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### Distinguishing Family Poverty from Child Neglect

Joshua Gupta-Kagan

Columbia Law School, [jgupta-kagan@law.columbia.edu](mailto:jgupta-kagan@law.columbia.edu)

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# Distinguishing Family Poverty from Child Neglect

Josh Gupta-Kagan\*

*ABSTRACT: Family courts and child protective services (“CPS”) agencies surveil, regulate, and separate hundreds of thousands of families for neglect annually. These families are overwhelmingly poor, and the history of this legal system reveals an expectation, if not an intention, to intervene in poor families. This raises the question whether family courts and CPS agencies are “confusing poverty and neglect” or if they intervene for more than “just poverty,” as a raging debate in the field is framed.*

*The law fails to help resolve this debate. Instead of distinguishing poverty from neglect, or providing nuanced examinations of what social science has long shown to be a complex relationship between poverty and neglect, the law assumes away the problem. The law asserts that neglect and poverty are distinct, so the legal system’s decision to label parental behavior as neglectful frames the case as about some parental fault or pathology and not about poverty. Consistent with that frame, the law has separated anti-poverty financial supports from interventions available in neglect cases, so neglect interventions largely avoid providing such supports, even though much empirical evidence shows they can reduce family court and CPS system involvement. Moreover, family court and CPS agency intervention can trigger a variety of steps which make poor parents poorer, undermining their ability to reunify with their children.*

*This Article identifies a range of changes which would improve the legal system’s ability to distinguish poverty from neglect, by both eradicating long-standing legal rules which confuse poverty and neglect, and establishing more radical rules that would reverse the historical division between neglect cases and anti-poverty financial supports. These proposals recognize how deeply intertwined poverty and neglect are currently, and the absence of any easy test to determine which families could stay safely together if they were not poor and which could not. Absent such a test, the best solution is to provide families the*

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\* Clinical Professor of Law, Columbia Law School. The author would like to thank Anna Arons, Avni Gupta-Kagan, Clare Huntington, Tarek Ismael, Katie Louras, Ann Shalleck, Shanta Trevedi, Richard Wexler and attendees of the Columbia Law School faculty workshop series for helpful comments on and conversations regarding earlier drafts, and Nereese Watson and Rose Wehrman for excellent research assistance.

*income or the supports that would replicate the experience of families who are not poor.*

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INTRODUCTION

The field of child neglect law is marked by a raging debate about the role of poverty in that legal system. All agree, normatively, that poverty alone should not justify such state intervention in family life, yet the vast majority of families investigated and subject to child protective services (“CPS”) agency oversight and family court jurisdiction for child neglect are poor.<sup>1</sup> Critics of the status quo argue that what CPS agencies and family courts often label “neglect” is really poverty, and these critics cast doubt on the wisdom of the present legal system, which features millions of investigations for neglect and separation of hundreds of thousands of allegedly neglected children from their parents each year. Those who would largely preserve the status quo—preservationists, or, perhaps more accurately, critics of these critics of the status quo—assert that authorities generally do not intervene in families for poverty alone. Article

1. A note on terminology: I use “CPS agency” to refer to the public agencies which investigate, regulate, and sometimes separate families in the name of protecting children. I use the acronym “CPS” because is it both the commonly used name for these agencies (which go by a variety of names in different jurisdictions) and because it captures what these agencies are supposed to do—protect children from the most severe forms of maltreatment by parents and other custodians. I also refer to “child neglect law” and the “child neglect legal system” to reference the body of law and legal institutions that intervene in response to what authorities determine to be child neglect. I avoid the common phrase “child welfare system” because of the ambiguous meaning behind “welfare,” the troubling historical connections with welfare (as in public benefits) systems described in Part I. My aversion to that phrase is not original. *See infra* note 227 and accompanying text.

titles illustrate the terms of the debate: “It’s Time to Stop Confusing Poverty with Neglect”<sup>2</sup> versus “It’s Not ‘Just Poverty.’”<sup>3</sup>

It is difficult to underestimate the importance of this debate. If the critics are correct, then the present child neglect legal system is a monstrous effort to police and regulate poor families, wrapped in the rhetoric of child protection. Nothing short of radical transformation of the system would suffice as a matter of public policy, children’s and families’ interests, or basic morality. And, indeed, that is what many critics call for.<sup>4</sup> But if the vast majority of cases rest on factors unrelated to poverty, then such changes are unnecessary.

The law should provide tools to help resolve this debate and disentangle poverty from dangerous parental behavior, and to distinguish when interventions should focus on poverty and when they should treat other conditions separate from financial circumstances. That is a very difficult, yet essential task, but the law barely tries to accomplish it. The law as developed at crucial historical junctures assumes away the problem by framing child neglect as something that exists independent of poverty. The field has featured long-standing assertions that poverty and neglect are distinct topics, and that the legal system intervenes only when parental pathology or bad behavior—what the system deems neglect—creates a risk to a child. But the legal system’s history, social science regarding child maltreatment, and legal practice have all revealed a high level of overlap between family poverty and child neglect. Following the insistence that poverty and neglect are distinct, little in our law or legal systems helps provide a definitive answer to whether a particular set of concerns about a child are due to poverty or something unrelated, or whether the state’s response should include provision of anti-poverty supports or more coercive intervention in the child’s family.

Tools to better distinguish poverty from neglect are urgently needed. Without such tools, current efforts to help legal system actors distinguish between poverty and neglect will not likely succeed. The record is clear that at least some state interventions in families occur due to poverty, though it is disputed both how frequently that happens, and, more deeply, what it means for the state to intervene *because of* poverty. Critics suggest that cases in which families would escape state intervention but for their poverty—that is, without their poverty, the conduct at issue would not have happened or would not pose any significant risk to children—are cases about poverty. Preservationists

2. Jerry Milner & David Kelly, *It’s Time to Stop Confusing Poverty with Neglect*, IMPRINT (Jan. 17, 2020, 5:12 AM), <https://imprintnews.org/child-welfare-2/time-for-child-welfare-system-to-stop-confusing-poverty-with-neglect/40222> [<https://perma.cc/gNDX-B8TF>].

3. Sarah A. Font & Kathryn Maguire-Jack, *It’s Not “Just Poverty”: Educational, Social, and Economic Functioning Among Young Adults Exposed To Childhood Neglect, Abuse, and Poverty*, CHILD ABUSE & NEGLECT, Mar. 2020, at 1, 1.

4. E.g., DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 289–90 (2022); Alan J. Detlaff et al., *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, 500–01 (2020).

imply that when conditions such as parental substance use or untreated mental illness are present, they distinguish a case from poverty, even when the family is poor.

This Article seeks both to add to our understanding of why the law does not help distinguish poverty from neglect and to identify several potential legal reforms that could begin to distinguish poverty from neglect more effectively. In doing so, this Article builds on existing criticisms of the child neglect system and makes four distinct contributions. First, it traces many of the explicit legal doctrines which intertwine family poverty and child neglect and contribute to the difficulty in separating the two concepts. These doctrines existed from the beginning of the family court and continue through the modern “child welfare” administrative state—the name of which evokes the overlap between public benefits (“welfare”) and state intervention in and regulation of families. These include historical relics, like provisions of the original juvenile court act granting the court jurisdiction over children who were destitute or homeless. These relics have modern influence, like the continuing use of terminology like “dependency” in multiple states.<sup>5</sup> It also traces the explicit ties between welfare (in the sense of public benefits) and foster care: States conditioned welfare benefits on determinations that parents were “suitable,” with the threat of placing children in foster care if they deemed these impoverished families unsuitable.<sup>6</sup> That arrangement artificially separated poverty (which could trigger financial supports) from neglect (which would trigger CPS agency involvement but no financial supports) and formed the basis of the modern federal foster care funding structures. Based on this history, one reason the law fails to distinguish poverty from neglect is that the legal system was not designed or intended to do so; rather, it assumed that the two were distinct and avoided addressing poverty.

Second, this Article evaluates the present legal tools for disentangling family poverty from child neglect in individual cases. Just as the present debate often fails to illuminate poverty’s role, present legal tools are inadequate to distinguish poverty and neglect in many, if not most, real world cases. About half of states have some kind of “poverty defense.”<sup>7</sup> As a matter of black letter law, this defense merely restates the thin amount of agreement in the broader debate—a parent has not neglected his or her child if any failure is due solely to the parent’s poverty. But this law, which is not even stated explicitly in about half of state child neglect statutes or in federal law, fails in practice to untangle the deeply intertwined nature of poverty and the child neglect legal system. And once it fails, the law frames cases as about neglect and not poverty,

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5. See *infra* notes 225–27.

6. See *infra* Section III.A.2.

7. See Michele Estrin Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495, 510 (2013) (“At least seven states recognize a poverty defense in criminal child neglect cases, while more than half the states recognize a poverty defense at some point in civil neglect cases.”).

bracketing off anti-poverty interventions (especially financial supports) from the menu of available options.

Third, this Article identifies several features of present-day law and legal practice which directly make family poverty a factor for the initiation or deepening of state regulation of families. Poverty, especially when manifested in inadequate housing, parental unemployment, or limited child care access, is the primary factor in some CPS involvement in families, and even some family separations. Authorities cite similar factors as reasons to continue family separations. Moreover, child neglect legal systems take actions, and trigger other legal systems to take actions, which further harm poor parents' already difficult financial situation. For instance, states seek child support from parents and Social Security benefits from children to offset the state's foster care costs—depriving families of resources that would help them reunify.

Fourth, this Article identifies a range of policy proposals which would help distinguish cases of child neglect from cases of family poverty. On their own, these reforms would not provide the transformative change many critics call for, but they can amount to “non-reformist reforms”<sup>8</sup> which take significant steps towards such change. These proposals seek to attach stronger doctrinal support to the norm that poverty should not form the basis for CPS agency intervention in families. This effort begins with conceptually easy (but politically hard) matters, such as eradicating long-standing legal rules which confuse poverty and neglect and exacerbate the difficulties faced by impoverished parents with CPS agency cases. States should revise their definitions of neglect to exclude homelessness. Income-based factors which authorities frequently require of parents before reunification, housing and employment requirements in particular, should be irrelevant to determinations of when children and parents can reunify.

This Article also acknowledges that disentangling poverty from neglect is an enormously difficult challenge that may not be achievable without some steps to ameliorate poverty and then observe whether safety concerns dissipate. The Article outlines more radical legal rules that would reverse the flawed historical division between neglect cases and anti-poverty financial supports. The two concepts are deeply intertwined, and the best test to separate them is to provide poor families the income or the supports that would replicate the experience of families who are not poor. Such steps will mitigate any safety risk in many families, and suggest that troublesome behavior which remains results from factors beyond poverty. Child neglect law can require such steps through definitions of reasonable and active efforts to both prevent family separations and reunify families after such separations occur.

Part I outlines the contours of the current debate about the role of poverty and neglect, identifying areas of narrow normative agreement and wider descriptive and normative disagreement. Part II examines the empirical

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8. See *infra* note 317 and accompanying text.

and legal context for this debate. It establishes that CPS agencies are involved in some cases based primarily on family poverty, and summarizes the social science evidence establishing a strong correlation between family poverty and increased CPS agency involvement and child maltreatment, the converse relationship between anti-poverty financial supports and reduced CPS involvement and child maltreatment, and the absence of clear evidence about causation in those relationships. Part II explains the inability of current law to effectively distinguish poverty from neglect, especially in complicated cases in which the two are intertwined. Part III explores the legal system's history of viewing poverty as indicative of neglect while simultaneously excluding anti-poverty financial supports from the interventions CPS agencies and family courts offer once they identify neglect. Part III also identifies remaining legal doctrines that continue this historic connection between poverty and neglect. Part IV explains how the present child neglect legal system can exacerbate family poverty by harming parents' financial situation. Part V offers several solutions, both to eliminate remaining legal vestiges of troubling historical connections between poverty and neglect, and to more effectively distinguish poverty from neglect.

#### I. THE CURRENT DEBATE ABOUT POVERTY AND CHILD NEGLECT

Families subject to the family regulation system are overwhelmingly poor. These class-based disparities overlap with and are significantly larger than racial disparities.<sup>9</sup> Multiple studies over multiple decades have linked poverty

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9. CPS agencies identify Black children, for instance, as victims of neglect or abuse in proportions 1.65 times greater than their numbers in the general population. C. Puzzanchera, M. Zeigler, M. Taylor, W. Kang & J. Smith, *Disproportionality Rates for Children of Color in Foster Care Dashboard (2010–2021)*, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES (2023), [http://ncjj.org/AFCARS/Disproportionality\\_Dashboard.asp?selDisplay=2](http://ncjj.org/AFCARS/Disproportionality_Dashboard.asp?selDisplay=2) [<https://perma.cc/RV8gJF37>]. Poor families similarly deemed to have neglected or abused their children were represented in proportions 2.4 times greater than their numbers in the general population. See *infra* note 10 (reporting percent of families in the general population and subject to CPS referrals who were below two hundred percent of the federal poverty line). Comparing poor families to middle class families has led to the observation that “families living below the [federal] poverty line are over 40 times more likely to enter child welfare than median-income families and the greatest predictor of maltreatment and child welfare entry is income.” Whitney L. Rostad, Tia McGill Rogers & Mark J. Chaffin, *The Influence of Concrete Support on Child Welfare Program Engagement, Progress, and Recurrence*, 72 CHILD. & YOUTH SERVS. REV. 26, 26 (2017).

Disparities by race and by class are, of course, overlapping. See, e.g., ROBERTS, *supra* note 4, at 36 (“Family policing is most intense in communities that exist at the intersection of structural racism and poverty.”). Some scholars have argued that racial disparities in the family regulation system reflect “indicators of social risk”—with child poverty the leading variable—more than racial bias. Brett Drake et al., *Racial/Ethnic Differences in Child Protective Services Reporting, Substantiation and Placement, with Comparison to Non-CPS Risks and Outcomes: 2005–2019*, 28 CHILD MALTREATMENT 683, 694, 696 (2023).



with both a tremendously increased likelihood of CPS agency involvement<sup>10</sup> and an increased likelihood of some form of child maltreatment.<sup>11</sup> Multiple studies have suggested “that economic factors may shape the child welfare report more so than the underlying behavior.”<sup>12</sup> One leading study tracked children eligible for Medicaid in California—that is, poor children—and found they were “significantly more likely to” be the subject of a child protection hotline call than other children by age five.<sup>13</sup> Parents’ education levels

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10. For instance, in a frequently-cited data set of families subject to a CPS investigation, 24.7 percent were in deep poverty, below 50 percent of the federal poverty line, and 83 percent were below 200 percent of the federal poverty line. MELISSA DOLAN, KEITH SMITH, CECILIA CASANUEVA & HEATHER RINGEISEN, RTI INT’L, NSCAW II BASELINE REPORT: INTRODUCTION TO NSCAW II 10 (2011), [https://www.acf.hhs.gov/sites/default/files/documents/opre/nscaw2\\_intro.pdf](https://www.acf.hhs.gov/sites/default/files/documents/opre/nscaw2_intro.pdf) [<https://perma.cc/7TZF-DMMN>]. That data refers to “in-home” families—families deemed to have neglected or abused a child but where the child remains in parental custody. In contrast, in the same year only 35.1 percent of the nation was under 200 percent of the poverty line. *Distribution of the Total Population by Federal Poverty Level (Above and Below 200 % FPL)*, KFF, <https://www.kff.org/other/state-indicator/population-up-to-200-fpl/?currentTimeframe=9&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> [<https://perma.cc/4PBP-4RK> F]; see also HUM. RTS. WATCH & AM. C.L. UNION, “IF I WASN’T POOR, I WOULDN’T BE UNFIT”: THE FAMILY SEPARATION CRISIS IN THE US CHILD WELFARE SYSTEM 61 (2022), <https://www.hrw.org/report/2022/11/17/if-i-wasnt-poor-i-wouldnt-be-unfit/family-separation-crisis-us-child-welfare> [<https://perma.cc/AB3S-YPP2>] (demonstrating a strong statistical relationship between local poverty and CPS investigation rates). The Supreme Court recognized the strong correlation between family poverty and foster care in 1977. See *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 833 (1977) (“It is certainly true that the poor resort to foster care more often than other citizens.”).

11. See Brett Drake, Melissa Jonson-Reid & Darejan Dvalishvili, *Poverty and Child Maltreatment*, in *HANDBOOK OF CHILD MALTREATMENT* 239, 242 (Richard D. Krugman & Jill E. Korbin eds., 2d ed. 2022) (“[P]oor children are overrepresented among maltreated children at a ratio of 3:1 or higher.”); ANDREA J. SEDLAK ET AL., U.S. DEP’T OF HEALTH & HUM. SERVS., *FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS* 12 (2018) (reporting that children in poverty “were more than 3 times as likely to be abused and about 7 times as likely to be neglected”); Lawrence M. Berger & Jane Waldfogel, *Economic Determinants and Consequences of Child Maltreatment* 10–11, 18–19 (OECD Soc., Emp. & Migration Working Papers, Paper No. 111, 2011) (summarizing research); see also Lawrence M. Berger, *Socioeconomic Factors and Substandard Parenting*, 81 SOC. SERV. REV. 485, 486 (2007) (noting “considerable body of evidence” linking poverty to child maltreatment and CPS agency involvement, but noting that “the links . . . have not been fully studied”). Income also correlates with later experiences in the system; families with more money reunify faster than those without. See *infra* note 247.

12. Kelley Fong, *Child Welfare Involvement and Contexts of Poverty: The Role of Parental Adversities, Social Networks, and Social Services*, 72 CHILD. & YOUTH SERVS. REV. 5, 6 (2017) (summarizing earlier research); see also, e.g., ANGELA BUTEL, CTR. FOR N.Y.C. AFFS., *THE NEW SCH., DATA BRIEF: CHILD WELFARE INVESTIGATIONS AND NEW YORK CITY NEIGHBORHOODS* 1 (2019) (finding that “[t]he 10 community districts in New York City with the highest rates of child poverty had rates of investigation four times higher, on average, than the 10 districts with the lowest child poverty”).

13. Emily Putnam-Hornstein & Barbara Needell, *Predictors of Child Protective Service Contact Between Birth and Age Five: An Examination of California’s 2002 Birth Cohort*, 33 CHILD. & YOUTH SERVS. REV. 1337, 1340–41 (2011). Sixty-five percent of Medicaid-eligible children at birth were reported to CPS by age five, compared with thirty-five percent of non-Medicaid eligible children. *Id.* at 1340. Adjusted for other risk factors, Medicaid-eligible children were 1.69 times more likely to be reported to CPS agencies than other children by age five. *Id.* at 1341.

correlate strongly with reports as well—those with a high school degree or less were six times more likely to be reported to child protection agencies than parents with college degrees.<sup>14</sup> The tremendous over-representation of poor families among those regulated and separated by CPS agencies is nothing new. It has been a feature of the legal system since its origins<sup>15</sup> and of prominent critiques of the legal system.<sup>16</sup> Among social scientists, child poverty is used as the leading “social risk” factor to measure expected rates of CPS agency involvement in specific communities.<sup>17</sup>

The strong correlation between poverty and CPS agency involvement creates the context for the recent debates about the intersection between poverty and neglect: Does that correlation reflect a system which confuses poverty for neglect or one which identifies parents engaging in harmful behaviors beyond poverty? This Part examines that debate and identifies what appear to be points of agreement and disagreement within it—especially the normative agreement that CPS agencies should not separate families due to poverty, and a descriptive disagreement over how often that occurs.

Social scientists also note that establishing and explaining a causal link between poverty and CPS agency involvement in families remains murky.<sup>18</sup> Any causal link that does exist could reflect one or more of several mechanisms,<sup>19</sup> and some of these are emphasized more by different sides of the debate. CPS agencies and family courts could, as critics allege, simply confuse poverty with neglect. Poverty could also trigger additional oversight by CPS agencies due to more mandatory reporters interacting with the families and possible biases by those reports or CPS agencies. Poverty could increase the stress on parents, leading to harmful behaviors they might not otherwise engage in. Poverty could also limit parents’ ability to address problems they experience, especially when costly steps, like new housing, or high-quality health care, mental health services, or substance abuse treatment, would help mitigate or resolve those problems.<sup>20</sup>

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14. *Id.* Notably, the effect of parental education was “dampened” for lower income and Medicaid-eligible families. *Id.* at 1341.

15. *See, e.g.,* LEROY H. PELTON, *FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES* 1–40 (1989) (describing class disparities from 1880s through 1970s).

16. *See, e.g.,* KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 114 (2017) (“Poor families are overrepresented in the child protective system.”); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 *UCLA L. REV.* 1474, 1484 (2012) (arguing the current child neglect system “addresses family economic deprivation with child removal rather than services and financial resources”).

17. Drake et al., *supra* note 11, at 684.

18. Berger & Waldfogel, *supra* note 11, at 10–11, 18–19; Berger, *supra* note 11, at 486.

19. For a summary of these possibilities, see BRIDGES, *supra* note 16, at 115–29.

20. It has also been suggested factors associated with poverty may limit some parents’ ability to respond to their poverty and lead to greater likelihood of child neglect. *See* U.S. ADVISORY BD.

The present debate has focused—perhaps too much—on the first potential explanation of poor families’ over-representation, that authorities confuse poverty for neglect. All sides to the debate agree this is normatively problematic, but disagree descriptively over how often it happens. By focusing on that possibility and not the more difficult fact patterns in which poverty could contribute to maltreatment or to families’ lesser ability to protect children from risks, the debate has not focused on the full range of cases in which poverty and neglect are intertwined. Critics sometimes label “neglect” as a near synonymous term for poverty, skirting over the possibility that poverty-related stressors could contribute to concerning parenting behaviors or that poverty could limit a family’s ability to mitigate the risk of such behaviors to children. Preservationists point out that neglect cases often involve fact patterns involving parental substance use, untreated mental illness, or intimate partner violence, all of which can sometimes create significant risks to children. That point, however, can obscure how poverty nonetheless constrains how parents address challenges like these. If a parent lacks the financial resources to leave an abusive partner or obtain quality substance abuse or mental health treatment,<sup>21</sup> and if some danger to the child exists, it is difficult to determine whether the resulting case is more about parental neglect of the child, or about the parent’s poverty.

A. *CRITICS OF THE STATUS QUO: THE LEGAL SYSTEM INTERVENES IN FAMILIES BECAUSE OF THEIR POVERTY, WHICH THE SYSTEM CONFUSES FOR NEGLECT*

Long-standing critiques accuse the child neglect legal system of intervening in the lives of poor families because of their poverty. In 1977, the Supreme Court noted “foster care has been condemned as a class-based intrusion into the family life of the poor.”<sup>22</sup> Two decades ago, Duncan Lindsey argued “[i]nadequacy of income, more than any other factor, constitutes the reason that children are removed—a conclusion that strikes at the very heart of the child protection system.”<sup>23</sup> More recently, Emma S. Ketteringham, managing

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ON CHILD ABUSE & NEGLECT, U.S. DEP’T OF HEALTH & HUM. SERVS., THE CONTINUING CHILD PROTECTION EMERGENCY: A CHALLENGE TO THE NATION 29, 87 (1993), <https://www.ojp.gov/pdffiles1/Digitization/144423NCJRS.pdf> [<https://perma.cc/MNQ2-2ZYF>] (suggesting “decline in neighborhood quality” associated with poverty contributes to child maltreatment and linking family poverty to “limited resources available in impoverished communities”).

