severe form of neglect than leaving an older child alone.

Third, more specific substantive definitions of neglect and abuse could exclude some fact patterns that ought not trigger state involvement, and could do so more surely than narrowing neglect and abuse definitions through severity of harm alone. Consider the case of a child left alone in a park while her mother worked because her mother lacked alternative child care.<sup>358</sup> The harm feared by authorities who intervened was presumably severe—assault of or accidental harm to the child—though the likelihood of such harm was low. Specific substantive definitions could make clear that these cases did not involve neglect at all and, if authorities determined that they did, that they amounted to less severe forms of maltreatment that do not permit more invasive state actions. Relatedly, creating more specific substantive definitions facilitates further public policy debates about which definitions are essential to maintain and which may be repealed or otherwise not enforced—analogue to similar debates in juvenile justice about specific provisions of the criminal code.<sup>359</sup>

## B. Registry Reforms

Child neglect and abuse registries illustrate the overbroad scope of invasive elements of the present child protection legal system and the lack of a close connection between the type of maltreatment at issue and interventions authorized by law. Several statutory reforms are warranted regarding placing parents on registries, opportunities for parents to remove their names from registries, and more precisely using registries to achieve the goal of protecting children without unnecessarily harming families' financial security.

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357. *E.g.*, S.C. CODE ANN. § 16-3-600 (2021).

358. *See supra* note 295 and accompanying text.

359. *See supra* notes 339-340 and accompanying text.

First, CPS agencies should only have the ability to place parents on registries when they determine the parent has neglected or abused a child *and* when the substantiated neglect or abuse would pose a significant risk to people served by positions subject to registry checks such as children at child care centers. Only the former provision is evident in most state laws. New York state recently adopted this principle in a reform that takes effect in 2022, requiring hearing officers in administrative appeals of registry placements to determine if the maltreatment is “relevant and reasonably related” to the registry’s protective purposes.<sup>360</sup> To tie registries more precisely to their purposes and avoid the harms to the very population of children the child protection system exists to serve, states should adopt similar standards.

Second, and relatedly, states should follow the lead of those which place all forms of maltreatment into tiers,<sup>361</sup> and limit a parent’s time on the registry based on the tier in which the parent’s conduct falls. A parent who is responsible for a relatively minor form of maltreatment should not face a lifetime of consequences, even if a nexus exists between the maltreatment and the registry’s protective purposes. Going some period of time without committing another act of maltreatment should suffice for removal from the registry.

Third, parents should have the ability to petition to remove their names from registries when they can show that they have remedied the conditions which led to the substantiation. For instance, parents whose substance abuse led to neglect who can establish they are now sober should no longer remain on the registry.

Finally, the standard of proof for placing parents on registries should be at least preponderance of the evidence. About half of states require only probable cause, credible evidence, reasonable evidence, or a similar formulation.<sup>362</sup> Those lower standards of proof not only require less evidence, but they do not generally require CPS agencies to compare evidence that supports an allegation against evidence that tends to exonerate a parent,<sup>363</sup> which can lead to erroneous placements of parents on registries. There is already a trend towards elevating the standard of proof,<sup>364</sup> and empirically, this difference appears to impact agency decisionmaking. Shifting to higher standards of proof for substantiation correlates with declines in the probability of substantiation,<sup>365</sup> and slight declines

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360. S. 7506-B, 2019-2020 Reg. Sess. Part R § 1 (N.Y. 2020); N.Y. SOC. SERV. LAW § 424-a(e)(viii) (McKinney 2022).

361. *See supra* notes 128-32 and accompanying text.

362. Nicholas E. Kahn, Josh Gupta-Kagan & Mary Eschelbach Hansen, *The Standard of Proof in the Substantiation of Child Abuse and Neglect*, 14 J. EMPIRICAL LEGAL STUD. 333, 336-37, 362 (2017). Since that Article was published, New York changed its standard of proof from “some credible evidence” to preponderance of the evidence. S. 7506-B, 2019-2020 Reg. Sess. Part R § 1 (N.Y. 2020); N.Y. SOC. SERV. LAW § 422(5)(a) (McKinney 2022).

363. *Jamison v. State Dep’t of Soc. Servs.*, 218 S.W.3d 399, 411 (Mo. 2007) (en banc).