21. See, e.g., Agnel Philip, Eli Hager & Suzy Khimm, *The “Death Penalty” of Child Welfare: In Six Months or Less, Some Parents Lose Their Kids Forever*, PROPUBLICA (Dec. 20, 2022, 8:30 AM), <https://www.propublica.org/article/six-months-or-less-parents-lose-kids-forever> [<https://perma.cc/AB5X-Xg7N>] (describing a case in which a parent’s fear of losing income led them to refuse a suggestion to attend inpatient drug treatment, which soon led to a termination of the parent-child relationship).

22. *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 833 (1977).

23. DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 175 (2d ed. 2004); see also PELTON, *supra* note 15, at 107 (arguing that the legal system violated the principle of not separating families for poverty alone from 1909 through Pelton’s writing in the 1980s).

director of the family defense practice at the Bronx Defenders, wrote in the *New York Times* that the broad category of “neglect” subjects poor families to regulation by CPS agencies that richer families would escape:

A parent in Park Slope . . . can deal with depression or anxiety privately. A parent in the South Bronx cannot. A parent in Park Slope can smoke marijuana or lose her temper and still be considered a good parent. A parent in the South Bronx would lose her kids for months, if not years, and have to go to drug-treatment and parenting classes to get custody back.<sup>24</sup>

Family Integrity & Justice Works, creator of the *Family Integrity and Justice Quarterly* which is dedicated to “replacing harmful child welfare approaches with efforts to support families in just and equitable ways,”<sup>25</sup> devoted its Spring 2022 issue to the theme “poverty is not neglect.”<sup>26</sup> Academics have similarly argued that interventions for neglect really address family poverty,<sup>27</sup> along with foundations,<sup>28</sup> advocacy organizations,<sup>29</sup> the American Bar Association,<sup>30</sup> some former CPS agency administrators,<sup>31</sup> some current agency staff,<sup>32</sup> and

24. Emma S. Ketteringham, *Live in a Poor Neighborhood? Better Be a Perfect Parent.*, N.Y. TIMES (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/opinion/poor-neighborhoods-black-parents-child-services.html> (on file with the *Iowa Law Review*). Ketteringham argues the class impact is intentional: “it is designed to treat structural failings as the personal flaws of low-income parents.” *Id.*

25. *Child Welfare*, PUB. KNOWLEDGE, <https://pubknow.com/expertise/child-welfare> [<https://perma.cc/6C3JJ857>].

26. FAM. INTEGRITY & JUST. Q., Spring 2022, at 1, 1.

27. *E.g.*, ROBERTS, *supra* note 4, at 69; LINDSEY, *supra* note 23, at 170; Kerry C. Woodward, *Race, Gender, and Poverty Governance: The Case of the U.S. Child Welfare System*, 28 SOC. POL.: INT’L STUD. GENDER, STATE & SOC’Y 428, 430 (2021); *see also* Asher Lehrer-Small, *Ending ‘Child Poverty Surveillance’: NYU Professor on Schools & Child Welfare*, THE74 (Oct. 7, 2022), <https://www.the74million.org/article/ending-child-poverty-surveillance-nyu-professor-on-schools-child-welfare> [<https://perma.cc/PX7U-DSE3>] (quoting Darcey Merritt, Associate Professor of Social Work at New York University, who described CPS as “child poverty surveillance”).

28. *E.g.*, *Our Vision*, REDLICH HORWITZ FOUND., <https://www.rhfdn.org/strategy> [<https://perma.cc/F2N5-gQ6G>] (setting a goal to “[c]hange policy so that race and poverty are no longer conflated with maltreatment” (emphasis omitted)).

29. HUM. RTS. WATCH & AM. C.L. UNION, *supra* note 10, at 89–100.

30. *See* AM. BAR ASS’N, RESOLUTION 606, at 9 (2022), <https://www.americanbar.org/content/dam/aba/administrative/news/2022/08/hod-resolutions/606.pdf> [<https://perma.cc/6PN8-YKUA>] (“For reports related to neglect, this [racial disparity in families reported to CPS agencies for suspected child maltreatment] may also suggest an ongoing correlation with poverty rates that are addressed through child removal rather than support to the family.”).

31. *E.g.*, Tom Morton & Jess McDonald, *America Must Change Its View of Poverty and Neglect*, IMPRINT (Feb. 15, 2021, 7:00 PM), <https://imprintnews.org/child-welfare-2/america-must-change-its-view-of-poverty-and-neglect/51659> [<https://perma.cc/4PCV-N8GK>].

32. A draft “Racial Equity Participatory Action Research & System Audit” cites New York City Administration for Children’s Services “staff and leadership” as blaming legal definitions of neglect for failing to account for poverty. ANTUAN WALLACE, ABIGAIL FRADKIN, MARSHALL BUXTON & SYDNEY HENRIQUES-PAYNE, NAT’L INNOVATION SERV., DRAFT: NEW YORK CITY

some op-ed writers.<sup>33</sup> Supreme Court dicta has echoed some of these concerns.<sup>34</sup> The disproportionate number of families of color who are poor creates a direct link between these concerns about poverty and similar concerns about the child neglect system's disproportionate regulation of Black and Indigenous families in particular.<sup>35</sup>

Importantly, this critique has become mainstream and bipartisan. The Trump Administration's federal Children's Bureau leadership wrote while in office that the field needed "to stop confusing poverty with neglect."<sup>36</sup> President Biden, while issuing the generally banal annual proclamation of a "National Foster Care Month," declared "[t]oo many children are removed from loving homes because poverty is often conflated with neglect, and the enduring effects of systemic racism and economic barriers mean that families of color are disproportionately affected."<sup>37</sup> Large, mainstream, organizations have endorsed similar ideas. The National Council of Juvenile and Family Court Judges published a pamphlet in 2021 on "Distinguishing Poverty Experienced by Families from Child Neglect," asserting that the legal system "operate[s] in a manner that fails to properly distinguish between poverty and neglect, thereby unfairly punishing families experiencing poverty—in particular families of color—and ultimately harming the very children and families they are supposed to help."<sup>38</sup> The Council blamed vague laws that define neglect broadly and permit CPS agencies and family courts to use their discretion to

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ADMINISTRATION FOR CHILDREN'S SERVICES RACIAL EQUITY PARTICIPATORY ACTION RESEARCH & SYSTEM AUDIT: FINDINGS AND OPPORTUNITIES 4, 28 (2020), <https://int.nyt.com/data/documenttools/draft-report-of-nyc-administration-for-children-s-services-racial-equity-survey/fc3e7ced070e17a4/full.pdf> [<https://perma.cc/EQE8-HYUV>].

33. Caleb Brennan, *Slash Child Abuse With One Simple Trick: Cash*, AM. PROSPECT (Oct. 14, 2022), <https://prospect.org/health/slash-child-abuse-with-one-simple-trick-cash> [<https://perma.cc/Q7Z7-MNR2>]; Michelle Goldberg, *Has Child Protective Services Gone Too Far?*, NATION (Oct. 19, 2015), <https://www.thenation.com/article/archive/has-child-protective-services-gone-too-far> [<https://perma.cc/YE5U-JQJN>].

34. See *Santosky v. Kramer*, 455 U.S. 745, 762–63 (1982) (criticizing termination of parental rights proceedings under "imprecise substantive standards" applied to parents who "are often poor, uneducated, or members of minority groups" as "vulnerable to judgments based on cultural or class bias"); *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 834 (1977) ("Studies also suggest that social workers of middle-class backgrounds, perhaps unconsciously, incline to favor continued placement in foster care with a generally higher-status family rather than return the child to his natural family, thus reflecting a bias that treats the natural parents' poverty and lifestyle as prejudicial to the best interests of the child."); *Stanley v. Illinois*, 405 U.S. 645, 648 (1972) (criticizing the state's proposed procedures for not providing a meaningful opportunity to the parent, "unmarried and impecunious as he is").

35. Dettlaff et al., *supra* note 4, at 505–06; ROBERTS, *supra* note 4, at 107–08.

36. Milner & Kelly, *supra* note 2. Milner and Kelly now work at Public Knowledge, which publishes the *Family Integrity & Justice Quarterly*. FAM. INTEGRITY & JUST. Q., *supra* note 26, at 3.

37. Proclamation No. 10192, 86 Fed. Reg. 23,849, 23,849 (Apr. 30, 2021).

38. NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, DISTINGUISHING POVERTY EXPERIENCED BY FAMILIES FROM CHILD NEGLECT 2 (2021), <https://www.ncjfcj.org/wp-content/uploads/2021/11/Distinguishing-Poverty.pdf> [<https://perma.cc/QX9B-CZ6W>].

conflate poverty and neglect.<sup>39</sup> In 2022, a coalition of organizations, including those in the child neglect law establishment such as Children’s Rights, Inc. and the National Association of Counsel for Children, submitted a report to the United Nations Committee on the Elimination of All Forms of Racial Discrimination alleging that the present law and legal system “penalize poverty.”<sup>40</sup>

*B. RESPONSES TO THE DOMINANT CRITICISM, AND THE NORMATIVE  
AND DESCRIPTIVE CONTOURS OF THE DEBATE*

Another school of thought makes two central claims in response to these critics and in support of largely preserving the present legal structure. The first claim is well summarized in the title of one article from this camp: *It’s Not “Just Poverty”: Educational, Social, and Economic Functioning Among Young Adults Exposed to Childhood Neglect, Abuse, and Poverty* by Sarah Font and Kathryn Maguire-Jack.<sup>41</sup> Comparing low-income children who were the subject of child neglect allegations to CPS agencies with other low-income children who were not, Font and Maguire-Jack find a correlation between neglect allegations and a list of more negative outcomes in young adulthood—less high school completion, lower earnings, more teenage parenthood, more criminal justice system involvement.<sup>42</sup> Something—the authors imply parental neglect—causes these worse outcomes.<sup>43</sup> This suggestion highlights a key descriptive point of disagreement about the extent to which poverty alone does lead to CPS involvement. Preservations suggest that the child neglect system rarely intervenes only due to poverty, and the primary reasons CPS agencies become engaged with families are those other than poverty, such as substance use and abuse, untreated mental illness, or domestic violence between parents.<sup>44</sup>

39. *Id.* at 2–4.

40. CHILD.’S RTS. & COLUMBIA L. SCH. HUM. RTS. INST., RACIAL (IN)JUSTICE IN THE U.S. CHILD WELFARE SYSTEM 2–3 (2022), <https://www.childrensrights.org/wp-content/uploads/imported-files/Childrens-Rights-2022-UN-CERD-Report-FINAL.pdf> [<https://perma.cc/2K8E-2W2N>]. The author serves on the *amicus curiae* committee of the National Association of Counsel for Children and has edited a NACC publication but had no role in the U.N. submission.

41. Font & Maguire-Jack, *supra* note 3, at 1. The authors are sociology and social work professors, respectively.

42. *Id.* at 6–7.

43. A gap seems to exist between the study’s title—suggesting a forceful rebuttal to claims that authorities confuse poverty for neglect—and the study’s rather limited findings. Notably, the study does not measure the immediate or near-term danger to children at the time of CPS involvement and instead measures longer-term outcomes. The study therefore does not answer the question whether CPS involvement would serve the needs of these children or families. Nor does it answer whether anti-poverty financial supports could have prevented the long-term negative outcomes found.

44. See, e.g., Lindsey Palmer, Sarah Font, Andrea Lane Eastman, Lillie Guo & Emily Putnam-Hornstein, *What Does Child Protective Services Investigate as Neglect? A Population-Based Study*, CHILD MALTREATMENT, July 13, 2022, at 1, 4–6 (explaining “neglect allegations . . . typically involve concerns related to parental substance use, mental illness, and domestic violence”).

Font and Maguire-Jack also acknowledge the difficulty in distinguishing family poverty from parental neglect, especially at a systemic level: “the evidence base that seeks to differentiate the effects of neglect from those of poverty and abuse is limited by considerable data and measurement issues.”<sup>45</sup> Moreover, they recognize that poverty and related conditions (such as living in neighborhoods which present adverse conditions, and difficulty in obtaining services and supports) could exacerbate problematic parenting behaviors, suggesting some difficulty in parsing out which problems to attribute to neglect and which to poverty in individual cases.<sup>46</sup> This discussion implies a limited degree of normative agreement: Poverty alone should *not* lead to CPS agency involvement. And the authors highlight a central descriptive point—the present system overwhelmingly impacts poor families. Tracking children subject to neglect allegations to young adulthood, they find that eighty-eight percent of families reported for alleged neglect (and ninety-three percent of families reported for both alleged neglect and alleged abuse) received public benefits at some point before the child turned sixteen.<sup>47</sup> Moreover, there is some agreement that anti-poverty interventions can help in at least some situations.<sup>48</sup>

Preservationists’ second claim is that because more than poverty drives CPS agency involvement, the appropriate state intervention—at least in many of these cases—is something more than addressing family poverty through voluntary financial supports. A set of academics and think tank researchers critiqued the notion

that neglect is simply a relabeling of poverty and that if poverty were eliminated, then neglect would no longer exist. In reality, “neglect” is rarely just about material needs. Rather, neglect is an umbrella term capturing a broad range of situations from disabling parental substance dependency to mental illness and family violence. *While economic and material support programs have shown promise in reducing the need for CPS involvement*, they are by no means the kind of panacea the abolitionists suggest.<sup>49</sup>

Dee Wilson, a former CPS agency administrator who publishes an influential newsletter, made a similar argument in an essay entitled *Abolish Child Welfare: What Then?*: “Child neglect is not ‘just poverty’ even in its situational and intermittent forms and never when neglect is chronic . . . Chronically neglecting families are

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45. Font & Maguire-Jack, *supra* note 3, at 2.

46. *Id.* at 3.

47. *Id.* at 10.

48. See NAOMI SCHAEFER RILEY, BRETT DRAKE, SARAH A. FONT & EMILY PUTNAM-HORNSTEIN, AM. ENTER. INST., WHAT CHILD PROTECTION IS FOR 2 (2021), <https://www.aei.org/wp-content/uploads/2021/08/What-Child-Protection-Is-for.pdf> [https://perma.cc/7MKG-CH3N] (acknowledging that “economic and material support programs have shown promise in reducing the need for CPS involvement”); Palmer et al., *supra* note 44, at 1 (“Addressing poverty and material needs has the potential to reduce child maltreatment, perhaps especially neglect.”).

49. SCHAEFER RILEY ET AL., *supra* note 48, at 2 (emphasis added).

poor (often severely poor), but their challenges go far beyond poverty and require much more than poverty related services.”<sup>50</sup> Importantly, there is some difference between these various authors regarding how much they defend CPS agencies as the proper entity to intervene. Font and Maguire-Jack acknowledge that “CPS may not be the appropriate agency to address the risks faced by these youth.”<sup>51</sup> In contrast, another preservationist recommends a legal system that separates more families and works less with families to reunify.<sup>52</sup>

These arguments suggest a more complicated debate about what it means for a neglect case or family separation to exist *because of* poverty, and that debate is far from settled. The descriptive claim that families involved with CPS agencies for alleged neglect face many challenges beyond simple lack of financial resources is well established. Kelley Fong, for instance, studied a cohort of impoverished parents who were the subjects of CPS neglect investigations, and found that they faced a range of challenges beyond lack of money: “domestic violence, substance abuse, mental illness, and criminal justice involvement.”<sup>53</sup> But that does not make it easy to disentangle cases from these families’ poverty. These families existed in “contexts of poverty,” in which parents sought support from service providers who triggered CPS agency involvement.<sup>54</sup> As Fong explained, “the experience of poverty typically means poor parents are connected to others whose disadvantages may prompt child welfare involvement.”<sup>55</sup> Poverty could exacerbate strained relationships, which could increase the risk of CPS calls made out of spite.<sup>56</sup> Professional service providers frequently made CPS hotline calls even when parents sought out their assistance.<sup>57</sup> Richer families would be much less likely to find themselves involved with CPS agencies even if they faced similar problems. For instance, “[t]he economic and social resources of more well-off families may help them address children’s behavior problems outside of the child

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50. Dee Wilson, *Abolish Child Welfare: What Then?*, DEE WILSON CONSULTING (Apr. 2022), <https://www.deewilsoncon.com/copy-of-comm-146> [<https://perma.cc/M34R-5SDU>].

51. Font & Maguire-Jack, *supra* note 3, at 10. Maguire-Jack and other colleagues separately “suggest[] that anti-poverty strategies have a potentially protective role against child maltreatment” and urge “more comprehensive economic support programs to reduce burdens on the child welfare system and prevent child maltreatment.” Kathryn Maguire-Jack, Michelle Johnson-Motoyama & Sarah Parmenter, *A Scoping Review of Economic Supports for Working Parents: The Relationship of TANF, Child Care Subsidy, SNAP, and EITC to Child Maltreatment*, AGGRESSION & VIOLENT BEHAV., July–Aug. 2022, at 1, 8.

52. Schaefer Riley’s book asserts that the present system leaves many children in dangerous homes, suggesting authorities should remove many more children. NAOMI SCHAEFER RILEY, *NO WAY TO TREAT A CHILD: HOW THE FOSTER CARE SYSTEM, FAMILY COURTS, AND RACIAL ACTIVISTS ARE WRECKING YOUNG LIVES* 15–16 (2021).

53. Fong, *supra* note 12, at 8 (summarizing earlier research).

54. *Id.* at 8–9.

55. *Id.* at 9–10 (also providing examples such as brief incarcerations, inpatient programs for substance abuse, kinship caregivers’ desire for a subsidy, and relationship dramas).

56. *Id.* at 10.

57. *Id.* at 11.



welfare system.”<sup>58</sup> As a result, it is easy to identify factors other than poverty in its narrowest meaning. But it is much more difficult to fully disentangle poverty from other factors, let alone prescribe whether interventions which address poverty versus other factors.

## II. THE LINK BETWEEN POVERTY, CHILD NEGLECT, AND CPS AGENCY INVOLVEMENT, AND LEGAL TOOLS TO IDENTIFY NEGLECT

Poverty and child neglect are overlapping categories. This Part explores that overlap, first demonstrating that cases that equate poverty with neglect do occur. Next, this Part explores cases with a more complex interplay between poverty and neglect, when poverty co-exists with a condition like parental substance use, mental illness, intimate partner violence and a harm or serious risk of harm to the child results. In these cases, poverty and neglect are deeply intertwined: Poverty imposes significant stressors on parents, which can worsen co-existing challenges to the point that they cause neglect, or poverty can prevent a parent from mitigating those challenges as a wealthier parent would.

This Part describes the inability of existing legal tools to distinguish poverty from neglect. In simpler cases, existing laws in many states either explicitly allow them to occur or at least grant discretion to CPS agencies and family courts, which sometimes exercise power based on family poverty. In more complex cases, fully disentangling poverty from neglect may not be possible. But the law barely tries. Some states exempt risks caused by poverty from the definition of neglect, but case law under those doctrines reveals that it offers at best weak protections for poor families. Moreover, certain legal doctrines assume away the question about poverty’s role—they frame such cases as solely about bad parental behavior, excluding poverty as a contributing factor and thus excluding provision of anti-poverty supports from the actions expected of the state to help families.

### A. CASES PRIMARILY ABOUT POVERTY

Some actions by the child protection system use the broad and vague concept of neglect to address situations that appear to involve family poverty with little or no parental wrongdoing or where child protective authorities’ concerns rest largely in parental poverty. This is particularly true in cases involving concerns about families’ housing. Homeless shelters have turned away families and told them that they will report them to CPS agencies if they fail to find alternative shelter placements.<sup>59</sup> State CPS agencies report

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<sup>58</sup>. *Id.*

<sup>59</sup>. Annie Gowen, *Homeless Families Who Turn to D.C. for Help Find No Room, Risk Child Welfare Inquiry*, WASH. POST (June 23, 2012, 8:16 PM), [https://www.washingtonpost.com/local/homeless-families-who-turn-to-dc-for-help-find-no-room-risk-child-welfare-inquiry/2012/06/23/gJQAv9bjyV\\_story.html](https://www.washingtonpost.com/local/homeless-families-who-turn-to-dc-for-help-find-no-room-risk-child-welfare-inquiry/2012/06/23/gJQAv9bjyV_story.html) (on file with the *Iowa Law Review*).

“[c]ircumstances [a]ssociated with [c]hild’s [r]emoval” to the federal Children’s Bureau for every child separated from parents or guardians and placed in foster care, and agencies list “[h]ousing” in a large number of cases—20,534 in 2020<sup>60</sup>—and homeless<sup>61</sup> families are severely over-represented in the child neglect legal system.<sup>62</sup> Some CPS agencies increase a family’s risk assessment score if they are homeless, in housing CPS deems unsafe, or facing eviction.<sup>63</sup> The social work literature refers to family housing as “a dominant theme in child neglect cases.”<sup>64</sup> Poverty leading to housing challenges and food insecurity has been shown to have particularly strong correlation with CPS agency investigations for neglect.<sup>65</sup> The Pulitzer-Prize-winning book *Invisible Child: Poverty, Survival & Hope in an American City* tells the story of a family separated by a CPS agency out of concerns about their housing conditions even when those conditions appeared to be the fault of the family’s landlord and the CPS agency failed to assist the family effectively in remedying the situation.<sup>66</sup> CPS agencies can pressure domestic violence victims to leave their partners with their children yet offer little material assistance in finding new housing.<sup>67</sup> Other cases involving a single instance of a parent leaving a child unsupervised due to the lack of child care and the parent’s need to work—thus reflecting

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60. CHILD.’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., THE AFCARS REPORT: PRELIMINARY FY 2020 ESTIMATES AS OF OCTOBER 04, 2021 – NO. 28, at 2 (2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport28.pdf> [<https://perma.cc/W6KL-W4SX>].

61. “Homeless” can be a term of art. *See, e.g.*, 42 U.S.C. § 11434a(2) (2018) (defining “homeless children and youths” for purposes of the McKinney–Vento Homeless Assistance Act). I do not offer a precise definition of the term because child neglect law, such as the authorities cited *infra* notes 76–78, and child neglect system data, *see, for example*, CHILD.’S BUREAU, *supra* note 60, at 2, do not generally do so.

62. CASEY FAM. PROGRAMS, WHAT DO WE KNOW ABOUT THE IMPACT OF HOMELESSNESS AND HOUSING INSTABILITY ON CHILD WELFARE-INVOLVED FAMILIES? 1 (2019), [https://www.casey.org/media/TS\\_Impact-homelessness-housing-instability\\_2021.pdf](https://www.casey.org/media/TS_Impact-homelessness-housing-instability_2021.pdf) [<https://perma.cc/VYZ6-TR4A>].

63. KELLEY FONG, INVESTIGATING FAMILIES: MOTHERHOOD IN THE SHADOW OF CHILD PROTECTIVE SERVICES 113 (2023).

64. *See, e.g.*, Joy Duva & Sania Metzger, *Addressing Poverty as a Major Risk Factor in Child Neglect: Promising Policy and Practice*, 25 PROTECTING CHILD. 63, 65 (2010); *see also* Mi-Youn Yang, *The Effect of Material Hardship on Child Protective Service Involvement*, 41 CHILD ABUSE & NEGLECT 113, 117 (2015) (reporting that “36 [percent] of CPS-investigated respondents experienced housing hardship” compared with twenty-six percent of other families).

65. *Id.* at 122.

66. ANDREA ELLIOTT, *INVISIBLE CHILD: POVERTY, SURVIVAL & HOPE IN AN AMERICAN CITY* 368–76 (2021).

67. Courtney Cross, *Criminalizing Battered Mothers*, 2018 UTAH L. REV. 259, 276.

family poverty more than anything else—have led to removals.<sup>68</sup> Such cases are not new features of the family regulation system.<sup>69</sup>

Cases like these are primarily about parents' poverty. The key issue addressed by state CPS agencies—lack of an adequate home or adequate child care—directly results from parental poverty. These cases may involve situations in which parents are blameless and simply poor. Or they may involve cases in which parents engaged in some behavior that may have left a child in danger—such as leaving a young child home alone for an extended period of time while the parent worked—but only in response to a problem created by poverty. Poverty is the primary cause of authorities' concern, but the legal system labels the situation “neglect” by individuals calling child protection hotlines, agencies separating families, and courts approving such separations.

There is little doubt that these poverty cases happen, but it is difficult to quantify what proportion of all cases are so clearly about poverty. This difficulty relates from multiple factors. The law does not distinguish different types of neglect, and data reporting requirements do not lead to precise information.<sup>70</sup> Moreover, the line between cases that are only about poverty and those that involve an overlap between poverty and some distinct negative behavior by a parent requires subjective judgments, and no easy test exists to distinguish between the two. For this Article's purposes,<sup>71</sup> the point is simply that in some cases poverty alone leads to CPS agency intervention in families and to the legal system labeling poverty as neglect, and the law has failed to prohibit such actions.<sup>72</sup>

In many cases, the law specifically allows conditions of poverty to justify CPS agency intervention. State neglect statutes typically define a parent's inability to provide a minimally adequate level of housing, food, or other basics

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68. For discussion of such a case, see Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 STAN. L. & POL'Y REV. 217, 223–31 (2022). One former foster youth, now a social worker and advocate for abolishing the present system, described her case as about child care: “[w]e were home unsupervised as my single black father worked evenings as a janitor to provide for his children. There was no abuse, no neglect, no harm—just poverty.” *From Director MJ (Maleeka Jihad)*, ABOLISH (MJCF Coalition, Denver, Colo.), Jan. 2023, at 1, 1 (on file with author).

69. See, e.g., PELTON, *supra* note 15, at 52 (describing similar cases in the 1970s and 1980s).

70. E.g., DANA WEINER, CLARE ANDERSON & KRISTA THOMAS, CHAPIN HALL AT THE UNIV. OF CHI., CHAPIN HALL POLICY BRIEF: SYSTEM TRANSFORMATION TO SUPPORT CHILD & FAMILY WELL-BEING: THE CENTRAL ROLE OF ECONOMIC & CONCRETE SUPPORTS 3 (2021), <https://www.chapinhall.org/wp-content/uploads/Economic-and-Concrete-Supports.pdf> [<https://perma.cc/2PNJ-Y6SP>] (“[C]urrent data reporting makes it difficult to parse problems related solely to poverty from neglect signifying maltreatment.”).

71. Elsewhere, I have argued for the development of much more precise definitions of neglect, in part to mitigate the risk that neglect could be understood to encompass these cases primarily caused by poverty. See generally Gupta-Kagan, *supra* note 68.

72. See *supra* notes 59–69 and accompanying text.

to children as neglect,<sup>73</sup> which can obviously result from parental poverty. Some states' definitions of neglect specifically exclude poverty from this definition. New York, for instance, defines failure to provide children "with adequate food, clothing, shelter or education" to be neglect only when the parent is "financially able to do so or offered financial or other reasonable means to do so."<sup>74</sup> The (in)effectiveness of this "poverty defense" is discussed in Section II.C.1.<sup>75</sup> The key point here is that about half of states do not even exempt poverty from their definition of neglect, making it possible to declare a parent neglectful in situations of pure poverty. In addition, consider homelessness. At least three states explicitly provide that homelessness on its own is not neglect,<sup>76</sup> and leading institutional players in the field suggest a similar view.<sup>77</sup> 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 without consideration of any additional facts,<sup>78</sup> and the remainder are silent in statutory definitions.

*B. HARDER CASES: POVERTY PLUS OTHER FACTORS, AND SOCIAL SCIENCE  
EVIDENCE ON THE OVERLAP BETWEEN POVERTY, NEGLECT, AND  
CPS AGENCY INVOLVEMENT*

The challenge in distinguishing poverty from neglect arises because neglect cases frequently involve families which simultaneously struggle with poverty and some other challenge, such as substance use, mental illness, or

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73. See CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., DEFINITIONS OF CHILD ABUSE AND NEGLECT 3 (2022), <https://www.childwelfare.gov/pubPDFs/define.pdf> [https://perma.cc/3DYW-WY8Y] ("Neglect is frequently defined as the failure of a parent . . . 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.").

74. N.Y. FAM. CT. ACT. § 1012(f)(i)(A) (McKinney 2023).

75. See *infra* Section II.C.1.

76. California became the latest addition to this list in Act of September 29, 2022, ch. 832, § 1, 2022 Cal. Legis. Serv. 8741, 8741 (West) (codified as amended at CAL. WELF. & INST. CODE § 300(b)(2)(A) (2023)). At least two other states previously defined neglect to exclude homelessness alone. OKLA. STAT. tit. 10A, § 1-1-105(20) (2023); WASH. REV. CODE § 26.44.020(19) (2023).

77. See, e.g., CASEY FAM. PROGRAMS, *supra* note 62, at 1.

78. CONN. GEN. STAT. ANN. §§ 46b-120(8), 46b-129(j)(2) (West Supp. 2023) (permitting a child adjudged "uncared for" to be committed to Commissioner of Children and Families); COLO. REV. STAT. § 19-3-102(1)(e) (2023). Case law can also treat housing instability as neglect. See, e.g., *In re Jesus M.*, 118 A.D.3d 1436, 1437-38 (N.Y. App. Div. 2014) (holding that a parent's inability to maintain stable housing for six months established that she neglected her child); *In re Niya Kaylee S.*, 110 A.D.3d 460, 461 (N.Y. App. Div. 2013) (holding that continued "lack of an income source, medical care, and stable housing" amounted to neglect). For a critique of the child protection system's treatment of homeless parents, see Bridget Lavender, Comment, *Coercion, Criminalization, and Child 'Protection': Homeless Individuals' Reproductive Lives*, 169 U. PA. L. REV. 1607, 1652-68 (2021).

domestic violence between adults.<sup>79</sup> The presence of such struggles does not, however, distinguish a case from poverty, especially when they overlap with poverty, which can cause or exacerbate these conditions. For instance, rates of depression among mothers of infants are higher when the mothers are poor,<sup>80</sup> or face significant stress from housing costs.<sup>81</sup> And poor mothers suffering from severe depression are more likely to also have suffered physical abuse by a partner or a substance use problem.<sup>82</sup>

In particular, a growing body of social science evidence shows that financial supports to fight poverty can reduce the number of families impacted by CPS agencies as well as child maltreatment. A recent study modeled a collection of anti-poverty interventions (a child allowance, expanded earned income tax credit, expanded Supplemental Nutrition Assistance Program benefits, and an increased minimum wage) and projected an eleven to twenty percent reduction in the number of families subject to CPS involvement.<sup>83</sup> The projected decrease would be particularly large for Black parents, single parents, and parents without a high school degree.<sup>84</sup>

Those projections build off of a growing body of evidence linking specific anti-poverty supports to declining rates of CPS involvement.<sup>85</sup> Economists found that providing families of young children one thousand dollars more in cash assistance reduced CPS referrals by age three for neglect by ten percent and abuse by thirty percent, and reduced the odds of child mortality (by any cause) by age five by thirty percent.<sup>86</sup> Social scientists demonstrated that

79. I do not suggest that these problems equal neglect. As a matter of law, neglect requires a parental failure to meet a minimal duty of care, and that such failure causes harm or severe risk of harm to the child. As neglect is currently understood, the high prevalence of parental substance use, mental illness, and domestic violence among families subject to CPS agency involvement show that these conditions correlate strongly with such involvement.

80. TRACY VERICKER, JENNIFER MACOMBER & OLIVIA GOLDEN, *THE URB. INST., INFANTS OF DEPRESSED MOTHERS LIVING IN POVERTY: OPPORTUNITIES TO IDENTIFY AND SERVE* 1–2 (2010), <https://www.urban.org/sites/default/files/publication/29086/412199-Infants-of-Depressed-Mothers-Living-in-Poverty-Opportunities-to-Identify-and-Serve.PDF> [<https://perma.cc/STR4-KPAR>].

81. Stacy Elliott, Stacia M. West & Amy B. Castro, *Rent Burden and Depression Among Mothers: An Analysis of Primary Caregiver Outcomes*, 2 J. POL'Y PRAC. & RSCH. 285, 293 (2021).

82. VERICKER ET AL., *supra* note 80, at 2.

83. Jessica Pac et al., *The Effects of Child Poverty Reductions on Child Protective Services Involvement*, 97 SOC. SERV. REV. 43, 72 (2023).

84. *Id.* at 72–73.

85. The federal Children's Bureau has summarized the bottom line: "What is increasingly clear is that helping families move out of poverty decreases the risk to children." CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., *SEPARATING POVERTY FROM NEGLECT IN CHILD WELFARE* 2 (2023), <https://www.childwelfare.gov/pubPDFs/bulletins-poverty-neglect.pdf> [<https://perma.cc/F9GH-2CLX>] (emphasis omitted).

86. Lindsey R. Bullinger, Analisa Packham & Kerri M. Raissian, *Effects of Universal and Unconditional Cash Transfers on Child Abuse and Neglect* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31733, 2023), [https://www.nber.org/system/files/working\\_papers/w31733/w31733.pdf](https://www.nber.org/system/files/working_papers/w31733/w31733.pdf) [<https://perma.cc/3KLF-M36E>]. The authors used variations in payments by the Alaska Permanent Fund Dividend to examine the impact of additional funds provided. *Id.* at 1–4.

expanding state Supplemental Nutrition Assistance Program (“SNAP,” also known as food stamps) eligibility and benefits reduces the frequency of CPS neglect investigations into families<sup>87</sup> and the frequency with which CPS agencies substantiate parents for neglect and separate parents and children.<sup>88</sup> For every five percent increase in the number of families receiving SNAP benefits, social scientists estimated that CPS agency caseloads declined between 7.6 and 14.3 percent.<sup>89</sup> Earlier research found similar declines in neglect reports and substantiations when states increased minimum wages by one dollar per hour.<sup>90</sup> An annual Earned Income Tax Credit (“EITC”) expansion of one thousand dollars was found to decrease the likelihood of CPS agency involvement with a family by eight to ten percent,<sup>91</sup> states which increased state EITC during the Great Recession had 7.4 percent fewer foster care entries than states which did not,<sup>92</sup> and refundable state EITC programs (which benefit more low-income families than non-refundable programs) correlates with an eleven percent decrease in family separations to foster care

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87. Anna E. Austin et al., *Association of State Expansion of Supplemental Nutrition Assistance Program Eligibility with Rates of Child Protective Services-Investigated Reports*, 177 JAMA PEDIATRICS 294, 295 (2023). States which eliminated asset tests to expand SNAP eligibility and states which increased income limits for SNAP eligibility each saw significant decreases in CPS investigations, especially for neglect, and states which took both steps saw larger decreases. *Id.* at 297–98. Although slight decreases occurred for abuse investigations, more significant decreases occurred for neglect. *Id.* The study did not quantify percentage decreases.

88. Michelle Johnson-Motoyama et al., *Association Between State Supplemental Nutrition Assistance Program Policies, Child Protective Services Involvement, and Foster Care in the US, 2004-2016*, JAMA NETWORK OPEN, July 13, 2022, at 1, 5. Sociologists have also found a 4.4 percent decrease in child neglect or abuse allegations following addition of an additional store accepting SNAP benefits in rural areas, correlating ability to use SNAP benefits with reduced family regulation system involvement. Lindsey Rose Bullinger, Julia M. Fleckman & Kelley Fong, *Proximity to SNAP-Authorized Retailers and Child Maltreatment Reports*, ECON. & HUM. BIOLOGY, Aug. 2021, at 1, 5.

89. Johnson-Motoyama et al., *supra* note 88, at 9. Impacts were especially large when states implemented transitional SNAP benefits—benefits for families that were losing Temporary Assistance to Needy Families—suggesting a particularly strong impact when families are “particularly vulnerable to CPS involvement” due to the loss of financial supports. *Id.*

90. Kerri M. Raissian & Lindsey Rose Bullinger, *Money Matters: Does the Minimum Wage Affect Child Maltreatment Rates?*, 72 CHILD. & YOUTH SERVS. REV. 60, 63–64 (2017).

91. Lawrence M. Berger, Sarah A. Font, Kristen S. Slack & Jane Waldfogel, *Income and Child Maltreatment in Unmarried Families: Evidence from the Earned Income Tax Credit*, 15 REV. ECON. HOUSEHOLD 1345, 1357–58 (2017). The timing of EITC and Child Tax Credit payments—which often come via tax refunds—has also been found to impact CPS agency involvement; providing those payments sooner reduced reports and substantiation of neglect or abuse in the month that followed those payments. Nicole L. Kovski, Heather D. Hill, Stephen J. Mooney, Frederick P. Rivara & Ali Rowhani-Rahbar, *Short-Term Effects of Tax Credits on Rates of Child Maltreatment Reports in the United States*, PEDIATRICS, July 2022, at 1, 4–5.

92. Amelia M. Biehl & Brian Hill, *Foster Care and the Earned Income Tax Credit*, 16 REV. ECON. HOUSEHOLD 661, 664 (2018). When Congress expanded the federal EITC in 2009, researchers compared changes in foster care entry rates in states who similarly expanded state EITCs (which are often linked to the size of the federal EITC, so expand or contract in unison) to those which did not. *Id.*

compared to states without their own EITC.<sup>93</sup> A more recent study found that “each additional \$1000 spent by states on benefit programs” for poor individuals reduced reports of neglect or abuse, agency substantiations of such reports, and agency foster care placements.<sup>94</sup> States which elected to expand Medicaid eligibility under the Affordable Care Act (which increased the rate of health insurance coverage for some low-income parents) saw a reduction of screened-in allegations of child neglect, compared with states that refused to expand Medicaid.<sup>95</sup> Provision of permanent housing subsidies to homeless families cut the rate of foster care placements by more than half compared to families offered no housing subsidies.<sup>96</sup> Receipt of child care subsidies reduced the risk of both neglect and physical abuse.<sup>97</sup> Even one-time financial benefits can have a positive impact. One study compared babies born in December—whose parents were eligible for certain tax benefits within months—to those born in January—whose parents had to wait a year—and found the December babies were the subject of fewer allegations of neglect or abuse, fewer investigations, and ultimately spent fewer days in foster care than January babies, and that these differences lasted until the children turned eight.<sup>98</sup>

These findings suggest that even if preservationists are right that factors other than poverty are present in many cases, that does not render poverty irrelevant. Neglect and poverty are deeply intertwined, and anti-poverty supports may reduce the risk to children in cases categorized as neglect.

The success of anti-poverty supports in reducing child maltreatment and CPS agency involvement has several plausible explanations, which can co-exist

93. Whitney L. Rostad, Katie A. Ports, Shichao Tang & Joanne Klevens, *Reducing the Number of Children Entering Foster Care: Effects of State Earned Income Tax Credits*, 25 CHILD MALTREATMENT 393, 395 (2020); see also Nicole L. Kovski et al., *Association of State-Level Earned Income Tax Credits with Rates of Reported Child Maltreatment, 2004-2017*, 27 CHILD MALTREATMENT 325, 330 (2022) (finding increase in refundable state EITC benefits correlates with reduced allegations of child neglect).

94. Henry T. Puls et al., *State Spending on Public Benefit Programs and Child Maltreatment*, PEDIATRICS, Nov. 1, 2021, at 1, 3-4.

95. Emily C.B. Brown et al., *Assessment of Rates of Child Maltreatment in States with Medicaid Expansion vs States Without Medicaid Expansion*, JAMA NETWORK OPEN, June 14, 2019, at 1, 6. Medicaid expansion largely assisted adults in obtaining health insurance, as children were already largely covered through other programs. Medicaid expansion likely helps children by helping the adults to take care of them, by increasing parents’ employment and access to medical and mental health care, and helping parents making housing payments. Clare Huntington, *Pragmatic Family Law*, 136 HARV. L. REV. 1501, 1523-24, 1567-68 (2023) (collecting studies).

96. DANIEL GUBITS ET AL., FAMILY OPTIONS STUDY: SHORT-TERM IMPACTS OF HOUSING AND SERVICES INTERVENTIONS FOR HOMELESS FAMILIES 70-71 (2015), [https://www.huduser.gov/portal/portal/sites/default/files/pdf/FamilyOptionsStudy\\_final.pdf](https://www.huduser.gov/portal/portal/sites/default/files/pdf/FamilyOptionsStudy_final.pdf) [<https://perma.cc/JAE5-GC45>].

97. Mi-Youn Yang, Kathryn Maguire-Jack, Kathryn Showalter, Youn Kyoung Kim & Kristen Shook Slack, *Child Care Subsidy and Child Maltreatment*, 24 CHILD & FAM. SOC. WORK 547, 551-52 (2019).

98. Katherine Rittenhouse, *Income and Child Maltreatment: Evidence from a Discontinuity in Tax Benefits* 3 (Apr. 10, 2023) (unpublished manuscript), <https://krittenh.github.io/katherinen-rittenhouse.com/Income%20and%20Child%20Maltreatment.pdf> [<https://perma.cc/9NYU-WBQR>].

simultaneously. To the extent CPS agencies and individuals who report alleged neglect to them do confuse neglect with poverty, anti-poverty programs can reduce the frequency of such errors. But the positive impact of financial supports extends beyond limiting confusion. Anti-poverty programs could reduce poverty-induced stress, thereby moderating problems like mental illness, substance use, and intra-family violence.<sup>99</sup> Lower levels of poverty could permit families a greater ability to address the challenges they do face.<sup>100</sup> Consistent with this theory, anti-poverty programs are correlated with a range of positive benefits to children's general welfare; receipt of the EITC, for instance, appears to reduce infant mortality and low birth weight, and improve self-reports of child and maternal health, while reducing hospital admissions for children's head injuries and self-reported parental behaviors which researchers use to identify neglect.<sup>101</sup> In the face of such evidence, however, some preservationists argue that "economic supports alone are unlikely to resolve parental health conditions that manifest as neglect."<sup>102</sup>

Quantifying how much anti-poverty programs reduce concerning parental behaviors and how much they reduce CPS agencies' concerns about parental behavior—"separate—though overlapping—phenomena"<sup>103</sup>—remains challenging. The empirical data shows strong correlations between anti-poverty programs and neglect reports to CPS agencies and agencies' subsequent neglect findings. Other research strongly correlates both family and neighborhood poverty with CPS agency regulation of families and rates of what researchers considered child maltreatment.<sup>104</sup> But causal relationships between poverty and either actual maltreatment or CPS agency involvement is more difficult to establish.<sup>105</sup> For instance, the study showing that a higher minimum wage leads to fewer reports and substantiations does not and

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99. Consistent with this view, many in the child neglect and abuse field assert that poor parents are more likely to neglect or abuse their children. *See, e.g.,* WEINER ET AL., *supra* note 70, at 3 ("[F]amilies experiencing poverty and economic insecurity do have higher rates of child abuse and neglect.").

100. *E.g.,* BRIDGES, *supra* note 16, at 117–19; Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 175.

101. Kovski et al., *supra* note 91, at 2 (summarizing research).

102. Palmer et al., *supra* note 44, at 7. The authors allow that "[f]urther research is needed" to evaluate whether "packaging economic supports with health- and behavior-focused interventions may reduce conditions that lead to CPS involvement." *Id.*

103. Pac et al., *supra* note 83, at 46.

104. Kristen S. Slack, Lawrence M. Berger & Jennifer L. Noyes, *Introduction to the Special Issue on the Economic Causes and Consequences of Child Maltreatment*, 72 CHILD. & YOUTH SERVS. REV. 1, 2 (2017); *see also* Kathryn Maguire-Jack & Sarah A. Font, *Intersections of Individual and Neighborhood Disadvantage: Implications for Child Maltreatment*, 72 CHILD. & YOUTH SERVS. REV. 44, 48–49 (2017) (finding that both individual and neighborhood poverty both correlate with higher self-reports of neglectful behavior).

105. Slack et al., *supra* note 104, at 1.



cannot answer why.<sup>106</sup> Reports and substantiations measure actions taken by individuals reporting concerns to CPS agencies and the agencies themselves, which may not always be accurate and which may reflect biases on the part of reporters or agencies, and are thus, at best, an imperfect proxy for parental behaviors of concern.<sup>107</sup> More broadly, family poverty has long been linked with insufficient housing, nutrition, medical care, child care, as well as significant stress,<sup>108</sup> and the National Academy of Sciences, evaluating decades of such research, concluded “that income poverty itself causes negative child outcomes.”<sup>109</sup> It is possible that these outcomes trigger CPS agency involvement rather than actual neglect by parents.

Relatively few studies examine both CPS agency action and actual behaviors by parents, and they do not tell a consistent story about whether poverty impacts one more than the other. The study showing that more generous EITC benefits reduce the number of families subject to CPS agency involvement also included measures of parental behaviors which could be labeled neglectful and of CPS agency involvement.<sup>110</sup> The study found that more generous benefits reduced negative parental behaviors and the likelihood of CPS agency involvement, but the extra income had a much larger impact on CPS agency actions than on parental behavior. Among low-income, single-parent families, extra EITC benefits reduced self-reported “behaviorally approximated neglect” by three to four percent and reduced CPS involvement by eight to ten percent.<sup>111</sup> A different study found different proportions—increased benefits to poor families reduced reports, substantiations, foster care placements and child fatalities attributed to maltreatment, with larger decreases in fatalities (and thus, presumably, in dangerous parental behaviors, at least among the most severe set of cases) than in agency actions.<sup>112</sup> Another study found that parental depression (which itself can be exacerbated by poverty<sup>113</sup>) partly—but only partly—explained the connection found between

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106. See Raissian & Bullinger, *supra* note 90, at 65–66. Intriguingly, the authors of that study appeared more concerned with the risk that measuring CPS reports, substantiations, and family separations would underestimate the frequency of neglect. See *id.* at 62–63 (justifying use of CPS reports “despite likely being an undercount”). It is certainly true that many cases which CPS agencies would consider neglect are not reported to those agencies. But the lack of attention to errors in the other direction—CPS agencies wrongly concluding that a parent neglected or abused a child—is a key shortcoming of this approach.