364. New York raised its standard of proof, effective Jan. 1, 2022. *See supra* note 362. Previously, several other states had strengthened their standards of proof. Elizabeth Day, Laura Tach & Brittany Mihalec-Adkins, *State Child Welfare Policies and the Measurement of Child Maltreatment in the United States*, 27 CHILD MALTREATMENT (forthcoming 2022) (manuscript at 9), <https://perma.cc/H9YU-4Z9X>; Kahn et al., *supra* note 362, at 339, 363-64.

365. Day et al., *supra* note 364, at 9; Sarah Font & Kathryn Maguire-Jack, *The*

in the likelihood of removal to foster care.<sup>366</sup> A more striking empirical finding is that higher standards of proof are associated with significant increases in CPS agency provision of family preservation services to families, and a “reallocation of resources within child welfare systems” to emphasize services regardless of substantiation.<sup>367</sup>

### C. Determinate Disposition Standards

#### 1. Tying Disposition Options to Severity of Maltreatment

Child neglect and abuse law has never defined which cases of abuse or neglect should trigger its greatest intervention—removing a child from parental custody. Instead, any adjudication of abuse or neglect can lead to any disposition. A judge may leave a child at home and terminate jurisdiction after adjudicating the parent responsible for the death of a sibling, and a judge may order a child removed after adjudicating the parent responsible for a single act of excessive corporal punishment leaving a bruise on a child’s lower back.

Child protection and juvenile delinquency law share a history of this indeterminacy at disposition. But just as juvenile delinquency law now features a trend towards offense-specific maximum sentencing options,<sup>368</sup> child neglect and abuse law should develop limits on possible dispositions based on the specific abuse or neglect adjudicated. This change requires a significant shift in child neglect and abuse law—tying specific types of abuse or neglect to specific disposition options. One of the benefits of more specific definitions of neglect and abuse is that such definitions make such connections more achievable.

Such connections would delineate multiple categories of maltreatment organized by severity, at least partly analogous to the various categories of crime. The least severe set of maltreatment involves conduct that could trigger agency oversight but should not lead to removal or, in most cases, any kind of court oversight. If the conduct in *In re A.M.* amounts to neglect at all, it should fall in this category—the issue was a lack of adequate child care, and the case could have been resolved through a prompt return of the child to her mother along with a provision of child care and brief agency oversight to ensure the child was not left home alone again. Maltreatment falling in the next category, including repeated instances of maltreatment in the least severe category, might justify agency oversight, but with a presumption against any removal. More severe conduct might justify removal when the state can show that particularly severe harms have occurred or would likely occur without removal. And the most severe (but rare) forms of maltreatment could lead to a presumption of removal.

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*Organizational Context of Substantiation in Child Protective Services Cases*, 36 J. INTERPERSONAL VIOLENCE 7414, 7424 (2021); Kahn et al., *supra* note 362, at 334.

366. Kahn et al., *supra* note 362, at 335.

367. *Id.* at 335, 354-55.

368. *See supra* Part III.E.

Such a structure creates a more determinate system in multiple ways. Tying specific maltreatment to maximum disposition options limits the discretion of judges and agencies to remove children—thus moving significantly towards a more determinate system. What matters is the specific type of maltreatment proven to a court—not what either agency or judge believes serves children’s interests. This focus can change the practice. Under current law, it matters relatively little what specific maltreatment is proven—so long as any type is proven, the judge has a full range of dispositional options. As a result, the specific maltreatment adjudicated (through negotiation or a trial) matters relatively little.

Tying specific types of child maltreatment to maximum disposition options creates a plea-bargaining dynamic—when the specific form of neglect or abuse adjudicated matters more, negotiations between CPS agencies and parents regarding what conduct can be adjudicated can be more important. It creates a dynamic which reduces the leverage the state has over families and thus responds to any concerns that emphasizing plea bargaining more would lead to the same abuses of plea bargaining that occur in the criminal justice system.<sup>369</sup> Those abuses result from the state having tremendous leverage granted by harsh penalties tied to certain more serious charges. But in child protection law, those harsh penalties are currently tied to all charges—as *In re A.M.* shows. Any case, no matter how minor, can lead to termination. Creating tiers of abuse or neglect with associated disposition options can reduce state power over families. CPS agencies will only have great leverage if they have a likelihood of proving to a court that a parent has committed a more severe form of abuse. Absent that, parents will have relatively strong leverage to negotiate for something no worse than an adjudication to lower-severity categories of maltreatment.