107. See Kovski et al., *supra* note 91, at 3.

108. Daan Braveman & Sarah Ramsey, *When Welfare Ends: Removing Children from the Home for Poverty Alone*, 70 TEMP. L. REV. 447, 461 (1997).

109. COMM. ON BLDG. AN AGENDA TO REDUCE THE NO. OF CHILD. IN POVERTY BY HALF IN 10 YEARS, THE NAT’L ACADS. OF SCIS. ENG’G MED., A ROADMAP TO REDUCING CHILD POVERTY 89 (Greg Duncan & Suzanne Le Menestrel, eds., 2019).

110. Berger et al., *supra* note 91, at 1348–50.

111. *Id.* at 1357–58.

112. Puls et al., *supra* note 94, at 3–5.

113. See Elliott et al., *supra* note 81, at 293.

poverty and CPS investigations.<sup>114</sup> More such studies are necessary to gain a fuller picture. As one social science study noted, “[t]he concept of poverty is nuanced, and its pathways to child maltreatment and CPS involvement are multifaceted.”<sup>115</sup>

To illustrate the difficulties presented by cases which involve both family poverty and some problematic parental behavior, Khiara Bridges explores *In re N.M.W.*, in which an appellate court approved a CPS agency’s removal of a six-year-old girl from a house dirty enough—there was trash and animal feces in multiple rooms—that the authorities concluded she faced a significant health risk.<sup>116</sup> If one takes poverty out of the analysis, this case can support the “it’s not ‘just poverty’” side of the debate—plenty of poor families keep trash and animal feces out of their homes, so this conduct likely reflects some pathology or fault of the parent. But that analysis is incomplete. Addressing the family’s poverty might have reduced stressors on the parent enough that she would have prevented the unsanitary conditions in her home. Or, pathology or not, more financial resources could have mitigated whatever risks existed through hiring a cleaning service.<sup>117</sup> Broadening the question about poverty in this way demonstrates how disentangling poverty from neglect in this case—and cases involving a range of other fact patterns—remains quite difficult.

### C. EXISTING LAW

The normative agreement that poverty should not lead to CPS agency intervention for neglect, coupled with the “nuanced” and “multifaceted” relationship between poverty and neglect<sup>118</sup> raises the question: how well do existing legal tools perform in distinguishing poverty from neglect? The complicated relationship between poverty and neglect raises harder questions: when a family is poor, when a parent exhibits some troublesome behaviors, and when a child is at risk of harm, how well does the law identify whether the risk is because of neglect? How well does the law identify what interventions are appropriate and, especially, whether more anti-poverty supports are appropriate?

This Section suggests the answer to all of these questions is “poorly.” Poverty and neglect’s complicated relationship may be impossible to disentangle. But rather than wrestle with that essential challenge, the most the law offers to distinguish poverty from neglect are simple statements in some state statutory codes that poverty is not neglect. These provisions have not proven

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114. Yang, *supra* note 64, at 123.

115. Abidemi Okechukwu & Ivo Abraham, *Child Maltreatment and the Ecosystem of Socioeconomic Inequities and Inequalities*, JAMA NETWORK OPEN, July 13, 2022, at 1, 1.

116. *In re N.M.W.*, 461 N.W.2d 478, 479–80 (Iowa Ct. App. 1990); BRIDGES, *supra* note 16, at 126–27.

117. The dissenting opinion made this point. *In re N.M.W.*, 461 N.W.2d at 483 (Sackett, J., dissenting).

118. See *id.*

capable of disentangling poverty and neglect, especially in harder cases. Worse, some aspects of the law artificially separate poverty from neglect, assuming away the question. For instance, the law imposes requirements on state CPS agencies to work to prevent family separations and to reunify families once separated, but mostly exempts anti-poverty supports from those requirements. As a result, existing law offers no requirements for CPS agencies to provide or facilitate economic supports to families in poverty.

### 1. “The Poverty Defense”<sup>119</sup>

Statutes in about half of states include provisions which define neglect to exclude conditions of poverty,<sup>120</sup> and the draft Restatement of Children and the Law includes similar language.<sup>121</sup> In such states, 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>122</sup> However, the leading study of these provisions suggests it does not stop agencies from filing many cases alleging parents are neglectful, or stop courts from finding in agencies’ favor in these 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>123</sup> While positive court decisions do exist,<sup>124</sup> Gilman concludes that “most courts . . . easily find non-economic . . . grounds” to explain parents’ neglect.<sup>125</sup> Notably, courts do so through subjective determinations—what Gilman calls “euphemisms for poverty”—such as “immaturity, nonchalance, poor decision-making,

119. Gilman, *supra* note 7, at 495.

120. *Id.* at 520. California became a high-profile addition to this list in 2022. Act of September 29, 2022, ch. 832, § 1, 2022 Cal. Legis. Serv. 8741, 8741 (West) (codified as amended at CAL. WELF. & INST. CODE § 300(b)(2)(A) (2023)).

121. The Restatement’s definition of “[p]hysical neglect” would require courts to “tak[e] into consideration the financial resources of the parent.” RESTATEMENT OF CHILD. & THE L. § 2.24(b)(1) (AM. L. INST., Tentative Draft No. 2, 2019).

122. D.C. CODE § 16-2301(g)(A)(ii) (Supp. 2023); *see also* S.C. CODE ANN. § 63-7-20(6)(a)(iii) (Supp. 2022) (defining “neglect” as failing to adequately care for the child when “financially able to do so”). Some states’ poverty defenses are limited. For instance, in New York, the poverty defense applies when a parent is alleged to have not provided “adequate food, clothing, shelter or education, . . . or medical, dental, optometrical or surgical care” but not when the parent is alleged to have failed to “provid[e] the child with proper supervision or guardianship” including when the allegation is rooted in substance “misus[e].” *Compare* N.Y. FAM. CT. ACT § 1012(f)(i)(A) (McKinney 2023) *with id.* § 1012(f)(i)(B).

123. Gilman, *supra* note 7, at 523.

124. *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). Even when a parent wins a case using the poverty defense, they are not spared the stress of such litigation and the possibility of a family separation during the pendency of that litigation.

125. Gilman, *supra* note 7, 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.

inattentiveness, [and] instability.”<sup>126</sup> It is not difficult to imagine this lens would view cases involving both poverty and parental substance use, for instance, as unrelated to poverty. Even more clear cut cases, such as those involving inadequate child care or housing, can be viewed as being not about poverty if they involve some instance of “poor decision-making” or “instability,” such as parental behavior that leads to eviction or a parent’s decision to leave a child unsupervised so the parent can work.<sup>127</sup> A review of poverty defense cases decided since Gilman’s 2013 article confirms the bottom line: The poverty defense does help parents in some clear cases (though often only after a trial court has separated a family for an extended period of time),<sup>128</sup> but when poverty exacerbates other conditions, courts frequently find neglect despite the poverty defense.<sup>129</sup> One court recited that poverty is not neglect, but then approved trial courts “considering a parent’s failure to maintain housing or employment in contravention of a state-issued case plan.”<sup>130</sup> Another court acknowledged that “unsuitable housing” is a “symptom of poverty,” yet blamed

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126. *Id.* at 529. The draft Restatement’s comments and illustrations provide a wide gap between when the poverty defense would win. If “[a] parent[] choose[s] to spend their [meager resources] on alcohol,” the poverty defense would not succeed. RESTATEMENT OF CHILD. & THE L. § 2.24 cmt. m, illus.21 (AM. L. INST., Tentative Draft No. 2, 2019). If a parent loses public benefits due to a computer glitch, is denied food at a local food bank, and their children lack enough to eat “for a brief period,” then the poverty defense would win. *Id.* A wide range of fact patterns exists between those two fact patterns, but the illustration of a successful use of the poverty defense suggests the same conclusion Gilman reached—it covers narrow ground only.

127. *See From Director MJ (Maleeka Jihad)*, *supra* note 68, at 1.

128. *E.g.*, *State ex rel. M.S.*, 279 So. 3d 956, 965 (La. Ct. App. 2019); *In re S.D.*, 776 S.E.2d 862, 864 (N.C. Ct. App. 2015); *In re A.M.W.*, 448 S.W.3d 307, 309, 318 (Mo. Ct. App. 2014).

129. *See, e.g.*, *In re J.J.H.*, 851 S.E.2d 336, 343–45, 350, 353 (N.C. 2020) (affirming termination order based in part on parent’s income, housing, and transportation challenges); *N.J. Div. of Child Prot. & Permanency v. T.C.*, No. A-3944-14T4, 2017 WL 2375693, at \*4–5 (N.J. Super. Ct. App. Div. June 1, 2017) (affirming neglect finding based on homeless mother living with young child in an abandoned home and using oven and electric heater because the court believed she “had the ability and resources to secure appropriate housing” but chose to live in the abandoned home); *Contra Costa Cnty. Child. & Fam. Servs. Bureau v. K.S. (In re D.C.)*, No. A149379, 2017 WL 2118367, at \*2–3, \*6–7 (Cal. Ct. App. May 16, 2017) (finding a mother neglectful when she fled domestic violence and lived in a commercial property with her children in unsanitary conditions; rather than provide the family with housing, the court separated the family and placed children in state custody); *In re Welfare of Child. of R.B. and T.B.*, Nos. A15-0880, A15-0882, 2015 WL 7941601, at \*9 n.11 (Minn. Ct. App. Dec. 7, 2015) (finding reasons beyond homelessness to adjudicate parents neglectful, even while acknowledging “homelessness was a primary factor in the termination of parental rights”); *Phoebe S. v. State*, No. S-15112, 2014 WL 1691614, at \*4–5 (Alaska April 23, 2014) (finding parent neglectful due to inadequate housing when parent could not enter a shelter and giving SNAP benefits “to a friend to go get groceries” amounted to a failure to “take advantage of . . . services” when that “friend” never came back). Courts have similarly found that agencies have no obligation to help parents obtain benefits to which they are entitled and which could help alleviate their poverty when the parents face other challenges. *State ex rel. Child., Youth & Fams. Dep’t v. Dustin G.*, No. A-1-CA-37362, 2019 N.M. App. LEXIS 228, at \*11 (N.M. Ct. App. April 23, 2019).

130. *In re R.T.*, 396 P.3d 802, 805 (Nev. 2017).

parents' "judgment" for their housing woes.<sup>131</sup> Another succinctly stated rule for excluding consideration of parental poverty, even when poverty causes the problem: "if the poverty causes [a parent] to neglect the needs of his [child] or expose his [child] to danger, then the [child's] removal is warranted."<sup>132</sup>

## 2. The Failure of Reasonable Efforts to Determine when to Provide Financial Supports

The existing legal structure has an additional defense against unnecessary intervention in poor families—the requirement that CPS agencies make "reasonable efforts" to prevent family separations and to reunify families.<sup>133</sup> Congress's goal was to ensure that CPS agencies did not separate families unnecessarily and did work expeditiously to reunify families, and therefore to keep the number of children in foster care relatively low.<sup>134</sup> In theory, the reasonable efforts requirement could provide a mechanism to distinguish poverty from neglect. If reasonable efforts included anti-poverty supports, then courts in each case could evaluate whether those supports sufficed to mitigate any risk to the child's safety. If they did, the case would likely reflect family poverty and a family separation would be unlawful. But if any risk to the child remained even after the provision of meaningful anti-poverty provisions, then some other factor distinct from poverty would be at work.

But that is not how the reasonable efforts requirement has operated. Reasonable efforts findings have generally provided little meaningful check on agency removal and reunification decisions.<sup>135</sup> Most relevant for distinguishing poverty from neglect, courts have frequently found that agencies satisfied their reasonable efforts obligations even if important services were not provided to families—so long as the state or local governments did not have those services available.<sup>136</sup> The logic of such decisions seems to be that the reasonable efforts obligation is imposed on CPS agencies, so only CPS agency actions should be considered. This aspect of reasonable efforts law

131. *Selsor v. Ark. Dep't of Hum. Servs.*, 516 S.W.3d 314, 318 (Ark. Ct. App. 2017).

132. *In re K.C.*, No. 26Ao1-1212-JT-555, 2013 WL 3832367, at \*7 (Ind. Ct. App. July 24, 2013) (second, third, and fourth alterations in original) (quoting *In re B.D.J.*, 728 N.E.2d 195, 202 (Ind. Ct. App. 2000)).

133. 42 U.S.C. § 671(a)(15)(A)–(B).

134. *In re James G.*, 943 A.2d 53, 69–70 (Md. Ct. Spec. App. 2008) (citing *In re Damon M.*, 765 A.2d 624 (Md. 2001)) (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.J. 259, 269–72 (2003) (describing goal of ensuring minimum quality of family preservation and reunification services).

135. See Gupta-Kagan, *supra* note 68, at 253–57 (summarizing weakness of reasonable efforts as implemented); Braveman & Ramsey, *supra* note 108, at 448, 456 (describing judges finding that agencies satisfied reasonable efforts obligations "by rote").

136. Braveman & Ramsey, *supra* note 108, at 456.

reinforces the divide between neglect and anti-poverty interventions. The focus on only CPS agency interventions allows child protection agencies to convince judges that they have made reasonable efforts even when the state 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>137</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>138</sup> Similar attitudes prevail in multiple states.<sup>139</sup> This approach permits a state as a whole to underfund housing, mental health care, child care, and more, and then use that underfunding as an excuse for CPS agencies to avoid helping families.

The Supreme Court added to the weakness of the reasonable effort requirement when it held in *Suter v. Artist M.* that a CPS agency’s reasonable efforts obligation was not a privately enforceable right, eliminating federal courts’ power to order states to provide certain supports and services as part of with their reasonable efforts obligations.<sup>140</sup> That step cut off a burgeoning possibility that federal courts might require states to provide some minimal anti-poverty financial supports to families before separating them. In particular, the federal court consent decree voided by *Artist M.* included requirements that the state provide limited cash assistance for families to pay for rent, utilities, or other services when that would keep families intact.<sup>141</sup> Consent decrees in other lower courts had required CPS agencies to provide housing, child care, financial assistance of immediate needs, family shelter, and financial assistance on par with money provided to foster families.<sup>142</sup>

Even more discrete reasonable efforts questions have not consistently led to requirements that CPS agencies provide services that families could not otherwise afford. Consider *In re N.M.W.*, the case involving unsanitary conditions in a home.<sup>143</sup> Approving the removal in that case, the Iowa Court of Appeals noted that the parent “was given numerous opportunities to clean and sanitize her apartment”—not that the state provided assistance to do so—“but failed

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137. *In re Shirley B.*, 18 A.3d 40, 55–58 (Md. 2011).

138. *Id.* at 55–56 (quoting *In re Shirley B.*, 993 A.2d 675, 689 (Md. Ct. Spec. App. 2010)).

139. See LEONARD EDWARDS, REASONABLE EFFORTS: A JUDICIAL PERSPECTIVE 43–83 (2014), <http://www.judgeleonardedwards.com/docs/reasonableefforts.pdf> [<https://perma.cc/389D-XNWW>] (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.”).

140. *Suter v. Artist M.*, 503 U.S. 347, 363–64 (1992).

141. Braveman & Ramsey, *supra* note 108, at 457.

142. PELTON, *supra* note 15, at 160.

143. See *supra* notes 116–17 and accompanying text.

to rectify the situation.”<sup>144</sup> In the court’s view, more direct assistance of the state was “encourage[d]” but not required.<sup>145</sup>

### 3. Case Plans Often Require that Parents Alleviate Their Poverty

When a child enters foster care, federal law requires CPS agencies, jointly with the parent,<sup>146</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>147</sup> The case plan defines what parents must do to reunify with children and is thus “a critical stage in the proceeding with profound long-term implications for all that follows.”<sup>148</sup> Poor case plans can require parents to do unnecessary tasks, which slow down reunification or, if parents fail to complete them, prevent reunification entirely. Case plans which fail to address the actual cause of maltreatment could lead to a recurrence of maltreatment after reunification.

The relatively sparse amount of law governing case plans leaves CPS agencies with wide discretion to impose requirements they see fit on parents. Beyond a general sense that the case plan should “facilitate” reunification,<sup>149</sup> federal law does not provide substantive guidance as to what should and should not be included. Federal regulations require simply that a case plan must “[i]nclude a description of the services offered and provided . . . to reunify the family.”<sup>150</sup> State laws and policies make clear that case plans should both describe “the 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>151</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

144. *In re N.M.W.*, 461 N.W.2d 478, 481 (Iowa Ct. App. 1990).

145. *Id.* at 482. Other reasonable efforts cases suggest that providing cleaning assistance does form part of a state’s obligation. *See, e.g., In re J.Y.*, 502 N.W.2d 860, 862 (S.D. 1993) (listing services including house cleaning as part of the adequate services provided by the CPS agency); *In re Tate*, 312 S.E.2d 535, 538–39 (N.C. Ct. App. 1984) (same).

146. 45 C.F.R. § 1356.21 (2022).

147. 42 U.S.C. § 675(1)(B).

148. 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. 1, 31 (2020).

149. 42 U.S.C. § 675(1)(B).

150. 45 C.F.R. § 1356.21(g)(4).

151. *See* CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUM. SERVS., CASE PLANNING FOR FAMILIES INVOLVED WITH CHILD WELFARE AGENCIES 1, 3 (2018), <https://www.childwelfare.gov/pubPDFs/caseplanning.pdf> [<https://perma.cc/3BAK-S28R>] (summarizing state case plan requirements and noting no principles to limit issues identified as the “problems” that need to be addressed).

conditions that eventually gave rise to the dependency adjudication.”<sup>152</sup> But even this case cautioned that the conditions leading to state intervention must not be read “narrowly.”<sup>153</sup>

With this discretion, it is common for CPS agencies to require parents to not only rectify whatever behavior or situation has been labeled neglect but also to not be poor. Dorothy Roberts has described how “child welfare authorities typically mandate that parents complete a ‘service plan’ with onerous requirements that are unrelated to the family’s needs.”<sup>154</sup> Requirements related to parental finances are prime examples. Agencies frequently include conditions such as a requirement on parents to obtain (if necessary) and maintain stable employment and housing as part of their case plan.<sup>155</sup> In one concerning case, a mother left an abusive relationship with her children, which led her to move to a new state, where she soon became homeless.<sup>156</sup> After voluntarily requesting the foster care agency take custody, the agency required her to “find suitable housing” and “maintain employment.”<sup>157</sup> Three years later, she had found temporary housing and had custody of a subsequently-born child, but the family court ruled she was “unfit because, among other things, she had not obtained housing appropriate for the [older] children.”<sup>158</sup>

152. *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 139, at 21 (emphasis added). Perhaps tellingly, no authority is cited for that proposition.

153. *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, meaning the overbroad case plan was in effect until then. *Id.* at 445.

154. ROBERTS, *supra* note 4, at 214.

155. For an example, see Gupta-Kagan, *supra* note 68, at 226 (describing a case plan which required a parent to maintain stable employment). See also *In re D.M.*, 851 S.E.2d 3, 7–8 (N.C. 2020) (describing trial court as denying reunification when a parent was still “attempting to secure stable housing and employment”); *In re Bernadette*, No. 20-P-1088, 2021 WL 5856452, at \*2 (Mass. App. Ct. Dec. 10, 2021) (“DCF implemented action plans for the mother that, among other things, required the mother to find suitable housing, attend parenting class, engage in therapy, maintain employment, attend meetings with DCF, and visit the children.”); *In re Veronica T.*, 244 A.D.2d 654, 655 (N.Y. App. Div. 1997) (describing agency meetings with parent “emphasizing her need to maintain stable housing” as part of its reasonable efforts to reunify the family). Some agency case plan templates include requiring parental employment as a standard element. E.g., L.A. CNTY. DEP’T OF CHILD. & FAM. SERVS., CASE PLAN FAMILY ASSESSMENT – [COURT], [https://policy.dcfslacounty.gov/wwwroot/elfinder/files/Attachments/008050210\\_att12.pdf](https://policy.dcfslacounty.gov/wwwroot/elfinder/files/Attachments/008050210_att12.pdf) [https://perma.cc/5WMF-MYTM]. Courts have used parental failures to meet these requirements as elements which support termination of the parent-child relationship. E.g., *In re Keadden W.*, 165 A.D.3d 1506, 1509 (N.Y. App. Div. 2018); *In re Zachary H.*, 129 A.D.3d 1501, 1501 (N.Y. App. Div. 2015).

156. *In re Bernadette*, 2021 WL 5856452, at \*2.

157. *Id.*

158. *Id.* at \*3. This decision was upheld on appeal. *Id.* at \*7.



### III. HOW POVERTY AND NEGLECT ARE INTERTWINED HISTORICALLY AND IN PRESENT LAW

The difficulty in distinguishing poverty from neglect is unsurprising when viewed historically. The two concepts have historically been intertwined—so much so that some scholars see an ongoing intent to focus only on poor families.<sup>159</sup> At its turn-of-the-twentieth-century origins, the juvenile court and child neglect laws intentionally mixed poverty and neglect—laws which live on today in some state statutes that permit agencies and courts to intervene in families based on factors like homelessness alone.<sup>160</sup> The child neglect system soon started insisting that poverty and neglect were distinct, an insistence which served to defend the system against accusations that it targeted poor families. But that insistence also distinguished anti-poverty financial supports from the child neglect system such that “a clear separation between financial supports to families and resources for child protection” has been a “consistent[.]” hallmark of public policy.<sup>161</sup> Any effort to disentangle poverty from neglect must address these historical connections.

#### A. *HISTORIC CONNECTIONS BETWEEN POVERTY AND NEGLECT*

Twenty-first century discourse starts from the proposition that poverty should not justify CPS agency or family court regulation of families. That differs from the attitude towards poverty at the child neglect system’s origins in the late nineteenth century. Early on, the system assumed it would largely impact poor families and also established that most families subject to it would not receive financial supports. Development of the modern child neglect legal system between the 1950s and 1970s reflects an assumption that family separations are an important option, especially for poor families, while simultaneously framing neglect in poor families as something that would not trigger material supports to those families.<sup>162</sup>

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159. See, e.g., BRIDGES, *supra* note 16, at 8 (“[The state] is only interested in protecting some children from abuse and neglect. . . . And those children are the ones that are born to poor women.”).

160. See *supra* note 78 and accompanying text.

161. CHILD WELFARE INFO. GATEWAY, *supra* note 85, at 4.

162. This Section does not pretend to offer a complete history of the child neglect and abuse legal system. Rather, it identifies key elements which help explain both how that system developed with the understanding that it would largely impact poor families and that the system would not provide financial or material supports to those families. More complete, book-length versions exist. See generally MICAL RAZ, ABUSIVE POLICIES: HOW THE AMERICAN CHILD WELFARE SYSTEM LOST ITS WAY (2020).

### 1. Juvenile and Family Court's Origin Story Centered on Poor Families

From its origin<sup>163</sup> in 1899,<sup>164</sup> the juvenile and family court was built with an expectation, if not an intent, to regulate poor families and separate many poor children from their parents. Juvenile court founders wrote that, “naturally,” poor families dominated the court’s docket.<sup>165</sup> However, one need not review statements of the early juvenile court to establish that they viewed poverty as evidence of parental unfitness; they codified that principle in the first Juvenile Court Act. That statute introduced the terms “dependent” and “neglect” and defined them in the same sentence to include poverty: “[T]he words dependent child and neglected child shall mean any child who for any reason is destitute or homeless or abandoned; or dependent upon the public for support; or has not proper parental care or guardianship; or who habitually begs or receives alms . . . .”<sup>166</sup> Finding that a child was “dependent” based purely on poverty was thus explicit in the statute, and such a finding led to the same potential consequences; the statute made no distinction between dispositions available to “dependent” and “neglected” children.<sup>167</sup>

These provisions built on earlier private and public actions to separate poor families. Nineteenth century laws permitted authorities to commit children who begged on the street to the care of almshouses.<sup>168</sup> The juvenile court’s creation followed years in which “orphan trains” transported many impoverished children (especially children of immigrants) in northeastern cities away from their families and to the Midwest,<sup>169</sup> in an effort explicitly motivated by a goal to separate poor children from their parents to end “hereditary pauperism.”<sup>170</sup>

Early child protection system leaders would soon try to moderate the explicit focus on poverty, agreeing at the 1909 White House Conference on

163. One can point to earlier points in the development of the family regulation system. For present purposes, the key point is that in this era, “dependency and neglect were viewed as one and the same” with poverty being assumed to result from moral defects justifying a separation of children from their parents. PELTON, *supra* note 15, at xiii, 1–2.

164. See *infra* note 165.

165. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 116–17 (1909). Then, as today, poverty overlapped with race and ethnicity. In the same paragraph, Mack observed that “[i]n many cases the parents are foreigners, frequently unable to speak English, and without an understanding of American methods and views.” *Id.* Observers of later iterations of the court similarly recognized that they existed to regulate the poor. As Jane Spinak wrote of New York’s unified family court (inaugurated in 1962), “[f]rom the beginning, the new family court would supervise mostly families without money.” JANE M. SPINAK, *THE END OF FAMILY COURT: HOW ABOLISHING THE COURT BRINGS JUSTICE TO CHILDREN AND FAMILIES* 170–71 (2023).

166. Juvenile Courts. For Dependent, Neglected and Delinquent Children., § 1, 1899 Ill. Laws 131, 131–32.

167. *Id.* § 7.

168. Sallie A. Watkins, *The Mary Ellen Myth: Correcting Child Welfare History*, 35 SOC. WORK 500, 500 (1990).

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

170. MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 107 (1986).

Children that poverty by itself should not justify family separations, “but only . . . inefficiency or immorality.”<sup>171</sup> This commitment led directly to the adoption of early forms of cash benefits paid by government to impoverished parents to help them raise their children.<sup>172</sup> But these anti-poverty supports were quite narrow in scope—mothers’ pensions were only offered to a small number of families deemed to be among the deserving poor, primarily white women who had married their children’s fathers.<sup>173</sup> And those pensions came along with administrative investigations to ensure welfare recipients lived moral lives.<sup>174</sup> The strong implication was that most poor families would not receive such financial supports because some psychological or moral deficit rendered them undeserving, and, for those families, any subsequent family court regulation or family separations would then be justified.<sup>175</sup>

## 2. The Flemming Rule and the Shift from “Suitable Homes” to “Neglect”

In the post-World War II era, a direct connection developed between the child neglect system and public benefits policies intended to respond to poverty. That connection reflected the continuing expectation that the child neglect legal system would separate many poor families, while simultaneously framing neglect cases as ones in which the state would not provide material supports to families.

States largely excluded Black families from those early welfare programs like mothers’ pensions, but Black families had increasing access to them after World War II.<sup>176</sup> By 1960, at least partly in response to that increased access of Black families, twenty-four states imposed rules requiring parents to provide “suitable homes” for their children as a condition of receiving Aid to Families with Dependent Children (“AFDC”) welfare payments.<sup>177</sup> That

171. Letter from Hastings H. Hart, Edmond J. Butler, Julian W. Mack, Homer Folks & James E. West, Comm. on Resols., to Theodore Roosevelt, President (Jan. 25, 1909), in *PROCEEDINGS OF THE CONFERENCE ON THE CARE OF DEPENDENT CHILDREN* 8, 10 (1909); see also Letter from Theodore Roosevelt, President, to Congress (Feb. 15, 1909), in *PROCEEDINGS OF THE CONFERENCE ON THE CARE OF DEPENDENT*, *supra*, at 5, 5 (“Surely poverty alone should not disrupt the home.”).

172. John J. Stretch, *The Rights of Children Emerge: Historical Notes on the First White House Conference on Children*, 49 *CHILD WELFARE* 365, 371–72 (1970).

173. Elizabeth D. Katz, *Fostering Faith: Religion in the History of Family Policing*, 92 *FORDHAM L. REV.* 2077, 2136–39 (2024); PELTON, *supra* note 15, at 10, 17.

174. PELTON, *supra* note 15, at 15.

175. *Id.* at 17.

176. ROBERTS, *supra* note 4, at 115–16.

177. See *id.* at 116–17; Susan Vivian Mangold, *Poor Enough to be Eligible? Child Abuse, Neglect, and the Poverty Requirement*, 81 *ST. JOHN’S L. REV.* 575, 584 (2007). The name AFDC was developed in 1962 and previously, the program was called “Aid to Dependent Children” or “ADC.” OFF. OF THE ASSISTANT SEC’Y FOR PLAN. & EVALUATION, U.S. DEP’T OF HEALTH & HUM. SERVS., A BRIEF HISTORY OF THE AFDC PROGRAM 2, 4, <https://aspe.hhs.gov/sites/default/files/private/pdf/167036/1history.pdf> [<https://perma.cc/3VC5-CL2R>]. For ease of reference, I refer to the AFDC program throughout.

requirement, in turn, created an opening for welfare and CPS agencies to regulate poor (and especially poor and Black) families to enforce the suitable home requirement.

The first step was for states (especially, but not entirely, southern states), to declare that many Black families did not provide their children with suitable homes as a mechanism to deny them AFDC benefits.<sup>178</sup> This practice eventually generated criticism after several southern states cut off tens of thousands of families, the vast majority Black, from AFDC benefits.<sup>179</sup> Some critics explicitly worried that denying these children welfare benefits would lead their families to fall deeper into poverty, which would lead their children to fall into foster care.<sup>180</sup> Notably, however, states simply denied welfare benefits but took no additional action.

The federal response came in 1961 via the “well-meaning but ultimately disastrous” Flemming Rule (named after Arthur Flemming, then the Secretary of Health, Education, and Welfare).<sup>181</sup> The Flemming Rule did not directly attack “suitable home” decisions as racist efforts to deny welfare benefits to Black families, nor did it seek to avoid or limit family separations. Rather, it took state agencies at their word that certain homes—that is, many poor, disproportionately Black homes—were unsuitable for children. And, taking that unsuitability as a given, it attacked the logic of state responses—cutting off AFDC benefits but providing no services or other interventions to help children in these unsuitable homes.<sup>182</sup> The Flemming Rule provided that if states insisted that homes were unsuitable, then the state had to intervene to protect children from that unsuitability. To keep federal welfare funding, states had to provide out-of-home placements to children when the state determined homes were unsuitable.<sup>183</sup> Congress soon codified the Flemming Rule, providing federal funding to help states pay to break up AFDC-eligible (that is, poor) families as an alternative to only cutting off AFDC funds.<sup>184</sup> Congress permitted states to remove children from homes found by a judge to be “contrary to the welfare of” the child.<sup>185</sup> As states began to follow suit, welfare agency judgments about family “suitability” morphed into judicial “contrary to the welfare” and neglect judgments.<sup>186</sup>

178. Claudia Lawrence-Webb, *African American Children in the Modern Child Welfare System: A Legacy of the Flemming Rule*, 76 CHILD WELFARE 9, 10–12 (1997); BRIGGS, *supra* note 169, at 37–44.

179. Lawrence-Webb, *supra* note 178, at 12; BRIGGS, *supra* note 169, at 39–41.

180. Lawrence-Webb, *supra* note 178, at 22.

181. BRIGGS, *supra* note 169, at 42; *see also* ALAN J. DETTLAFF, CONFRONTING THE RACIST LEGACY OF THE AMERICAN CHILD WELFARE SYSTEM: THE CASE FOR ABOLITION 59–62 (2023) (explaining the historical background leading to the Flemming Rule).

182. Lawrence-Webb, *supra* note 178, at 14–16.

183. Mangold, *supra* note 177, at 586; SPINAK, *supra* note 165, at 164–66.

184. S. REP. NO. 87-1589, at 13–14 (1962); AM. BAR ASS’N, *supra* note 30, at 7.

185. S. REP. NO. 87-1589, at 13 (1962); Act of May 8, 1961, Pub. L. No. 87-31, 75 Stat. 75, 76; AM. BAR ASS’N, *supra* note 30, at 7.

186. *See* Lawrence-Webb, *supra* note 178, at 17–18, 20–21.

The modern child neglect and foster care system—especially its federal funding details, and the large numbers of cases based on neglect—grew out of the Flemming Rule’s foundation. As the Supreme Court described in 1979, Congress created the federal foster care funding system “in the aftermath of” the Flemming Rule.<sup>187</sup> The Court explained that the Rule’s key point was to prohibit states from cutting AFDC payments to families they deemed unsuitable, and requiring states instead to remove those “dependent children.”<sup>188</sup> The Court’s language is instructive, as it reflects the transition from judgments that families were “unsuitable” to judgments that parents had “neglected” their children, and recognized “a fundamental purpose of the Foster Care program [created as a result of the Flemming Rule] . . . to facilitate removal of children from their homes.”<sup>189</sup> The Flemming Rule thus paved the way for states to relabel poor (and disproportionately Black) families as neglectful and subject to family separation.

The Flemming Rule’s fingerprints remain evident in the modern child protection system. One fingerprint is found in legal findings recited in nearly every case leading to a family separation and a child’s placement in foster care. Family courts must rule that staying or returning home with a parent is “contrary to the welfare of the child” as a condition for states to obtain federal financial support for foster care placements.<sup>190</sup> The Flemming Rule reflects the modern neglect system in a more fundamental way—the separation of anti-poverty financial supports from the menu of interventions when state authorities separated families. When state agencies were concerned about a home’s “suitability,” the Flemming Rule encouraged them to frame the matter as one of child neglect and intervene through the foster care system. That intervention would not include provision of financial supports but would involve “rehabilitative measures.”<sup>191</sup> The entire structure of the Flemming Rule was to tell states what they had to do to justify their *denial* of financial supports to families they deemed neglectful. As Jane Spinak has written, the Flemming Rule “decoupled” financial supports and rehabilitative services.<sup>192</sup> Whatever intervention followed, and whatever rehabilitative services the state offered to families, it would not include financial supports to redress their poverty and poverty-induced stressors. By the 1970s, this separation hardened as CPS

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187. *Miller v. Youakim*, 440 U.S. 125, 138 (1979); *see also* Mangold, *supra* note 177, at 586 (describing Congress’s codification of the Flemming Rule).

188. *Miller*, 440 U.S. at 138–39.

189. *Id.*; *see also* *King v. Smith*, 392 U.S. 309, 323–25 (1968) (describing Flemming Rule’s history and subsequent congressional codification).

190. 42 U.S.C. § 672(a)(2)(A)(ii); *see also* AM. BAR ASS’N, *supra* note 30, at 8 (describing this requirement as “[b]uilding on the Flemming Rule”).

191. *King*, 392 U.S. at 325.

192. SPINAK, *supra* note 165, at 166.

agencies developed into independent entities from public benefits agencies in many states.<sup>193</sup>

### 3. “Battered Child Syndrome,” CAPTA, and the Medicalization of Neglect

At the same time that the Flemming Rule created the federal foster care funding structure and separated rehabilitative interventions for neglect from anti-poverty financial supports, other developments framed neglect as caused by parental faults, and thus something distinct from poverty and thus requiring interventions other than material anti-poverty supports. Rhetorically, advocates emphasized that child maltreatment affected all income levels and demographic groups, while medical evidence focused on narrow forms of abuse seemingly caused by parental pathologies. The result was the construction of a legal system that continued (as it does through the present) to disproportionately impact poor families, but which would not address the poverty-related concerns at issue.

The year after the federal government issued the Flemming Rule, Dr. Henry Kempe and colleagues published *The Battered-Child Syndrome*, which identified cases of severe, often repeated physical abuse.<sup>194</sup> This article, and concern about the relatively small number of parents who would inflict such abuse for reasons assumed to be pathological, shaped our present child protection system.<sup>195</sup> Soon, nearly every state adopted mandatory reporting statutes as a means to identify these cases.<sup>196</sup> These laws broadened the scope of the system well beyond what Kempe and his colleagues advocated for, requiring a wide set of professionals to report not only severe abuse, but also neglect.<sup>197</sup> The system which developed framed all abuse and neglect cases similarly—they involved children endangered by a parent’s “moral, psychological, physiological, or some other personal failing.”<sup>198</sup> By “medicalizing” society’s understanding of child maltreatment, this view focused on parents’ individual problems and failings, not poverty.<sup>199</sup> Accordingly, the system’s

193. PELTON, *supra* note 15, at 18.

194. C. Henry Kempe, Frederic N. Silverman, Brandt F. Steele, William Droegemueller & Henry K. Silver, *The Battered-Child Syndrome*, 181 JAMA 17, 19–21 (1962).

195. JANE WALDFOGEL, THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE AND NEGLECT 139 (1998); Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society’s Response*, 36 OHIO N.U. L. REV. 819, 838–41 (2010).

196. Hafemeister, *supra* note 195, at 840–41.

197. Josh Gupta-Kagan, *Toward a Public Health Legal Structure for Child Welfare*, 92 NEB. L. REV. 897, 929–30 (2014).

198. LINDSEY, *supra* note 23, at 27.

199. Mical Raz, *History of Child Protection Law*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND AGENCIES IN NEGLECT, ABUSE, AND DEPENDENCY CASES 33, 40 (Josh Gupta-Kagan, LaShanda Taylor Adams, Melissa Dorris Carter, Kristen Pisani-Jacques & Vivek S. Sankaran eds., 4th ed. 2022); see also Patricia E. Erickson, *Federal Child Abuse and Child Neglect Policy*

“master narrative” is one of children victimized by deviant or degenerate parents<sup>200</sup> in need of interventions to address that deviancy—not to address their poverty. The notion that poor parents, and especially poor and Black parents, were to blame for their own problems found a similar voice in Daniel Patrick Moynihan’s 1965 report “The Negro Family: The Case for National Action” (commonly known as the “Moynihan report”), in which Moynihan blamed a “tangle of pathology” for poor Black families’ struggles.<sup>201</sup> Social work literature of the time also “focused, explicitly or implicitly, on the supposed deviant features of communities of color” rather than structural economic or racial inequality.<sup>202</sup>

Consistent with this focus on individual pathology, the federal government soon established a federal funding apparatus to support and regulate the modern child welfare system, and that apparatus codified the separation of poverty from neglect interventions. In 1974, Congress passed the Child Abuse Prevention and Treatment Act (“CAPTA”).<sup>203</sup> CAPTA made mandatory reporting statutes a requirement of federal funding and, despite its name, imposed those and other requirements on systems which addressed neglect in addition to abuse. Enacted after broader anti-poverty programs failed to pass Congress and during a backlash to War on Poverty programs, CAPTA’s sponsors framed the bill’s substance as distinct from discussions of poverty or race,<sup>204</sup> with leading proponents even stating, “[t]his is not a poverty

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*in the United States Since 1974: A Review and Critique*, 25 CRIM. JUST. REV. 77, 78 (2000) (explaining that the “psychological model of child abuse and child neglect . . . places emphasis on rehabilitation of ‘guilty parents’ rather than on environmental causes” like poverty). Similar critiques exist of family court and other problem-solving courts “for engaging in ‘responsibilization’: holding individuals accountable for addressing their own problems while failing to hold the government accountable for its role in creating the conditions that led to those problems.” Anna Arons, *The Empty Promise of the Fourth Amendment in the Family Regulation System*, 100 WASH. U. L. REV. 1057, 1131 (2023) (quoting Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL’Y REV. 417, 425–27 (2009)); see also Miller, *supra*, at 425–27 (describing the way these problems were viewed, shifting from societal influences to individual behavior, thereby focusing on individuals altering their behavior instead of examining how government helps create these problems); Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579, 1625 (2018) (same).

200. Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1, 2–3 (2010); see also Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 121–34 (2013) (explaining the consequences of the flawed framework of current child protection policies); Annette R. Appell, *On Fixing “Bad” Mothers and Saving Their Children*, in *“BAD” MOTHERS: THE POLITICS OF BLAME IN TWENTIETH-CENTURY AMERICA* 356, 356, 376 (Molly Ladd-Taylor & Lauri Umansky eds., 1998) (describing the unique situation of “bad” mothers in the child welfare system because of the punitive nature of the system and the state’s inability to be a “good” parent).

201. OFF. OF POL’Y PLAN. & RSCH., U.S. DEP’T OF LAB., *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* 44–45 (1965).

202. Jasmine Wali, *Where Were the Social Workers? A Historical Overview of the Social Work Profession’s Complicity in the Family Policing System*, 21 COLUM. SOC. WORK REV. 121, 127 (2023).

203. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. § 5101).

204. E.g., RAZ, *supra* note 162, at 10–13.

problem.”<sup>205</sup> Influential organizations similarly described the problem of child maltreatment as artificially separated from questions of poverty and its stressors,<sup>206</sup> thus “individualiz[ing] . . . blame [and] serv[ing] as a distraction from” high poverty rates.<sup>207</sup>

One thing CAPTA and subsequent legal developments did not do is define neglect with any specificity. The vagueness of neglect definitions is well-established.<sup>208</sup> That vagueness, coupled with a legal and rhetorical focus on parental pathologies,<sup>209</sup> and an aversion to providing financial supports to poor families has led to many of the criticisms of the present system.<sup>210</sup>

Taken together, developments from the late 1950s through the 1970s established a legal model which presumed parental pathologies caused both child abuse and neglect. The Flemming Rule’s explicit focus on removing poor children from “unsuitable” homes belied the class-blind rhetoric behind CAPTA. And the Flemming Rule’s codification created a legal pathway to effectuate those family separations while complementing the notion that anti-poverty supports were not appropriate with such families.

#### 4. 1996 Welfare Reform

Reform of public benefits laws in 1996 and the surrounding discourse reaffirmed the ideas that poor families should be subject to state surveillance and possible separation while only able to access limited financial supports. The reform, which replaced AFDC’s entitlement to limited public benefits for poor individuals and families with Temporary Aid to Needy Families (“TANF”) block grants to states to spend within wide bounds.<sup>211</sup> Several points from this history are most relevant to this Article.

205. *Id.* at 12 (quoting *Child Abuse Prevention Act, 1973: Hearing on S. 1191 Before the Subcomm. on Child. & Youth of the S. Comm. on Lab. & Pub. Welfare*, 93d Cong. 17 (1973) (statement of Sen. Walter F. Mondale)); *see also* PELTON, *supra* note 15, at 37 (describing CAPTA as addressing “a disease that was blind to class”).

206. *E.g.*, RAZ, *supra* note 162, at 29–30 (discussing work of Parents Anonymous in the 1970s).

207. *See* DETTLAFF, *supra* note 181, at 87.

208. *E.g.*, Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS., Summer 1975, at 226, 278–79; Michael Wald, *State Intervention on Behalf of “Neglected” Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1000–04 (1975); JEANNE M. GIOVANNONI & ROSINA M. BECERRA, *DEFINING CHILD ABUSE* 1–5 (1979); *see also* Gupta-Kagan, *supra* note 68, at 231–32 (arguing that this vagueness continues through the present).

209. *See, e.g.*, S. Lisa Washington, *Pathology Logics*, 117 NW. U. L. REV. 1523, 1541 (2023).

210. *See, e.g.*, Sharon L. McDaniel et al., *Perfectly Imperfect: How Imprecise Definitions of Child Neglect and Poverty Reinforce Anti-Black Racism in the Child Welfare System*, FAM. INTEGRITY & JUST. Q., Spring 2022, at 22, 22–23 (“Dismissing the link between poverty and neglect for Black families places the blame squarely on Black parents and discounts the historical legacy of systemic racism, legal neglect’s vague classifications, and the patterns of surveillance of Black families once they are targeted by the system . . .”).

211. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103, 110 Stat. 2105, 2112–61 (codified as amended at 42 U.S.C. §§ 601–610, 612, 613, 615–617).



First, the debate consistently articulated a connection between poverty and foster care. Critics of the 1996 reforms worried that denying poor families welfare benefits would place children in danger. A repeated response was that those children could be placed in state custody or institutions.<sup>212</sup> Such proposals garnered much criticism, but reflected an essential truth: taking financial resources away from poor parents risked hurting their children and creating a stronger push for family separations.<sup>213</sup> When the resulting compromise bill faced criticism for removing poor children's safety net, advocates for welfare reform pointed to CPS agencies and their funding—which continued, undisturbed, as an uncapped entitlement.<sup>214</sup> That argument reinforced the notions that poor families who lost benefits deserved separation through foster care, and that the interventions for such families would include oversight and regulation, but not anti-poverty financial supports.

Second, tracking Congress's spending underscores the link between reduced public benefits and increased foster care. Throughout the 1990s, as welfare reform was debated, enacted, and implemented, Congress increased federal spending on foster care while decreasing spending on public benefits.<sup>215</sup> Congress has shown a willingness to divert funds that could provide financial supports to poor families to helping to pay for family separations and adoptions, even tapping a TANF contingency fund to help pay state CPS agencies bonuses for arranging permanent family separations and adoptions for children in foster care.<sup>216</sup> These shifts in funding priorities continue their impact. For instance, by turning public benefits into a block grant to states, Congress has permitted states to use funds which were previously used to support families to separate them instead, with multiple states using TANF block grants to pay for their CPS agencies.<sup>217</sup>

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212. Charles Murray, *The Coming White Underclass*, AM. ENTER. INST. (Oct. 29, 1993), <https://www.aei.org/articles/the-coming-white-underclass> [<https://perma.cc/868A-ZKTN>]. The claim was made most infamously by then Speaker-designate Newt Gingrich in 1994. See, e.g., Howard Markel, *Orphanages Revisited: Some Historical Perspectives on Dependent, Abandoned, and Orphaned Children in America*, 149 ARCHIVES PEDIATRICS & ADOLESCENT MED. 609, 609 (1995) (summarizing the debate Gingrich started and discussing history of orphanages that housed large number of children who were not orphans but whose “parents were simply too poor to support them”).

213. Braveman & Ramsey, *supra* note 108, at 448.

214. *Id.* at 459.

215. ROBERTS, *supra* note 4, at 120–23.

216. *Id.* at 122.