## 2. Placement Preferences/Hierarchies

If the state must remove a child from parents’ custody and place the child in the state’s custody, the law should impose meaningful placement hierarchies, not the weak kinship placement preference in existing federal law.<sup>370</sup> And state statutes should do more than the status quo of listing a range of placement options, all of which are available to courts and agencies.

The legislative agenda here is relatively simple: State legislatures should require agencies and courts to follow a placement hierarchy whenever a child must be removed from a parent. Other legal parents should have custody when possible, followed by other family members or fictive kin,<sup>371</sup> followed by stranger foster families, followed by congregate care facilities. Whenever an agency seeks to move down that hierarchy, the law should require it to prove

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369. Gupta-Kagan, *supra* note 336, at 480-86.

370. See *supra* notes 148-50 and accompanying text.

371. “Fictive kin” refers to individuals with a close family-like relationship to a child or the child’s parents, but who are not related biologically or through marriage or adoption. *E.g.*, D.C. Mun. Regs. tit. 29, § 6027.3(b) (2017). Fictive kin’s close relationship with the child or child’s parents distinguishes living with them from living with strangers in foster care.

why more favored options are impossible, dangerous, or otherwise strongly contrary to a child's best interest. The agency must bear the burden of proof for such arguments, and courts must enforce a meaningful kinship placement preference.<sup>372</sup> The law should further require CPS agencies to make active efforts to facilitate and maintain placements higher on the hierarchy; when a child's kinship foster parent faces eviction and thus the child faces losing a preferred placement, agencies should have to help preserve that kinship placement, as agencies failed to do in Ma'Khia Bryant's case.<sup>373</sup>

#### D. Between Disposition and Permanency

Agency and family court discretion remains at its highest in the period from disposition to an ultimate permanency resolution, whether that is reunification and restoration of full custody to a parent, or adoption or guardianship with a new permanent family. Here, the best interest standard still reigns, granting agencies power to push to reunify or permanently separate parents and children, and judges to order agencies to reunify families immediately or to stop working towards reunification.

The law should significantly limit this power to reduce the risk that children will remain in foster care unnecessarily, and reduce the possibility of disparities in post-disposition decisions. The best tool to achieve these aims is for legislatures to impose more meaningful substantive standards for the many decisions made after disposition and before the end of a case. This subsection outlines several such standards and rules.

##### 1. Defining When Parents and Children May Reunify

Reunification should be required when a parent has substantially complied with a case plan narrowly tailored to remedy the underlying abuse or neglect which the court has adjudicated. Requirements beyond the specific type of maltreatment should not be imposed; the state should not impose requirements such as parental employment when it does not bear a direct relationship to the underlying maltreatment.

If the agency is concerned about other forms of maltreatment, it should plead and prove such maltreatment. If the state's intervention is based on concern that a parent failed to protect a child against abuse by the parent's partner, then mitigating the risk of subsequent abuse (such as by obtaining a protection order

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372. The Washington Supreme Court's recent decision in *In re K.W.*, 504 P.3d 207 (Wash. 2022), provides an example. The court made clear that agency predictions of a family member's likelihood of passing an agency home study, or past CPS agency involvement does not suffice for overcoming a kinship placement preference. *Id.* at 221. CPS agencies and courts must be wary of discretionary decisions with disproportionate impact on low-income families and families of color, *id.* at 220, 221, and family courts must review agency denials of kinship placements to ensure they are not based on factors which could serve as "proxies for race." *Id.* at 222.

373. *See supra* note 161 and accompanying text.

against the abusive partner, housing independent of that partner, or some other step) eliminates the need for further intervention, and the child should return home immediately. If the agency is also concerned about something unrelated to what it alleged in the petition—such as the concerns in *In re A.M.* about the mother’s new relationship—then the agency should plead and prove such an allegation.

## 2. Defining When to Set a Permanency Plan Other than Reunification

Existing law largely lacks a substantive standard for when to move away from reunification as a permanency plan, and wrongly preferences adoption over guardianship when reunification is ruled out. Family courts should only set alternatives to reunification when, after an extended period of time,<sup>374</sup> a parent has not made adequate progress to remedying the conditions leading to state intervention, and progress to permit reunification does not appear likely in the reasonably foreseeable future. This standard sounds roughly similar to state laws which require consideration of a parent’s compliance with a case plan and progress “toward alleviating or mitigating the causes necessitating placement in foster care.”<sup>375</sup> Reforms suggested above—more precise definitions of grounds justifying intervention and rules tying dispositions and case plans to address the specific grounds in particular cases—should make existing standards for permanency plans more determinate.