217. See, e.g., CONG. RSCH. SERV., RL32760, THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: RESPONSES TO FREQUENTLY ASKED QUESTIONS 3 (2023), <https://sgp.fas.org/crs/misc/RL32760.pdf> [<https://perma.cc/V6CZ-3ES2>] (reporting \$2.7 billion in TANF funds spent on “child welfare”); Eli Hager, *A Mother Needed Welfare. Instead, the State Used Welfare Funds to Take Her Son.*, PROPUBLICA (Dec. 23, 2021, 5:00 AM), <https://www.propublica.org/article/a-mother-needed-welfare-instead-the-state-used-welfare-funds-to-take-her-son> [<https://perma.cc/8SBJ-Z4JJ>] (describing how Arizona spends sixty-one percent of TANF dollars on its CPS system and only thirteen percent on welfare payments, and that the average state diverts eight

*B. CONTINUING LEGAL DOCTRINES CONNECTING POVERTY AND NEGLECT*

Part I above surveyed several elements of present child neglect law and practice which inhibit the legal system's ability to distinguish poverty from neglect: some states continue to define homelessness as neglect<sup>218</sup> and inadequate housing causes or contributes to tens of thousands of family separations each year.<sup>219</sup> About half the states have statutory definitions of neglect which fail to exclude poverty.<sup>220</sup> Reasonable efforts law reflects the expectation that some anti-poverty supports simply will not be provided,<sup>221</sup> consistent with the historical denial of such benefits to many families subject to CPS agency and family court regulation and framing of child maltreatment as a matter of individual pathology rather than structural inequity.<sup>222</sup> And case plans requiring parents to have stable housing and stable employment as a condition of reunification<sup>223</sup> reflects the idea that parents are supposed to financially take care of their children without public supports.<sup>224</sup>

This Section addresses two other remaining relics of historic connections between poverty, public benefits, and the law's conception of neglect.

1. Terminology

Strikingly, the statutory terms which codified the notion that poor families were subject to state regulation and family court ordered separations remains in multiple states. The terms "dependent" or "deprived" child continue to be used to describe multiple states' child abuse or neglect jurisdiction, despite their historical and doctrinal connection to poverty.<sup>225</sup> The very name of the

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percent of TANF dollars to their CPS systems); Jenni Bergal, *States Raid Fund Meant for Needy Families to Pay for Other Programs*, STATELINE (July 24, 2020, 12:00 AM), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/24/states-raid-fund-meant-for-needy-families-to-pay-for-other-programs> [<https://perma.cc/V3CB-8B5Y>] (describing state diversion of TANF funds to a variety of programs including child welfare).

218. See *supra* note 78 and accompanying text.

219. See *supra* notes 60–61 and accompanying text.

220. See *supra* text accompanying note 120.

221. See *supra* Section II.C.2.

222. See Washington, *supra* note 209, at 1577 (arguing that pathologizing parents avoids "a more complete picture of the circumstances of family poverty and the impacts of the depth and breadth of the carceral state" on child neglect cases).

223. See *supra* Section II.C.3.

224. Indeed, many parents subject to such plans have reported receiving no assistance in meeting housing or employment requirements imposed by case plans. HUM. RTS. WATCH & AM. C.L. UNION, *supra* note 10, at 112.

225. E.g., ALA. CODE § 12-15-310(a) (LexisNexis Supp. 2022) ("dependent" child); ARIZ. REV. STAT. ANN. § 8-201(15) (Supp. 2022) ("[d]ependent child"); CAL. WELF. & INST. CODE div. 2, ch. 2, arts. 5.5–13 (West 2016) (using "dependent child" and "dependent children" throughout); COLO. REV. STAT. § 19-3-102 (2023) ("[n]eglected or dependent child"); FLA. STAT. § 39.01(14) (2023) ("dependent" child); GA. CODE ANN. § 15-11-2 note (2023) (Evidence of Deprived Child) (using terms "deprived child" and "deprivation" cases); 705 ILL. COMP. STAT. 405/2-4 (2022)

system used in many of these states—the dependency system<sup>226</sup>—evokes the early statutes making families subject to juvenile court jurisdiction solely due to poverty. At best, such terminology is anachronistic. At worst, it communicates the continued expectation that the child neglect system is for poor families. The more common name—“child welfare”—similarly suggests a connection with other welfare benefits. That phrase is ironic, given the historical separation of welfare benefits from cases involving CPS agency surveillance, regulation, and family separation, and has appropriately generated much criticism.<sup>227</sup>

## 2. Federal Funding Remains Contingent on Family Poverty

One continuing link of welfare benefits to foster care is the federal funding law’s AFDC eligibility requirement.<sup>228</sup> For a state CPS agency to receive federal financial support for the costs of separating a child from her family and keeping the child in foster care, the child’s family’s financial situation must be sufficiently poor so that the family would have qualified under the AFDC program “as in effect on July 16, 1996.”<sup>229</sup> This link is rooted in the Flemming Rule’s connection between “suitable home” determinations and providing foster care funds; the federal government was providing foster care funds to help states provide services to families who were no longer receiving federally-funded AFDC assistance.

This provision is particularly absurd because it is based on a public benefits program that no longer exists,<sup>230</sup> and does so based on financial

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(“[d]ependent minor”); OHIO REV. CODE ANN. § 2151.353 (West Supp. 2023) (“dependent child”); OKLA. STAT. tit. 10A, § 1-1-105(20)–(21) (2020) (“[d]eprived child” and “[d]ependen[t]” child); 42 PA. CONS. STAT. § 6302 (2022) (“[d]ependent child”); TENN. CODE ANN. § 37-1-102(13) (Supp. 2023) (“[d]ependent and neglected child”); WASH. REV. CODE § 13.34.030(6) (2023) (“[d]ependent child”).

226. For instance, the California state court system offers a guide to “dependency court.” *Guide to Dependency Court – for Parents*, CAL. CTS., <https://www.courts.ca.gov/1205.htm> [<https://perma.cc/6EBG-APZS>].

227. See Emma Williams, *Family Regulation, Not ‘Child Welfare’: Abolition Starts with Changing Our Language*, IMPRINT (July 28, 2020, 11:45 PM), <https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586> [<https://perma.cc/XQF3-5G4X>] (noting the many voices “inside and outside the agency [who] lament the lack of welfare services that the system is able to offer” and describing the “child welfare” name as a product of the “state’s imagination”); see also Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020, 5:26 AM), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480> [<https://perma.cc/4XMA-F9PJ>] (referring to “the misnamed ‘child welfare’ system”).

228. For a detailed summary and critique of this requirement, see Mangold, *supra* note 177, at 583–84.

229. 42 U.S.C. § 672(a)(1)(B), (a)(3)(A)(i).

230. Congress repealed AFDC and replaced it with TANF in the 1996 welfare reform legislation. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

eligibility criteria from 1996, thus failing to account for inflation.<sup>231</sup> More deeply, the AFDC link reflects the historical assumption that the foster care system should address deeply impoverished families, and it exists in tension with the twenty-first century normative principle that poverty should not trigger CPS agency involvement. As Susan Mangold has explained, the family of a child in foster care “must be poor enough” for the state to receive federal funds to support the costs of keeping that child in foster care.<sup>232</sup> That is, the federal government continues to support foster care for poor children only. So it is cheaper for states to separate poor families than rich families, reflecting the historic assumption that regulating and sometimes separating poor families is precisely what the child neglect system is for.

Despite its absurdity, the AFDC-eligibility does serve one useful purpose and should not be simply eliminated: It limits funding to the agencies responsible for separating many families unnecessarily, including many cases in which such separations reflect concerns about poverty more so than actual maltreatment. Accordingly, some advocates have argued for maintaining the AFDC-federal funding link.<sup>233</sup> Crafting a policy solution, therefore, is somewhat complicated, as will be discussed, *infra*, in Section V.D.

#### IV. HOW PRESENT CHILD NEGLECT AND ABUSE LAW AND PRACTICE CAN EXACERBATE FAMILY POVERTY

This Part explores a different consequence of neglect law’s focus on parental pathologies at the exclusion of parental poverty: how the state removing children from their families to foster care triggers further harm to poor parents’ finances. Such harm occurs without adequate consideration of how it can undermine efforts to reunify families. The historic insistence that poverty and neglect are distinct has implicitly shielded such state action imposing these harms from criticism. The idea that neglect and poverty are distinct suggests that there is no need to evaluate how particular actions within the neglect system impact poor families.

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231. EMILIE STOLTZFUS, CONG. RSCH. SERV., THE TITLE IV-E INCOME TEST INCLUDED IN THE “LOOKBACK” 3 (2019), [https://www.cwla.org/wp-content/uploads/2019/09/CD\\_lookback\\_4\\_2019.pdf](https://www.cwla.org/wp-content/uploads/2019/09/CD_lookback_4_2019.pdf) [<https://perma.cc/XB3C-WY55>]. Inflation has affected eligibility significantly. The median 1996 AFDC eligibility standards amounted to sixty percent of the federal poverty guidelines in 1996, but only thirty-six percent in 2019. *Id.* As a result, state CPS agencies can claim federal financial support for a decreasing number of foster children, and some advocates have called for Congress to eliminate the AFDC eligibility requirement or otherwise reform this provision of federal funding law. *E.g.*, PEW CHARITABLE TRS., TIME FOR REFORM: FIX THE FOSTER CARE LOOKBACK 3, 7–8, [https://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster\\_care\\_reform/FixtheFosterCareLookbackpdf.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster_care_reform/FixtheFosterCareLookbackpdf.pdf) [<https://perma.cc/5GU8-9A7W>]. The impact of repealing this provision is addressed *infra* in Section V.D.

232. Mangold, *supra* note 177, at 595.

233. *See, e.g.*, Richard Wexler, *You Get What You Pay For: The Federal Government Should Stop Paying for Foster Care*, FAM. INTEGRITY & JUST. Q., Summer 2022, at 56, 64–65.

The notion that separating children from their parents harms parents is intuitive. As other scholars have established, the forced loss of custody of a child to the state induces feelings of grief, confusion, and despair in parents; parents' identity as parents faces a profound challenge; and rates of anxiety and substance use disorder diagnoses increase as parents struggle with the forced separation.<sup>234</sup>

This Section expands that discussion by examining the financial harms that CPS interventions can trigger, and how those harms can delay or prevent reunification.<sup>235</sup> Typical cases trigger a range of surveillance activities that parents must permit and services that they must participate in as conditions of reunification. These commands can interfere with work obligations and, in some situations, impose direct financial costs on parents when the state does not pay.<sup>236</sup> Consider three factors under current law and practice: child support obligations of parents *to the state* when children are in foster care, loss of public benefits contingent on child custody, and placement of parents on child protection registries, which limits parents' job opportunities. Given the body of research showing how poverty increases the likelihood of child maltreatment and CPS agency involvement<sup>237</sup> and how anti-poverty supports reduce the likelihood of both,<sup>238</sup> these actions raise strong concerns that they are hurting the children and families the system is supposed to help.

#### A. CHILD SUPPORT

Federal law provides that, to receive federal foster care funds, "all steps will be taken . . . to secure an assignment to the State of any rights to support on behalf of each child receiving foster care maintenance payments."<sup>239</sup> This provision requires CPS agencies to cooperate with state child support enforcement agencies to collect child support from parents of foster children.<sup>240</sup>

234. 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, 1169–70 (2019); Kendra L. Nixon, H.L. Radtke & Leslie M. Tutty, "Every Day It Takes a Piece of You Away": *Experiences of Grief and Loss Among Abused Mothers Involved with Child Protective Services*, 7 J. PUB. CHILD WELFARE 172, 180–84 (2013).

235. Other arms of juvenile and family courts, those handling cases alleging delinquent behavior by children, have been analogously criticized for financially harming parents in a manner that undermines their goals. Barbara Fedders, *The Anti-Parent Juvenile Court*, 69 UCLA L. REV. 746, 781–88, 800–02 (2022).

236. See, e.g., FONG, *supra* note 63, at 176–77 (describing how "[p]overty also makes it difficult to meet CPS's requests" due to work conflicts and cost).

237. See *supra* Section I.B.

238. See *supra* notes 88–96.

239. 42 U.S.C. § 671(a)(17).

240. This agency structure is telling. Federal law puts funding for state child support enforcement and state foster care systems next to each other—the former is codified in title IV-D of the Social Security Act and the latter in title IV-E. 42 U.S.C. §§ 651–679c. More importantly, in many states, the same agency administers both programs, which makes operationalizing cooperation between

The impact of such cooperation does not help children. Child support payments usually go to the adult with custody of the child, providing that person with financial resources to take care of the child they would not otherwise have. But in the foster care context, as Daniel Hatcher has explained, states seek to “convert[] funds originally intended to benefit children into government revenue streams in order to reduce state spending on welfare and foster care services.”<sup>241</sup> Child support payments from parents of foster children do not help the children in any way. Rather, they reimburse the state for the cost of foster care and permit the state to use funds elsewhere.

The function of seeking child support from parents of foster children is thus difficult to square with the nominal goals of the foster care system. Such payments do not improve the well-being of affected children. Perhaps they serve to punish parents—though such a purpose is inconsistent with the goal of rehabilitating parents and reunifying families. Perhaps such child support payments impose a test on parents: Prove you are financially able to pay for a child before you reunify. But such a test would create an income-based condition for reunification beyond the grounds which justified the initial removal of the kind criticized in Section I.C.3.

Ironically, collecting child support from parents of foster children does not gather significant money compared to state expenditures on CPS systems. One researcher estimates that parents can pay only seventy million dollars collected in a given year nationally—less than two hundred dollars per child in foster care per year.<sup>242</sup> The meager funds recovered may also be less than expenditures on child support enforcement.<sup>243</sup> Unsurprisingly, given the poverty

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foster care and child support enforcement easier. The South Carolina Department of Social Services, for instance, administers both the state’s child support and child protection programs. See *Child Support*, S.C. DEP’T OF SOC. SERVS., <https://dss.sc.gov/child-support> [<https://perma.cc/SgZ5-52N2>]; *Child Protective Services*, S.C. DEP’T OF SOC. SERVS., <https://dss.sc.gov/child-well-being/child-protective-services> [<https://perma.cc/KZ4V-TS5H>]; see also, e.g., *DSS Divisions*, MO. DEP’T OF SOC. SERVS., <https://dss.mo.gov/dssdiv.htm> [<https://perma.cc/2VTN-KQ5Y>] (same); *Division & Offices*, GA. DEP’T OF HUM. SERVS., <https://dhs.georgia.gov/organization/about/division-offices> [<https://perma.cc/3983-WT6V>] (same).

241. Daniel L. Hatcher, *Collateral Children: Consequence and Illegality at the Intersection of Foster Care and Child Support*, 74 BROOK. L. REV. 1333, 1334 (2009).

242. Trish Skophammer, *Child Support Collections to Offset Out-of-Home Placement Costs: A Study of Cost Effectiveness* 15 (June 2017) (D.P.A. dissertation, Hamline University), [https://digitalcommons.hamline.edu/cgi/viewcontent.cgi?article=1014&context=hsb\\_all](https://digitalcommons.hamline.edu/cgi/viewcontent.cgi?article=1014&context=hsb_all) [<https://perma.cc/2FFF-3DSP>].

243. *Id.* at 82. Reviewing one state’s efforts and cost estimates, concluding that “the child support program is likely spending more than it collects. Even at the lowest estimate [of child support enforcement costs], the overall gain is only \$595,379 and does not include the expenses of court staff, hearing officers, or child welfare agencies in making referrals.” *Id.*

of the parents of foster children, only a very small number comply with these child support orders in full.<sup>244</sup>

While these child support payments make little difference to state coffers, ordering parents to pay child support to the state negatively impacts affected families. Parents forced to pay child support to the state lose money that they could otherwise spend to take whatever steps the state insists they take to reunify. This is true whenever parents comply with child support orders, even if they only comply partially. Moreover, anything short of full compliance becomes a violation of a court order and authorities could view such a violation as grounds to delay or deny reunification. Empirical research is sparse on the impact of orders imposed on parents who have lost their children to the foster care system to pay child support to the state, but what does exist confirms the intuitive view that such orders harm reunification efforts. A comparison of otherwise similar cases in Wisconsin—some in counties which aggressively sought child support and some in counties which did not—found “that ordering mothers to pay support to offset the costs of foster care delays reunification.”<sup>245</sup> And the more money parents were ordered to pay, the worse the impact on their children; a one hundred dollar increase in a mother’s monthly child support order increased a child’s stay in foster care by 5.1 months.<sup>246</sup>

Explaining why seeking child support from largely poor parents delays their reunification with their children is intuitive. Hurting parents financially limits their ability to take steps to convince authorities that they are ready to reunify with their children.<sup>247</sup> “To the extent that poverty or other resource limitations contributed to the initial placement, reducing resources by ordering child support payments may increase barriers to reunification and permanency.”<sup>248</sup> Scholars in other settings have linked the financial status to poor families’ ability to engage in and complete various services,<sup>249</sup> a finding which seems applicable to services demanded of parents as a condition of reunification. Similarly, researchers studying the impact of child support

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244. MARIA CANCAN, STEVEN COOK, MAI SEKI & LYNN WIMER, INST. FOR RSCH. ON POVERTY, UNIV. OF WISC.—MADISON, INTERACTIONS OF THE CHILD SUPPORT AND CHILD WELFARE SYSTEMS: CHILD SUPPORT ENFORCEMENT AFTER FAMILY REUNIFICATION 10 (2012), [https://www.irc.wisc.edu/wp/wp-content/uploads/2018/06/Task5\\_CS\\_11-12\\_FINAL.pdf](https://www.irc.wisc.edu/wp/wp-content/uploads/2018/06/Task5_CS_11-12_FINAL.pdf) [<https://perma.cc/7RMV-YJAE>]. An evaluation of this practice in Wisconsin concluded “that only 3 percent of fathers and mothers fully comply with their offset orders.” *Id.*

245. Maria Cancian, Steven T. Cook, Mai Seki & Lynn Wimer, *Making Parents Pay: The Unintended Consequences of Charging Parents for Foster Care*, 72 CHILD. & YOUTH SERVS. REV. 100, 108 (2017).

246. *Id.* at 109. Even when children did not reunify, the same harm occurred; permanency of whatever form (reunification, guardianship, or adoption) was delayed when the state obtained child support orders against parents from whom the state had taken children. *Id.* at 108.

247. See Hatcher, *supra* note 241, at 1335 (harming poor “parents’ struggles to obtain economic stability” can “hamper[] the likelihood of family reunification[]”).

248. Cancian et al., *supra* note 245, at 101.

249. Rostad et al., *supra* note 9, at 27–29, 31–32.

payments also found that parents with higher incomes reunified with their children faster than more impoverished parents,<sup>250</sup> a finding consistent with earlier studies showing that parents “with lower overall average incomes (including both cash assistance and earnings) were reunified more slowly.”<sup>251</sup>

This dynamic has played out troublingly in some termination of parental rights cases. Daniel Hatcher identified how states have used parents’ inability to pay child support to a foster care agency as a ground to terminate a parent and child’s legal relationship.<sup>252</sup> Hatcher describes one case, in which an incarcerated father earned an early release and hoped to reunify with his child in foster care, but saw his parental rights terminated in part because of a failure to pay \$72.80 in child support while in prison.<sup>253</sup> Other states continue to use a parent’s failure to pay child support to offset the state’s foster care costs as a ground to permanently terminate a parent and child’s legal relationship.<sup>254</sup>

The practice of seeking child support payments from parents of foster children has generated a growing amount of criticism and the beginnings of reform. In addition to Hatcher’s 2009 article and the 2016 research showing the counter-productive impacts of the practice, a leading social work professor urged the practice be curtailed.<sup>255</sup> NPR published critical coverage of the practice in 2021.<sup>256</sup> Subsequently, the federal government has taken one step in the direction of reform by issuing guidance in June 2022 encouraging states to not seek child support payments for parents of foster children.<sup>257</sup> Not only are such efforts “generally deemed not to be cost effective,” they

250. Cancian et al., *supra* note 245, at 108.

251. *Id.* at 102 (collecting studies from 1994 and 2006). Similarly, other studies found that more generous welfare benefits increase the likelihood of CPS involvement. *Id.*

252. Hatcher, *supra* note 241, at 1359–64.

253. *In re T.D.P.*, 595 S.E.2d 735, 737–38 (N.C. Ct. App. 2004); Hatcher, *supra* note 241, at 1336–37.

254. *See In re J.C.J.*, 874 S.E.2d 888, 893–96 (N.C. 2022); *S.C. Dep’t of Soc. Servs. v. M.R.C.L.*, 712 S.E.2d 452, 456–57 (S.C. 2011); *In re L.M.W.*, 275 S.W.3d 843, 848 (Tenn. Ct. App. 2008); *S.C. Dep’t of Soc. Servs. v. Seegars*, 627 S.E.2d 718, 721–22 (S.C. 2006); *S.C. Dep’t of Soc. Servs. v. Cummings*, 547 S.E.2d 506, 510–11 (S.C. Ct. App. 2001). Some state statutes list a failure to pay child support to the state as grounds for termination. *E.g.*, ALA. CODE § 12-15-319(a) (9) (LexisNexis Supp. 2022); IOWA CODE § 600A.8(4) (2023); KY. REV. STAT. ANN. § 625.090(3) (f) (LexisNexis Supp. 2023); MINN. STAT. § 260C.301(b) (3) (2022); S.C. CODE ANN. § 63-7-2570(4) (Supp. 2022). Some courts have been more hesitant to terminate on this ground. *See, e.g., In re M.J.B.*, 140 S.W.3d 643, 654–55 (Tenn. Ct. App. 2004).

255. Jill Duerr Berrick, *Reduce Number of CPS Families Required to Pay for Foster Care*, CALMATTERS (Mar. 14, 2022), <https://calmatters.org/commentary/2022/03/reduce-number-of-cps-families-required-to-pay-for-foster-care> [<https://perma.cc/XC5C-ZHPB>].

256. Joseph Shapiro, Teresa Wiltz & Jessica Piper, *States Send Kids to Foster Care and Their Parents the Bill – Often One Too Big to Pay*, NPR (Dec. 27, 2021, 4:35 PM), <https://www.npr.org/2021/12/27/1049811327/states-send-kids-to-foster-care-and-their-parents-the-bill-often-one-too-big-to-pay> [<https://perma.cc/8PR6-9TLM>].

257. U.S. DEP’T OF HEALTH & HUM. SERVS., CHILD.’S BUREAU, CHILD WELFARE POLICY MANUAL § 8.4C(5) (2022), [https://acf.hhs.gov/cwpm/public\\_html/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=170](https://acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=170) [<https://perma.cc/Q7GJ-2J5Q>].



exacerbate harms to children because “[i]t’s likely that reducing the income of the child’s parent(s) could impede their ability to engage in reunification efforts, potentially extending the time the child spends in foster care.”<sup>258</sup> That guidance goes as far as the Children’s Bureau can go given its duty to enforce the present statute which requires states “where appropriate” to take “all steps . . . to secure” child support payments for children in foster care.<sup>259</sup> The guidance suggests that doing so for poor families is generally not “appropriate,” and suggests state CPS agencies set “a specified income level” for parents before they will seek child support.<sup>260</sup>

### B. LOSS OF ANTI-POVERTY FINANCIAL SUPPORTS THROUGH FOSTER CARE

Separating a family through the foster care system can deny that family access to a range of anti-poverty financial supports, including those supports which multiple studies have found reduce the likelihood of child maltreatment or CPS agency involvement.<sup>261</sup> The loss of these financial supports causes the same harms that imposing child support obligations do—delayed reunification.

#### 1. Welfare Benefits

Poor families rely on an array of welfare benefits. Losing a child to the foster care system can also mean losing some of those benefits, though rules are inconsistent across different programs. Many families who lose their children temporarily to foster care lose at least some of their public benefits,<sup>262</sup> and generally face “economic destabilization,”<sup>263</sup> which in turn correlates with a reduced likelihood of reunification.<sup>264</sup>

<sup>258</sup>. *Id.*

<sup>259</sup>. 42 U.S.C. § 671 (a) (17). Since the federal guidance, one state, Washington, has announced that it has stopped seeking child support payments from parents of children in foster care. Ross Hunter, *DCYF Child Support Collection Referrals End Today*, WASH. ST. DEP’T OF CHILD., YOUTH & FAMS. (Sept. 1, 2022), <https://www.dcyf.wa.gov/news/dcyf-child-support-collection-referrals-end-today?s=03> [<https://perma.cc/HFK5-ER23>]. And California legislation requires CPS agencies to promulgate regulations treating seeking child support from parents of foster children as presumptively posing an unlawful “barrier” to reunification (so long as reunification is sought). 2022 Cal. Stat. 755 § 2 (codified at CAL. FAM. CODE § 17552(a)(2) (West Supp. 2023)).

<sup>260</sup>. U.S. DEP’T OF HEALTH & HUM. SERVS., *supra* note 257, § 8.4C(5).

<sup>261</sup>. *See supra* notes 88–96 and accompanying text.

<sup>262</sup>. The constellation of welfare programs can vary by jurisdiction, with one constant—losing children to foster care temporarily leads many parents to lose important benefits and thus the economic stability necessary to reunify. *See, e.g.*, WANJA OGONGI, STONELEIGH FOUNDATION, *BARRIERS TO SUCCESSFUL REUNIFICATION IN PHILADELPHIA: FINDINGS FROM THE PERCEPTIONS OF BIRTH PARENTS & CHILD WELFARE PROFESSIONALS* 12 (2020), <https://clsphila.org/wp-content/uploads/2020/02/BarrierstoSuccessfulReunification.pdf> [<https://perma.cc/XR5J-KLLT>] (reporting one quarter of parents lost some public benefits, such as general assistance, SSI, or child care benefits, which “made it even harder for the parent” to reunify).

<sup>263</sup>. Jennifer L. Hook, Jennifer L. Romich, JoAnn S. Lee, Maureen O. Marcenko & Ji Young Kang, *Trajectories of Economic Disconnection Among Families in the Child Welfare System*, 63 SOC. PROBS. 161, 174 (2016).

<sup>264</sup>. *Id.* at 175.

This phenomenon is most well established for TANF<sup>265</sup> benefits.<sup>266</sup> Legal advice to parents commonly notes the loss of public cash assistance when families are separated by foster care,<sup>267</sup> and the available data suggests that many parents do lose TANF benefits when CPS agencies separate their families.<sup>268</sup> TANF recipients tend to be very poor—often with incomes below a fraction of the poverty line<sup>269</sup>—a fact which renders the loss of TANF benefits particularly severe. Unsurprisingly, at least four social science studies conclude that losing TANF benefits significantly reduces the likelihood of reunification.<sup>270</sup>

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265. TANF plays a diminishing role in the safety net. Dana Thomson et al., *Chapter 3. The Role of the Social Safety Net in Protecting Children from Poverty*, CHILD TRENDS (Sept. 11, 2022), <https://www.childtrends.org/publications/lessons-from-a-historic-decline-in-child-poverty-role-of-the-social-safety-net-in-protecting-children-from-poverty> [https://perma.cc/82SE-2F85]. But a “substantial overlap” remains between families receiving TANF and families subject to CPS agency intervention. JiYoung Kang, Jennifer L. Romich, Jennifer L. Hook, JoAnn S. Lee & Maureen Marcenko, *Dual-System Families: Cash Assistance Sequences of Households Involved with Child Welfare*, 10 J. PUB. CHILD WELFARE 352, 353 (2016).

266. Still, tracking practices regarding TANF impacts can be difficult because eligibility rules vary by state. *E.g.*, Jacob Goldin & Ariel Jurow Kleiman, *Whose Child Is This? Improving Child-Claiming Rules in Safety-Net Programs*, 131 YALE L.J. 1719, 1738–39 (2022). Some states, for instance, permit TANF benefits to continue flowing to parents for up to 180 days when the state placed children in foster care and “determine[s] the child is expected to return to the primary caregiver within” that time period. WASH. ADMIN. CODE § 388-454-0015(1)(d) (2023).

267. *E.g.*, CTR. FOR FAM. REPRESENTATION, EFFECTS OF CHILD REMOVAL ON HOUSING AND BENEFITS IN NEW YORK CITY 1 (2021), <https://cfny.org/wp-content/uploads/2021/02/CFR-HoUsing-Benefits-Fact-Sheet.pdf> [https://perma.cc/Y6JA-JP3J].

268. One 2016 study found that far more families with a child in foster care lost TANF benefits or had only “[s]hort [s]pells” of TANF support than those who maintained or gained benefits. Kang et al., *supra* note 265, at 358–60. Earlier commentary identified anecdotal instances of parents losing TANF benefits following a child removal. Morgan B. Ward Doran & Dorothy E. Roberts, *Welfare Reform and Families in the Child Welfare System*, 61 MD. L. REV. 386, 428–29 (2002).

269. MAXINE EICHNER, *THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED)* 26 (2020).

270. Kang et al. found a straight-line correlation between TANF benefits and reunification likelihood. Parents who gained benefits after losing their children to foster care had a reunification rate of 83.8 percent. Kang et al., *supra* note 265, at 365. Parents who maintained their previous TANF benefits had a 71.2 percent, those with “short spells” of TANF 66.3 percent, and those who lost TANF benefits 58.3 percent. *Id.* A study by the Washington State Department of Social and Health Services compared one group of parents who lost TANF benefits upon removal of their children to a group that did not under what the state called its “concurrent benefits program,” and the latter group both reunified more quickly and was more likely to reunify at all. DAVID B. MARSHALL, KATHRYN BEALL, DAVID MANCUSO, REBECCA YETTE & BARBARA FELVER, WASH. DEP’T OF SOC. & HEALTH SERVS., *EFFECT OF TANF CONCURRENT BENEFITS ON THE REUNIFICATION OF CHILDREN FOLLOWING PLACEMENT IN OUT-OF-HOME CARE* 1–5 (2013), <https://www.dshs.wa.gov/sites/default/files/rda/reports/research-11-198.pdf> [https://perma.cc/Wg8Z-JMQU]. Two earlier studies similarly found that parents who lost cash assistance reunified significantly slower than parents who did not. Kathleen Wells & Shenyang Guo, *Reunification of Foster Children Before and After Welfare Reform*, 78 SOC. SERV. REV. 74, 87–88 (2004); Katherine Kortenkamp, Rob Geen & Matthew Stagner, *The Role of Welfare and Work in Predicting Foster Care Reunification Rates for Children of Welfare Recipients*, 26 CHILD. & YOUTH SERVS. REV. 577, 586, 588 (2004).

Similar research is lacking with other welfare benefits, but the eligibility rules of some important benefits suggest that parents do lose these benefits when state agencies place their children in foster care, and it is reasonable to expect similar negative impacts on reunification. SNAP benefits are given to a household including a child “living with” a parent.<sup>271</sup> Losing custody of a child to the foster care system means the child no longer lives with the parent, making the parent ineligible to continue receiving SNAP benefits for the child (even if the parent is expected to purchase food for the child for visits).<sup>272</sup>

Similarly, separation of families via foster care can jeopardize some publicly-supported housing. Families can lose some state or locally-provided family shelter placements, for instance, when CPS agencies separate them.<sup>273</sup> In contrast, temporary foster care placements should not jeopardize a parent’s public housing or Section 8 housing vouchers because U.S. Housing and Urban Development regulations define a “family” to include “a child who is temporarily away from the home because of placement in foster care.”<sup>274</sup> This regulation provides an important protection to families separated by foster care—they can maintain their housing so that inadequate housing and its related challenges do not become a barrier to reunification—and thus provide a model for how welfare law can avoid harms to families separated by foster care.

## 2. Social Security Benefits

In practice, parents can also lose access to a child’s Social Security benefits via the child’s placement in foster care. A child can be eligible for Social Security benefits following the death of one parent or due to the child’s disability,<sup>275</sup> and the Social Security Administration pays those benefits to a “representative payee.”<sup>276</sup> Social Security Administration regulations suggest that parents should continue to serve as representative payees so long as they are

271. 7 C.F.R. § 273.1(b)(1)(ii).

272. SNAP regulations suggest foster parents should not generally receive SNAP benefits for foster children in their care, so benefits should not generally shift from parents to foster families. See 7 C.F.R. § 273.1(b)(1)(iii), (b)(4). That distinguishes SNAP benefits from tax credits. See discussion *infra* Section IV.B.3.

273. CTR. FOR FAM. REPRESENTATION, *supra* note 267, at 1; N.Y. COMP. CODES R. & REGS. tit. 18, § 900.15(d) (2019).

274. 24 C.F.R. § 5.403(2)(i). Some local housing assistance programs have similar rules. See CTR. FOR FAM. REPRESENTATION, *supra* note 267, at 1 (describing New York City rental assistance).

275. For a brief summary, see Goldin & Jurow Kleiman, *supra* note 266, at 1739–40. Similarly, children can be eligible for some veterans benefits, which CPS agencies sometimes claim similarly to Social Security benefits. Ian Marx, *Washington Must Step Up to Protect Foster Youths’ Benefits*, IMPRINT (Aug. 17, 2022, 6:21 AM), <https://imprintnews.org/opinion/washington-protect-foster-youth-benefits/67187> [https://perma.cc/DMZ4-C2G2].

276. 20 C.F.R. § 416.610(b).

“demonstrating strong concern for the [child’s] well being.”<sup>277</sup> The regulation goes on to disfavor treating foster care agencies as representative payees.<sup>278</sup>

Yet that is precisely what has happened in nearly all states. A Marshall Project and NPR expose documented “that in at least 49 states and Washington, D.C., foster care agencies comb through their case files to find kids entitled to these benefits, then apply to Social Security to become each child’s financial representative.”<sup>279</sup> That is, CPS agencies take public benefits away from parents or guardians and shift it to themselves, providing no corresponding benefit to the children (who are in foster homes receiving foster care maintenance payments). The families lose significant financial supports which could aid their reunification. Following this coverage and other criticism,<sup>280</sup> some tentative reforms have begun, with a small number of jurisdictions announcing they would stop the practice, though reform efforts have also met resistance.<sup>281</sup>

277. 20 C.F.R. § 416.621(c)(2). The regulation creates a list of preferred representative payees. The most preferred is a custodial parent. *Id.* § 416.621(c)(1). But losing custody to foster care should not generally make a parent lose their most preferred status. The second option is a non-custodial parent who contributes to the child’s “support and is demonstrating strong concern for the” child. *Id.* § 416.621(c)(2). Not paying support does not take away the parent’s preferred status either, because the third option, cited above, is a parent not paying support but “demonstrating strong concern for the” child. *Id.* § 416.621(c)(3). Parents in this situation are well advised to both inform the Social Security Administration that their child is in foster care, and to use Social Security payments for the child’s benefit. *E.g.*, CTR. FOR FAM. REPRESENTATION, *supra* note 267, at 1.

278. 20 C.F.R. § 416.621(c)(7) (listing “[a]n authorized social agency or custodial institution” as the least preferred representative payee option for children).

279. Eli Hager & Joseph Shapiro, *Meet Malerie, Tristen, Katrina, Alex, Ethan, Mateo*, MARSHALL PROJECT (May 17, 2021, 7:45 PM), <https://www.themarshallproject.org/2021/04/22/foster-care-agencies-take-thousands-of-dollars-owed-to-kids-most-children-have-no-idea> [<https://perma.cc/MV6G-A7BG>] (footnote omitted); Eli Hager & Joseph Shapiro, *State Foster Care Agencies Take Millions of Dollars Owed to Children in Their Care*, NPR (Apr. 22, 2021, 7:00 AM), <https://www.npr.org/2021/04/22/988806806/state-foster-care-agencies-take-millions-of-dollars-owed-to-children-in-their-care> [<https://perma.cc/44KM-NPNH>].

280. *E.g.*, CHILD.’S ADVOC. INST. & FIRST STAR, *THE FLEECING OF FOSTER CHILDREN: HOW WE CONFISCATE THEIR ASSETS AND UNDERMINE THEIR FINANCIAL SECURITY* 4–22 (2011), [http://www.caichildlaw.org/Misc/Fleecing\\_Report\\_Final\\_HR.pdf](http://www.caichildlaw.org/Misc/Fleecing_Report_Final_HR.pdf) [<https://perma.cc/9Q8V-FFQP>].

281. *See, e.g.*, Haven Orecchio-Egresitz, *New York City Will Stop Collecting Social Security Checks from Children in Foster Care*, INSIDER (Mar. 9, 2022, 11:24 AM), <https://www.insider.com/new-york-city-wont-take-social-security-from-foster-children-2022-3> [<https://perma.cc/SZ5Q-R4GQ>]. In California, advocates raised concerns about this practice and the legislature passed a bill to prohibit it, but the governor vetoed that bill. *See* Jeanne Kuang, *California Child Welfare Agencies Under Fire for Pocketing Foster Kids’ Social Security Money*, CALMATTERS (Apr. 5, 2023), <https://calmatters.org/california-divide/2023/04/social-security-foster-benefits> [<https://perma.cc/YCN9-SX7J>] (describing practice in California and pending legislation, which had not yet had a hearing, to prohibit it); Assemb. 1512, 2023–2024 Leg., Reg. Sess. (Cal. 2023); Jeanne Kuang, *Newsom’s Veto Lets California Counties Continue Taking Foster Kids’ Money*, CALMATTERS (Oct. 9, 2023), <https://calmatters.org/california-divide/2023/10/california-foster-kids-money> [<https://perma.cc/M7TZ-gZMG>] (describing veto of Assemb. 1512).

### 3. Tax Benefits

Finally, parents can lose access to important tax credits when the state places their children in foster care. The Internal Revenue Code defines a child to include “an eligible foster child of the taxpayer,”<sup>282</sup> and uses that definition to determine who is eligible for the EITC<sup>283</sup> and the Child Tax Credit.<sup>284</sup> Assignment of eligibility for these tax credits is particularly important because they are the most effective tools for moving families with children out of poverty.<sup>285</sup> As a result, the foster parent—the taxpayer with “an eligible foster child” in their home—can claim the tax credits, not the family from which the state removed the child. That scenario could shift the credits from one family to another, even though the foster family should be receiving foster care maintenance payments to provide for the child’s needs.<sup>286</sup> Tax policy experts have observed that eligibility for these tax benefits changes when children’s living arrangements and legal status change,<sup>287</sup> although data quantifying how often parents lose tax benefits when children enter foster care does not appear to have been quantified. It is reasonable to expect the loss of these tax credits to have a similarly negative impact on reunification as the loss of other financial benefits.

#### C. OVERBROAD REGISTRY STATUTES IMPOSE ECONOMIC HARMS ON PARENTS

Agency involvement can further exacerbate families’ poverty by placing parents on a state child neglect and abuse registry. Employers in certain fields—such as child care, teaching, and any position in close contact with children, and often any position in contact with other vulnerable populations, such as elder care or home health aides—can access registries to determine if job applicants or current employees are listed there, and certain professional licenses depend on not being on the registry.<sup>288</sup> Registry placements harm

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282. I.R.C. § 152(f)(1)(A)(ii); *see also id.* § 152(f)(1)(C) (defining “eligible foster child” as “an individual who is placed with the taxpayer by an authorized placement agency or by judgment, decree, or other order of any court of competent jurisdiction”). Defining “child” to include foster children makes a foster child a “qualifying child” under § 152(c). *Id.*

283. *Id.* § 32(c)(3).

284. *Id.* § 24(c)(1).

285. The EITC, in particular, has the strongest anti-child poverty impacts of any individual safety net program. Thomson et al., *supra* note 265.

286. 42 U.S.C. § 672.

287. *E.g.*, PATRICK A. LANDERS & MARGOT L. CRANDALL-HOLLOCK, CONG. RSCH. SERV., IN11634, CHILD TAX BENEFITS AND CHILDREN WITH COMPLEX OR DYNAMIC LIVING ARRANGEMENTS 1–2 (2021), <https://crsreports.congress.gov/product/pdf/IN/IN11634> [<https://perma.cc/H25E-5CQ5>].

288. *See, e.g.*, Colleen Henry & Vicki Lens, *Marginalizing Mothers: Child Maltreatment Registries, Statutory Schemes, and Reduced Opportunities for Employment*, 24 CUNY L. REV. 1, 5–9 (2021) (describing history of expanding registry checks for child care employment); MO. REV. STAT. § 210.903(2)(2) (2000) (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).

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>289</sup> Lost job opportunities can pressure lower-income parents to “seek work in the underground economy,”<sup>290</sup> and, ironically, can hurt children by limiting their parents’ employment opportunities. With state agencies substantiating neglect or abuse in more than six-hundred thousand cases annually,<sup>291</sup> and with parents facing difficulties in challenging their placement on state registries,<sup>292</sup> the scope of economic harm through these registries is quite large.

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 which follow.<sup>293</sup> The connection between substantiated neglect and protecting children from people hired in child care or similar positions is frequently “tenuous.”<sup>294</sup> Researchers have identified no studies correlating substantiated maltreatment allegations with risk to children when parents are later hired in child care.<sup>295</sup> If an adult has sexually abused a stepchild, for instance, that individual may pose a threat to children if that person were a child care provider. In those cases, the risk of future abuse outweighs the employment cost to the individual adult. But in less severe cases, including the vast majority of neglect cases, the logic of such broad registry placements is hard to decipher, and leads to the critique that registry placements punish parents without

289. See Henry & Lens, *supra* note 288, at 2–3.

290. *Id.* at 13–14.

291. CHILD.’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2020, at 21 (2022), <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2020.pdf> [<https://perma.cc/34AP-L7GE>]. The precise number of children who were the subject of CPS-agency-substantiated investigations in 2020 was 618,399. *Id.* There were fewer investigations and fewer substantiations that year due to the COVID-19 pandemic, and the figure in previous years was over 650,000. *Id.*

292. See 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, 911–14 (2020) (describing obstacles parents face in challenging registry placements and advocating for procedural changes to ease such challenges).

293. Others have criticized the procedures through which many states place parents on child neglect and abuse registries. *E.g., id.* at 864–82. I have separately criticized the policy rationale for registries. Gupta-Kagan, *supra* note 68, at 238–39.

294. Henry & Lens, *supra* note 288, at 9. For several examples of registry placements denying parents employment without protecting children, see Scott Pham, *The Blacklist: “It’s Like a Leech on Me”: Child Abuse Registries Punish Unsuspecting Parents of Color*, BUZZFEED NEWS (Apr. 27, 2022, 5:31 AM), [https://www.buzzfeednews.com/article/scottpham/child-abuse-and-neglect-registries-punish-parents-of-color?utm\\_source=dynamic&utm\\_campaign=bfsharecopy](https://www.buzzfeednews.com/article/scottpham/child-abuse-and-neglect-registries-punish-parents-of-color?utm_source=dynamic&utm_campaign=bfsharecopy) [<https://perma.cc/RG62-PZS7>]. See also Goldberg, *supra* note 33 (describing a parent losing her home healthcare aide job and any further career in health care—parent had wanted to become a licensed practical nurse—following substantiation for inadequate supervision of nine- and eleven-year-olds who rode scooter into street).

295. Henry & Lens, *supra* note 288, at 9.

protecting children.<sup>296</sup> And, extrapolating from the research on child support from parents of children in foster care,<sup>297</sup> one could reasonably predict that such registry placements hurt children by hurting their parents financially.

#### V. EXPANDING LEGAL TOOLKIT TO DISTINGUISH POVERTY FROM NEGLECT

While various critics of the status quo have offered a variety of proposed changes, they either amount to dramatic calls for abolition which are unlikely to occur anytime soon<sup>298</sup> or vague suggestions for better distinguishing poverty and neglect which hold little promise for meaningful change.<sup>299</sup> This Part seeks to start filling that gap by proposing a set of legal improvements.<sup>300</sup>

Several points covered thus far identify areas requiring change, which this Part will explore. First, and most modestly, there is a widespread normative agreement that poverty alone should not trigger CPS agency involvement, a break from historic understandings which equated poverty with parental unfitness and tied neglect law to welfare law. Yet, legal relics of that historic understanding remain, poverty alone can lead to CPS involvement and family separations, and CPS agencies and courts frequently impose conditions for reunification that are difficult for poor individuals and which extend beyond conditions that can be termed neglect. Legislatures should repeal those relics and reform the law so it prohibits poverty from becoming the primary justification for neglect cases or extending family separations.

Second, foster care placement can trigger steps by a variety of state agencies that can exacerbate parents' poverty and thereby undermine reunification efforts. The law should prevent such counter-productive steps.

Third, the complex relationship between poverty and neglect makes any effort to distinguish the two extremely difficult. Recognizing that difficulty, this Part urges that we reverse historical steps taken to separate anti-poverty from anti-neglect interventions. Absent a workable doctrinal test to distinguish poverty from neglect, the best way to do so is to provide adequate anti-poverty supports. Only once such supports are provided and harmful parental behavior continues can the legal system fairly conclude that the conduct at

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296. See, e.g., ALAN DETTLAFF, KRISTEN WEBER, MAYA PENDLETON, BILL BETTENCOURT & LEONARD BURTON, UPEND, HOW WE ENDUP: A FUTURE WITHOUT FAMILY POLICING 13 (2021), <https://upendmovement.org/wp-content/uploads/2021/06/How-We-endUP-6.18.21.pdf> [<https://perma.cc/6B3D-HKQT>] (criticizing registries as imposing “permanent punishment”).

297. See *supra* Section III.A.

298. The proposals developed in this Section amount to non-reformist reforms, a concept explored *infra* in text accompanying note 315.

299. See *infra* Section V.A.

300. The focus of this Article is on changes to the laws governing individual cases and funding of the family regulation system. Nothing suggested in this Article is intended to be exclusive of other changes, especially development of mechanisms to provide direct support to families without involving the family regulation system or even the government. See, e.g., Anna Arons, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 12 COLUM. J. RACE & L.F. 1, 22–25 (2022) (describing neighborhood-based mutual aid efforts).

issue is neglect rather than the result of poverty. To implement this idea, this Part proposes steps which would amount to a more radical change intended to better distinguish poverty from neglect: States should be required to provide anti-poverty supports as a condition of receiving federal funds. CPS agencies should spend at least as much money helping families stay together as they would spend separating them. And state efforts to keep families together must extend beyond what CPS agencies can provide and include a minimally adequate safety net, including basic income and housing supports. The federal government should insist on such efforts as a condition of the billions of dollars it provides to states to operate foster care systems.