## 3. Establishing a Rational Hierarchy of Permanency Options

When a permanency plan change is called for, legislatures should rectify problematic rules in existing law which preference more invasive action over less without any empirical basis. As discussed above, existing law preferences terminating legal relationships between parents and children and creating new ones through adoption over options which do not require that drastic step.<sup>376</sup> These standards lack an empirical basis and violate the principle of limiting family integrity rights only when necessary.

At a minimum, Congress and state legislatures should repeal preferences for terminations and adoptions over guardianship. In federal law, this means repealing the provision requiring states to rule out adoption before considering guardianship.<sup>377</sup> It also means repealing the law’s push for terminations after children have been in foster care for a certain amount of time. In addition to revising the timeline itself, Congress should remove the push towards terminations when states do shift away from reunification efforts.

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374. What amounts to an extended period of time may reasonably be shorter for the youngest children; children’s sense of time should be balanced with sufficient time for parents to make progress.

375. D.C. CODE § 16-2323(b) (2022).

376. *See supra* notes 190-91 and accompanying text.

377. 42 U.S.C. § 673(d).

Further steps are called for. Not only is preferencing adoption unsupported by data, but it also runs counter to the value that ought to be placed on maintaining children's connections with family members. Adoption requires the termination of children's legal relationship with their parents. For reasons explained below,<sup>378</sup> terminations should be limited to situations where that legal relationship is actively harmful to children, not simply when children cannot live with their parents. A corollary to that rule is that adoptions should be limited to such cases, and when children cannot reunify with their parents, the law should preference guardianship over adoption unless any remaining legal connection between parent and child would be harmful.

#### E. Defining Reasonable and Active Efforts

Just as the reasonable efforts standard has been long criticized, advocates have also identified several means of strengthening that standard. Requiring state agencies to make not just "reasonable" but "active efforts" to prevent removal and reunify families is a useful start, as Alan Dettlaff and others have advocated.<sup>379</sup> Active efforts—which are already required when a case involves an American Indian child under the Indian Child Welfare Act<sup>380</sup>—is a stronger phrase than "reasonable efforts" and thus signals to agencies and courts that a more meaningful standard is at play, and has been interpreted to require more.<sup>381</sup> The federal statute does not define "active efforts,"<sup>382</sup> but a 2016 federal regulatory definition provides greater specificity than exists for "reasonable efforts," listing a range of examples of active efforts, including helping parents overcome barriers to obtaining services, conducting searches for family members who could support the family, and identifying available community resources.<sup>383</sup> This definition thus represents a significant improvement upon the existing "reasonable efforts" law.

This step, however, is only a beginning. Active efforts standards remain less than clear in application.<sup>384</sup> Moreover, the existing regulations repeat the central irony of reasonable efforts law—its focus on the actions of a CPS agency, and acceptance of the limited availability of essential supports and services from other agencies. Active efforts can include "[i]dentifying" existing resources and helping families access and use them.<sup>385</sup> But if the services do not exist in the community, courts can find active efforts. Consider a family with inadequate

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378. *See infra* Part V.F.

379. *See sources cited supra* note 316.

380. 25 U.S.C. § 1912(d).

381. *E.g., In re L.M.B.*, 398 P.3d 207, 219 (Kan. Ct. App. 2017); *see also* Leonard Edwards, *Defining Active Efforts in the Indian Child Welfare Act*, NAT'L ASSOC. COUNSEL FOR CHILD.: THE GUARDIAN, Jan/Feb 2019, at 1, 3 (summarizing cases).

382. 25 U.S.C. § 1912(d); *see also* Edwards, *supra* note 381, at 1 ("[T]he statute did not define the term 'active efforts.'").

383. 25 C.F.R. § 23.2 (2021).

384. Edwards, *supra* note 381, at 1-2.

385. 25 C.F.R. § 23.2(2) (2021).

housing; if no housing resources are available, there is no violation of the agency's duty to identify available resources. Agencies can still remove children who could safely remain with their families with housing assistance.

To add meaning to the reasonable or active efforts requirement, I suggest including several minimum principles to help define the efforts that state agencies should take to prevent removal and reunify families.

First, a state must develop a minimally adequate set of primary prevention and basic intervention services available to all families. This principle would change the focus of reasonable efforts determinations from purely case-by-case decisions—which focus on the CPS agency's work in individual cases—and instead focus on the systemic provision of services and supports which can help keep children living safely with their families. Reasonable efforts findings are all about federal financial support of state foster care systems, and the federal government should not fund a state's separation of families when the state fails to provide services that can keep families together. More modest ideas have been advocated for some time. Judge Leonard Edwards, for instance, has argued that a CPS agency's referral of a family to services with unreasonably long waiting lists amounts to a failure to provide reasonable efforts.<sup>386</sup> To implement this principle, the federal Children's Bureau should identify essential elements of prevention supports and services—such as housing assistance, mental health care, substance abuse treatment, and legal services<sup>387</sup>—and then evaluate if a state provides a minimally adequate set of supports in each area. If, for instance, a state fails to provide sufficient housing assistance to families, it should not then be able to access federal financial support to separate families when sufficient housing assistance would have alleviated the concern.

Second, CPS agencies' efforts to prevent removal and reunify families should include at least<sup>388</sup> equivalent resources as would be expended if the child were removed and placed in foster care. This principle seeks to ensure a minimum baseline of the amount of support agencies should provide to families and reduce financing inequities built into the foster care system.<sup>389</sup>

This first proposed principle would help respond to a common critique of the status quo—that our child protection system confuses poverty with neglect.<sup>390</sup> Requiring the state to offer parents the same amount of support it would offer to foster parents would help distinguish families which can stay safely together with adequate supports from those where true maltreatment occurs. If the family's challenge is primarily financial, then providing financial supports should resolve

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386. Leonard Edwards, *Reasonable Efforts: Let's Raise the Bar*, NAT'L ASSOC. COUNSEL FOR CHILD.: THE GUARDIAN, Spring 2020, at 21, 22-23.

387. I do not present this as an exhaustive list.

388. This proposal states a minimum standard. The law values family integrity such that keeping children safely with families is much preferred to removal, so the reasonable efforts should include spending more to keep families together.

389. See *supra* notes 237-42 and accompanying text.

390. E.g., Milner & Kelly, *supra* note 3; Sharkkara Harrison, 'Poor' Parenting—When Poverty is Confused with Neglect, RISE (Nov. 15, 2017), <https://perma.cc/AZ54-UKM7>.

any threat. If something beyond poverty is the primary issue, then risks to children will remain after providing this support. Providing that support—and removing the excuse that it is not the CPS agency’s responsibility to provide that support—and evaluating what happens is the most direct way to distinguish the two categories of cases.

Third, efforts to prevent removals and reunify families must recognize that addressing some chronic conditions—especially some substance abuse and mental health disorders—requires concerted and evolving efforts over time. If a parent does not successfully rehabilitate at first, CPS agency efforts must reevaluate their approach and consider adjustments.<sup>391</sup> As a result, agencies referring parents once to one service provider falls short of satisfying its obligations.<sup>392</sup> Agencies which fail to provide the assistance parents need to visit their children and participate in foster care fail to meet efforts requirements.<sup>393</sup>

Fourth, and relatedly, reasonable efforts must be individually tailored to the needs of the family. When parents have a disability, CPS agencies must accommodate that disability by modifying their efforts to prevent removal and reunify families.<sup>394</sup>

Fifth, the reasonable efforts should orient every case decision made around the primary goal of reunifying families. For instance, at least one state has held that reasonable efforts includes efforts to place a child in a location conducive to frequent contact between parents and children.<sup>395</sup> Similarly, state CPS agencies are already required to work to avoid changing a child’s school enrollment when placing the child in foster care,<sup>396</sup> though this provision is not mentioned in the reasonable efforts statute.<sup>397</sup> School stability avoids exacerbating the disruption to the child’s life while helping maintain the parent’s ability to be involved in the child’s education. A CPS agency’s failure to meet its school stability obligations should generally indicate a failure to make reasonable efforts to prevent removal.

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391. See, e.g., *In re R.J.F.*, 443 P.3d 387, 397 (Mont. 2019) (faulting CPS agency because, “[w]hen Mother did not exhibit progress, the Department did nothing more to assist Mother in meeting the goals of her treatment plan”).

392. E.g., *In re James G.*, 943 A.2d 53, 81 (Md. Ct. Spec. App. 2008).

393. E.g., *In re R.J.F.*, 443 P.3d at 397 (“Despite Mother’s demonstrated difficulties in travelling to Billings for visitation and services, the Department continued the very same child placement and visitation/service arrangement.”).

394. At least one state has codified this proposition. South Carolina requires that when a parent has a disability, reasonable efforts “must include efforts that are individualized and based upon a parent’s or legal guardian’s specific disability, including referrals for access to adaptive parenting equipment, referrals for instruction on adaptive parenting techniques, and reasonable accommodations with regard to accessing services.” S.C. CODE ANN. § 63-7-720(B) (2021).

395. E.g., *In re R.J.F.*, 443 P.3d at 398 (“[R]easonable efforts . . . do require the Department . . . to use its best efforts to place a child in close enough proximity to a parent to arrange visitation in sufficient frequency and duration to make it possible for a parent to establish a bond between herself and her child.”).

396. 42 U.S.C. § 675(1)(G).

397. 42 U.S.C. § 671(a)(15).

These principles are of general applicability, and do not preclude fact pattern-specific reasonable efforts requirements,<sup>398</sup> or arguments that are less about services provided to families and more about *whether* CPS agency judgment to remove a child is reasonable.

#### F. Ending Terminations of Parent-Child Relationships in All But the Most Extreme Cases

Earlier criticisms of terminations highlighted their problematic role in seeking to achieve permanency. As state agencies and family courts increased their use of terminations in the name of facilitating adoptions in the 1990s, critics established that this increased use undermined the goals of achieving permanency, because adoptions did not keep pace with terminations, and the result was an increasing number of legal orphans—children who had no legal parent (due to a termination) and no new parent (because no adoption occurred).<sup>399</sup> Such critics recommended an important principle to limit terminations—no termination should occur absent a need to protect children’s welfare and a “high probability” of adoption following termination.<sup>400</sup> Other critics argued that terminations should only occur when the state can prove that any ongoing relationship between parent and child would cause some “specific, significant harm and that any alternative short of termination will not avert that harm.”<sup>401</sup>

Some more recent advocates have gone further—advocating for the abolition of terminations and adoptions entirely as unnecessary steps when other permanency options such as guardianship is available.<sup>402</sup> Indeed, the law and

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398. For instance, in cases involving a parent of a young child with a substance use disorder who needs inpatient treatment, reasonable efforts to prevent removal should include provision of an opportunity enter a treatment program with that child. Such a requirement follows guidance from the American College of Obstetricians and Gynecologists, which notes that substance use disorder treatment is more effective for mothers who keep custody of their children during treatment. Am. Coll. of Obstetricians & Gynecologists Comm. on Ethics, Formal Op. 633, *Alcohol Abuse and Other Substance Use Disorders: Ethical Issues in Obstetric and Gynecologic Practice*, 125 *OBSTETRICS & GYNECOLOGY* 1529, 1534 (2015).

399. Guggenheim, *supra* note 207, at 132-34.

400. *Id.* at 135.

401. Marsha Garrison, *Why Terminate Parental Rights?*, 35 *STAN. L. REV.* 423, 425 (1983).

402. *E.g.*, Dettlaff et al., *supra* note 2, at 513 (“We also reject the concept of ‘termination of parental rights’ and support the end of this practice, leaving decisions regarding the care and support of children to the families and communities in which they reside.”); Albert & Mulzer, *supra* note 333; Ashley Albert, Tiheba Bain, Elizabeth Brico, Bishop Marcia Dinkins & Kelis Houston, *Ending the Family Death Penalty and Building A World We Deserve*, 11 *COLUM. J. RACE & L.* 861, 869, 879 (2021). Others would severely limit the practice. *See, e.g.*, PUB. KNOWLEDGE, FAM. INTEGRITY & JUST. WORKS, CHILD WELFARE SYSTEM REPLACEMENT CHART, <https://perma.cc/NY7H-4QE6> (archived Apr. 23, 2022) (calling for replacement of “[r]equirements to TPR at certain time-limited junctures” with “[p]rohibition on TPR if parents are in treatment, only one parent is incarcerated, or instances where a parent can continue to be a meaningful part of a child’s life”).

practice of permanency has made clear that even when children cannot reunify with their families of origin, they can still maintain legal and emotional bonds with them—most prominently through guardianship.

Even when adoptions do occur, state adoption law has developed to establish that complete terminations of the parent-child relationship are not required to facilitate adoptions.<sup>403</sup> In California, adoptions can occur without terminating the parental rights of biological parents.<sup>404</sup> In practice, contact with biological families through the various practices and legal statuses called “open adoption” or “adoption with contact” and trends towards more openness of adoption records represent a sharp break from the historic secrecy of adoption.<sup>405</sup> A growing majority (32) of states now permit adoptive and biological parents to enter into post-adoption contact agreements, and the vast majority of those make clear that biological parents can enforce such agreements.<sup>406</sup>

The law and practice of terminating parent-child legal relationships has not caught up—the legal system still orders terminations and offers legal fictions like a new birth certificate pretending that a child was physically born to adoptive parents,<sup>407</sup> and agencies continue to follow the federal rule presuming termination petitions should be filed after a child has been in foster care for fifteen months.<sup>408</sup> The law and practice should recognize that complete and involuntary terminations of parental rights are required much more rarely than current practice suggests. Quite simply, involuntary terminations are unnecessary to obtain legal permanency and emotional stability for children because children can have permanency without terminations.

The most justifiable use of involuntary termination of parental rights is to protect children from further harm from their family of origin—a proposed standard which builds on earlier calls for limiting terminations to cases when that step is necessary to protect children.<sup>409</sup> Complete and involuntary terminations should only be permitted when the parent has committed an extremely severe form of neglect or abuse—a step possible only once states define neglect and abuse in more precise forms—or the parent’s behavior and the state of the parent-child relationship show that the harms of continuing any legal relationship

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403. As Solangel Maldonado points out in her comment to this Article, open adoptions may provide an alternative to complete and involuntary terminations in many cases. Solangel Maldonado, Commentary, *Child Protection, Evidentiary Standards and Open Adoption*, 33 STAN. L. & POL’Y REV. ONLINE (forthcoming 2022).

404. S.B. 274 § 7, 2013-2014 Reg. Sess. (Cal. 2013); CAL. FAM. CODE § 8617(b) (West 2022).

405. Josh Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. JUV. L. & POL’Y 1, 23-24 (2015).

406. Lisa A. Tucker, *From Contract Rights to Contact Rights: Rethinking the Paradigm for Post-Adoption Contact Agreements*, 100 B.U. L. REV. 2317, 2351 (2020). Tucker catalogs the strong trend towards enactment of statutes recognizing post-adoption contact agreements. *Id.* at 2349-51.

407. *E.g.*, D.C. CODE § 16-314 (2022).

408. *See supra* Part II.A.5.e.

409. Garrison, *supra* note 401, at 425, 485-89; Guggenheim, *supra* note 207, at 135.

between parent and child clearly and significantly outweighs the benefits of that relationship.<sup>410</sup>

#### CONCLUSION

The child protection field features significant momentum building for significant change. The time is thus ripe to address longstanding critiques of the child protection legal structure—the indeterminacy of most substantive rules in the child protection system, and the bias that indeterminacy permits throughout child protection cases. In addition, several of the (few) determinate rules that have developed over the years do not align with empirical evidence and the fundamental value of protecting parents’ and children’s relationships.

Building on past critiques of the child protection legal system, this Article demonstrates how substantive indeterminacy throughout the law can build on itself. Vague grounds for state intervention in family life mixes with wide discretion to determine which children to separate from parents, what to require of parents to reunify, and whether and when to reunify—permitting unnecessarily invasive state action.

The present moment calls for changes throughout the life of a child protection case, establishing determinate standards which limit state interventions to situations where they are truly necessary to protect children, and changing determinate standards that permit more interventions than necessary. Such changes, coupled with the growth of family defense and other changes in the legal system, can help create a transformed child protection system that is much better able to protect children from severe neglect and abuse while better respecting family integrity.

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410. This standard approximates the Family Integrity and Justice Work’s call to “prohibit[]” terminations when “a parent can continue to be a meaningful part of a child’s life.” PUB. KNOWLEDGE, FAM. INTEGRITY & JUST. WORKS, *supra* note 402, at 5.