#### A. PROPOSED SOLUTIONS IN EXISTING DEBATE

One striking element about the existing debate is the absence of many proposed reforms that would strengthen substantive legal tools to effectively distinguish poverty from neglect. A recent document published by the federal Children's Bureau is telling. It critiques the longstanding "separation" between providing families with financial supports and child neglect interventions,<sup>301</sup> but does not seek to reverse that separation in our legal system. Instead, it encourages states to define neglect more clearly to exclude poverty.<sup>302</sup> Like the Children's Bureau, mainstream organizations complaining about the legal system confusing poverty for neglect have generally offered quite modest proposed reforms. The National Council of Juvenile and Family Court Judges ("NCJFCJ"), for instance, urges Congress to amend federal funding law to require each state's law to provide that poverty alone will not separate families or justify terminations of parental rights.<sup>303</sup> Similarly, Human Rights Watch and the American Civil Liberties Union proposed "[n]arrow[ing] the definition of child abuse and neglect" so it excludes "poverty-related circumstances [and] lack of financial resources."<sup>304</sup>

Such provisions already exist in many states and have not proven powerful enough to distinguish poverty from neglect.<sup>305</sup> Newer versions do not add legal tools. A newly enacted poverty defense law in California states that a child is not neglected "solely due to . . . [i]ndigence or other conditions of financial difficulty, including, but not limited to, poverty, the inability to provide or obtain clothing, home or property repair, or childcare."<sup>306</sup> This

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301. CHILD WELFARE INFO. GATEWAY, *supra* note 85, at 4.

302. *Id.* at 5. The Children's Bureau offers some general guidance to distinguishing poverty from neglect. *Id.* at 6–7.

303. NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, *supra* note 38, at 5.

304. HUM. RTS. WATCH & AM. C.L. UNION, *supra* note 100, at 12.

305. *See supra* Section II.C.1.

306. Act of September 29, 2022, ch. 832, § 1, 2022 Cal. Legis. Serv. 8741, 8741 (West) (codified as amended at CAL. WELF. & INST. CODE § 300(b)(2)(A) (2023)). Kentucky also recently enacted a poverty defense. Act Relating to Child Welfare and Declaring an Emergency, ch. 75, § 17, 2022



law, while welcome, does not address how to determine whether a particular problem alleged by the state is “solely due” to poverty. Similarly, a proposed federal law would require states to ensure that allegations of neglect “concerning a child’s living arrangements or subsistence needs are addressed through services and benefits and that no child is separated from the child’s parent for reasons of poverty.”<sup>307</sup> But the bill does not offer further details on how states would ensure that poverty does not lead to any family separations. In essence, it would federalize the poverty defense<sup>308</sup> without strengthening it at all.

The Children’s Bureau goes on to encourage more financial supports, including an endorsement of the Biden Administration’s now-expired expanded child tax credit, and a range of other anti-poverty financial supports.<sup>309</sup> The Bureau echoes calls for expanded supports made by earlier reformers.<sup>310</sup> These supports are essential, but avoid recommending steps that can be taken within the child neglect legal system. Tellingly, the Children’s Bureau encourages CPS agencies to provide “navigator services” to help families obtain public benefits.<sup>311</sup> While that modest proposal could certainly help some families, it reinforces the separation that the Children’s Bureau critiqued between CPS agencies and anti-poverty services. All the Bureau recommends are aids to obtain financial supports available elsewhere, not for the agencies to address family poverty directly. Nor does the Bureau offer any legal reforms to ensure that agencies seek to address family poverty before separating families.

NCJFCJ also urges the creation of a stronger safety net,<sup>312</sup> and some process reforms, such as “[e]nsur[ing] high quality legal representation for all” parties.<sup>313</sup> But NCJFCJ recommends no further substantive changes to the definition of neglect or the obligation of state agencies to address family poverty. Intriguingly, the NCJFCJ does recommend training judges and CPS agency staff on distinguishing poverty and neglect, but without specifying tests they would use to do so.<sup>314</sup> Even leading abolitionist writing calls for significant expansion of

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Ky. Acts 457, 467 (codified at KY. REV. STAT. ANN. § 600.020(1)(a)(8) (LexisNexis Supp. 2023)) (adding phrase “when financially able to do so or offered financial or other means to do so” to one definition of neglect).

307. Family Poverty Is Not Child Neglect Act, H.R. 573, 117th Cong. § 2(1) (2021).

308. See *supra* Section II.C.1.

309. CHILD WELFARE INFO. GATEWAY, *supra* note 85, at 5.

310. See, e.g., INST. OF JUD. ADMIN. & AM. BAR ASS’N, STANDARDS RELATING TO ABUSE AND NEGLECT 6 (1981) (calling for “much more state support and services for children and families” outside of neglect and abuse cases, especially “day care, income maintenance, and health insurance”).

311. CHILD WELFARE INFO. GATEWAY, *supra* note 85, at 8.

312. NCJFCJ urges “comprehensive supports” including “childcare, housing and rental assistance, cash assistance, health care, and paid leave.” NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, *supra* note 38, at 6.

313. *Id.* at 7.

314. *Id.* at 5–7.

anti-poverty financial supports, including housing,<sup>315</sup> but generally do not call for new tests to distinguish poverty from neglect.<sup>316</sup>

*B. SEVERING CHILD NEGLECT’S BLACK LETTER LAW FROM POVERTY*

This Section seeks to fill an important gap in existing proposals: changes short of abolition but nonetheless constituting “non-reformist reforms – those measures that reduce the power of an oppressive system while illuminating the system’s inability to solve the crises it creates.”<sup>317</sup> Such changes would need to do what current law fails to—distinguish poverty from neglect, both when poverty is a primary driver of cases, and in more complicated cases in which poverty and deep-seated parental problems overlap. The proposals outlined in this Section would reduce the power of the present child neglect system by narrowing the scope of situations which can trigger CPS agency and family court intervention, limiting the poverty-related orders which are permitted under such interventions, and limiting the ability of such interventions to exacerbate family poverty. Moreover, they would attack a long-standing foundation of the status quo—the idea that providing anti-poverty supports has no role in responding to concerns about child neglect. For those who support abolition, these proposals can serve as a “road to abolition”<sup>318</sup> by developing a smaller neglect system and stronger safety net, both pillars of an alternative approach.

One need not endorse abolition, however, to recognize the need for legal reforms to better distinguish poverty from neglect. Legal reform can sever explicit regulation of poverty from child abuse and neglect law and legal process. This goal requires more than codifying the poverty defense, and this Section outlines several categories of modest reforms to achieve that goal. The law should prevent poverty situations from justifying CPS agency intervention or family separations, or from extending family separations. Legal terminology should not equate neglect with poverty or public benefits. And when interventions do occur, the law should prevent actions that exacerbate family poverty and thus undermine reunification goals.

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315. Dettlaff et al., *supra* note 4, at 511; Melody R. Webb, *Building a Guaranteed Income to End the “Child Welfare” System*, 12 COLUM. J. RACE & L. 668, 680–81 (2022); Caitlyn Garcia & Cynthia Godsoe, *Divest, Invest, & Mutual Aid*, 12 COLUM. J. RACE & L. 601, 615–18 (2022).

316. See, e.g., Dettlaff et al., *supra* note 4, at 510–13 (proposing reforms to build “[t]he road to abolition”).

317. Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> [<https://perma.cc/JWR6-Q4VX>]; see also Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 114 (2019) (describing non-reformist reforms as “transformative changes in carceral systems with the objective of demolishing those systems rather than fixing them”).

318. Dettlaff et al., *supra* note 4, at 510.

1. Replacing “Neglect”—or at Least Preventing Poverty from Justifying or Extending Family Regulation or Separation

The long-standing overlap between poverty and the legal concept of “neglect,” coupled with the legal system’s inability to develop an effective test to disentangle the two raises strong questions about the utility of neglect as a legal category. In other work, I have argued that legal definitions of neglect are far too broad and vague, and this indeterminacy permits bias based on multiple factors, including poverty, to infect decision-making.<sup>319</sup> I argued that legislatures should enact definitions of neglect that are far more specific, on par with the specificity found in criminal codes.<sup>320</sup>

For purposes of this Article, broader redrafting of neglect definitions is necessary because other legal tools are inadequate to the task of distinguishing poverty from neglect. The present statutory mechanism for doing so are definitions of neglect which exclude poverty—the poverty defense.<sup>321</sup> This Article does support enactment of the poverty defense in all states and by Congress (through its federal funding power). Without the poverty defense, statutory law is that failure to provide adequate food, clothing, or shelter amounts to neglect<sup>322</sup>—that is, that to be poor is to neglect one’s children. But given the documented inadequacy of the poverty defense,<sup>323</sup> this step is insufficient.

More specific definitions of maltreatment can more effectively exclude pure poverty situations from understandings of neglect than the poverty defense in its existing form. Legislatures, agencies, and courts should specify that homelessness, any situation involving inadequate housing, or inadequate child care does not on its own qualify as neglect.<sup>324</sup> Inadequate housing conditions when a parent has sought to remedy the conditions (and especially when a landlord has failed to do so) should not justify a neglect finding or family separation. Inadequate supervision when a parent left a child alone to work or obtain public benefits when the parent sought but could not obtain adequate child care should not justify a neglect finding or family separation.

More specific definitions will also help address extended parent-child separations. Present vague definitions of neglect mean there is no connection between the specific neglect adjudicated and whether the state may separate the family, or the conditions the state may impose for family reunification. That lack of specificity can lead agencies to impose poverty-based barriers to

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319. See generally Gupta-Kagan, *supra* note 68.

320. *Id.* at 273–76.

321. See *supra* Section II.C.1.

322. E.g., N.Y. FAM. CT. ACT. § 1012(f)(i)(A) (McKinney 2023).

323. See *supra* Section II.C.1.

324. This change would not render housing problems irrelevant; when parental behavior falls below “a minimum degree of care,” and that failure causes the housing problem, and that housing problem causes an imminent risk of harm to the child, a neglect finding might be possible. N.Y. FAM. CT. ACT § 1012(f)(i) (McKinney 2023).

reunification, requiring, for instance, that parents maintain stable employment or stable housing before their children can return to their custody.<sup>325</sup> The law should instead require a close nexus between any specific child maltreatment adjudicated and the requirement for reunification.<sup>326</sup> If a child is, for instance, separated based on a judge's conclusion that a parent's substance use disorder led to behavior placing the child in danger, then the case plan should be focused narrowly on the substance use and related behaviors. The law should prohibit states from imposing distinct requirements that parents not be poor as a condition of reunification. Requirements of stable employment or housing, in particular, should not be imposed. This reform will work together with reforms narrowing the definition of neglect. If lacking stable housing or stable employment does not amount to neglect, then obtaining stable housing or stable employment should not provide a barrier to reunification.

## 2. Avoiding Language Which Conflates Poverty with Neglect

The historical overlap between poverty and neglect remains in language describing the child neglect legal system in terms relevant to poverty. To mark a break from those historical roots and communicate the normative message that poverty is not neglect, legislatures should remove such language.

This means, at a minimum, ending the use of "dependency" to describe child neglect cases and the related legal systems. The historic roots of the term "dependency" focus on family poverty. An understanding of those roots supports excising that term from the vocabulary describing the child neglect legal system.

Similarly, all in the field should no longer use the common phrase "child welfare" to describe the legal system. Others, especially Dorothy Roberts and Emma Peyton Williams, have argued for alternative names such as the family regulation or family policing system,<sup>327</sup> and how the ambiguous phrase "child welfare" can be "misleading."<sup>328</sup> For purposes of this Article, it suffices to note that the term "welfare" is commonly understood to mean public benefits. The history of intersections between welfare law and so-called "child welfare" law reflects a troubling expectation that welfare-receiving families (that is, poor families) would be on the receiving end of CPS agency and family court regulation. The term is also ironically inaccurate when applied to the child

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325. See *supra* note 155 and accompanying text.

326. Gupta-Kagan, *supra* note 68, at 280–81.

327. See Dorothy Roberts, *Feminism, Race, and Adoption Policy*, in ADOPTION MATTERS: PHILOSOPHICAL AND FEMINIST ESSAYS 234, 234 (Sally Haslanger & Charlotte Witt eds., 2005); 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), [https://etd.ohiolink.edu/acprod/odb\\_etd/ws/send\\_file/send?accession=oberlin1592141173476542&disposition=inline](https://etd.ohiolink.edu/acprod/odb_etd/ws/send_file/send?accession=oberlin1592141173476542&disposition=inline) [<https://perma.cc/J2CR-E8CV>].

328. Nancy D. Polikoff & Jane M. Spinak, *Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, 11 COLUM. J. RACE & L. 427, 430 (2021).

neglect legal system because that same history illustrates how welfare benefits and other anti-poverty programs have been largely excluded from that legal system.

### 3. Eliminating Financial Harms on Poor Families from Present Practice

Legal reforms can prohibit some of the more troubling ways in which the present legal system exacerbates the harms of poverty. First, federal and state law should prohibit efforts by state agencies to collect child support from parents of children the state has placed in foster care. The empirical record demonstrates that such efforts delay reunification while failing to generate any significant revenue for the state.<sup>329</sup> Even if they did generate revenue for the state, it would be difficult to justify the practice given the harms caused by delayed reunification. The primary benefit of prohibiting this practice is that doing so would end one way in which the present system undermines poor families' efforts to reunify. Relatedly, seeking child support operates more like a fine than real child support; any child support payments do not actually go to the child or their caretaker and rather simply goes to state coffers. Accordingly, prohibiting the practice would also eliminate one punitive element of a legal process intended to be rehabilitative.

While the recent federal guidance suggesting states generally need not seek child support is welcome,<sup>330</sup> further reforms are necessary. Seeking child support payments from parents above a "specified income level" comes with significant risks. States would have to set and enforce such levels and could be unnecessarily strict in doing so. There is no reason to think funds received from the few parents with greater means with children in foster care would generate significant revenue in any event. And continuing the possibility of child support payments would further communicate an inappropriately punitive element of the system.

Stronger reforms would come in the form of federal legislation to repeal the provision regarding seeking child support or, better yet, to prohibit states from seeking child support from parents of foster children. On the state level, state law should prevent agencies from ever seeking child support through a determination that doing so is rarely or never appropriate.<sup>331</sup>

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329. See *supra* notes 245–46 and accompanying text.

330. See *supra* note 257 and accompanying text. Another related reform appears in recent New York legislation repealing language which deprived unmarried fathers of the right to challenge their children's adoptions if they had not paid child support while the child was in foster care. Act of Dec. 30, 2022, ch. 828, § 1, 2022 N.Y. Sess. Laws 2193, 2193 (McKinney) (codified at N.Y. DOM. REL. LAW § 111 (McKinney Supp. 2023)).

331. State law reforms could come in the form of statutory bans on the practice, agency regulations or policies prohibiting the agency from seeking child support, or court decisions refusing to grant child support orders. Declaring that such orders are not "appropriate" (the statutory term) should keep state agencies in compliance with the federal statute, 42 U.S.C. § 671 (a) (17). Given its guidance describing child support orders as generally inappropriate, the Children's Bureau would likely not declare any state bans to violate the federal funding requirements.

Second, financial anti-poverty supports should continue to flow to parents so long as the family's permanency plan is reunification. Parents do not need those benefits to provide for children's day-to-day care, but unlike when another individual obtains custody separate from the foster care system, there is no need to transfer benefits to ensure the child is taken care of. The immediate needs of the child are met through the foster care system, and federal funds reimburse that system to ensure it can meet children's needs. Maintaining benefits to parents helps satisfy the foster care system's primary goal of reunifying families. Existing public benefits should largely stay with families so they can use them to address the factors leading to the family separation and reunify as quickly as possible. These principles are already reflected in public housing and Social Security disability benefit regulations,<sup>332</sup> and should be extended to other public benefits law like SNAP and TANF<sup>333</sup> and tax law. One step in this direction was taken in California, which, effective 2022, permitted TANF benefits to remain with parents for six months after the state removed a child;<sup>334</sup> this rule should apply to all public benefits as long as the child's permanency plan is reunification.<sup>335</sup> Moreover, to avoid agencies finding end runs around these laws as has occurred with Social Security benefits,<sup>336</sup> the law should protect benefits flowing to parents so long as family courts have set a goal of reunification.<sup>337</sup>

Third, child protection registries should be reformed to limit the financial harm they do to parents—and thus to the children in their care. Comprehensive reform of these registries is beyond the scope of this Article.<sup>338</sup> The central point is that placement on registries should be reserved for conduct that clearly presents risks to other children in a workplace setting. Before placing a parent on the registry, a state agency should not only have to prove that the parent was neglectful, but that this neglect is related to the activities required

332. See *supra* notes 274, 277–78 and accompanying text.

333. See, e.g., Jim Moye & Roberta Rinker, *It's a Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?*, 39 HARV. J. ON LEGIS. 375, 392 (2002) (recommending that parents be able to retain welfare benefits for up to six months after separation by a CPS agency).

334. Act of July 16, 2021, ch. 85, § 32, 2021 Cal. Legis. Serv. 2672, 2739 (West) (codified as CAL. WELF. & INST. CODE § 11203(b) (West 2023)).

335. Federal statutory change would be required to implement this reform because TANF law currently caps state discretion at 180 days. 42 U.S.C. § 608(a)(10)(A).

336. See *supra* notes 279–80 and accompanying text.

337. Such a rule would add even more importance to a change in permanency plans away from reunification and would thus underscore the need for rigorous procedures for and prompt appeals of permanency plan changes, a topic I have addressed elsewhere. See generally Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Cases Between Disposition and Permanency*, 10 CONN. PUB. INT. L.J. 13 (2010).

338. For various proposals, see Gupta-Kagan, *supra* note 68, at 272–87; Sen et al., *supra* note 292, at 889–927; Henry & Lens, *supra* note 288, at 33; and Molly Greer, *Suggestions to Solve the Injustices of the New York State Central Register for Abuse and Maltreatment*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 729, 756–65 (2011).

of employment, a principle that New York has incorporated into its registry law.<sup>339</sup> In the limited neglect cases that do indicate a risk to other children, parents should have the ability to prove that they have rehabilitated such that no risk remains; a parent whose past substance abuse led to behavior putting young children at risk should be able to establish their sobriety and pursue employment.

*C. DISTINGUISHING POVERTY FROM NEGLECT THROUGH  
ANTI-POVERTY SUPPORTS*

This Section makes a more dramatic proposal: The federal government should use its spending power to end the historic separation between CPS agency involvement and anti-poverty supports through two steps. First, in neglect cases, Congress should require states to spend the same amount of money to preserve and reunify families as they spend to separate families. Second, the federal government should require each state's safety net to meet minimum standards before the state can access federal funds to support separation of families.

This proposal flows from two insights discussed throughout this Article. First, poverty has repeatedly been shown to be a risk factor for CPS agency involvement and for child maltreatment, and a hindrance to a parent's ability to mitigate those risk factors and convince authorities they should be able to reunify. Second, no easy legal test exists to identify which cases can be resolved by addressing family poverty and which by addressing other factors. As a result of these two factors, the present legal system deems parents neglectful and separates families when some anti-poverty interventions would have prevented that separation. The precise scope of the phenomenon is unknowable absent some more effective legal test, but given the centrality of poverty to neglect, the number is surely significant.

This reality raises serious moral questions about the present system. That system uses state power to invade families' constitutionally-protected right to family integrity after denying families anti-poverty supports which could have helped keep many of those families free of state intervention. At present, the state provides a weak safety net, especially for the poorest families.<sup>340</sup> Through the family regulation system, the state then surveils, regulates, and separates a significant proportion of those poorest families. And then the state spends significant sums to take care of children in its custody—spending money to separate families that could have kept some families intact, and spending

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339. N.Y. SOC. SERV. LAW § 424-a(1)(e)(viii) (McKinney Supp. 2023).

340. The poorest families, especially those that do not work, do not benefit from the EITC, the strongest anti-poverty tool in use in the United States. *See supra* note 285 and accompanying text.

money on financial supports to help strangers house and provide child care for children it refused to provide to those children's parents.<sup>341</sup>

This Article argues the state should provide stronger anti-poverty supports to families and determine if they adequately mitigate any safety risk to the child. This proposal follows social science research suggesting that these anti-poverty measures will reduce both child maltreatment and CPS agency intervention.<sup>342</sup> And it seeks to avoid the moral hazard of spending money to separate families after refusing to spend similar sums keeping families together. Absent more effective legal tools, providing financial supports and then determining whether such provision mitigates any risks to children is the best way to determine if some troublesome parental behavior is the result of neglect or of poverty.

Implementing this proposal, and more precisely defining the anti-poverty supports the state should provide, requires revising existing law regarding agencies' obligations to make reasonable efforts to prevent family separations and, if necessary, reunify families. Currently, a central barrier to distinguishing poverty from neglect under existing law is the inability of reasonable efforts requirement to require states to provide even modest anti-poverty financial supports.<sup>343</sup> It is worth noting that some voices—even those skeptical of the most dramatic calls for change—endorse greater provision of financial supports to some poor parents as part of agencies' reasonable efforts.<sup>344</sup>

This Article proposes a significantly invigorated reasonable efforts requirement to provide the legal structure for a state obligation to provide greater material supports, with two elements. First, whenever poverty is a significant stressor on families, efforts to keep the family safely together or to reunify the family should include individualized steps to reduce that stressor. CPS agencies should provide emergency food, housing, or child care assistance,

341. Federal law requires states to make such expenditures. 42 U.S.C. § 675(4)(A). These expenditures to foster families, which are inaccessible to parents, are often quite significant. In the New York metro area, for instance, the board rate is up to \$35.15 per day, or more than \$1,000 per month. N.Y. OFF. OF CHILD. & FAM. SERVS., MAXIMUM STATE AID RATES FOR FOSTER BOARDING HOME PAYMENTS AND ADOPTION SUBSIDIES 2023–24 RATE YEAR (JULY 1, 2023, THROUGH MARCH 31, 2024) 1 (2023), <https://ocfs.ny.gov/main/rates/assets/docs/rates/fc-b/FC-Board-Rates-2023Jul01-2024Mar31.pdf> [<https://perma.cc/LQ3B-N222>].

342. See *supra* Section I.B.

343. See *supra* Section II.C.2.

344. For instance, former agency director Dee Wilson, in an essay criticizing calls to abolish the child neglect and abuse system, wrote that “when parents are unable to meet their child’s basic needs (as set forth in statute) due to poverty, the public agency must assist parents to access needed resources in the community, and if such resources are not available the public agency must provide funding for essential resources.” Wilson, *supra* note 50. This proposal itself falls short of the dramatic reform necessary. By limiting it to situations when a neglect is “due to poverty,” Wilson directs his proposal to cases that, definitionally, do not amount to neglect in many states, and presumes the law currently has the ability to identify which cases are “due to poverty.” See *id.* Nonetheless, this proposal reflects the central point that when a neglect case features poverty, financial supports to address that poverty must be part of the solution.



or assistance advocating with other agencies to provide needed assistance, and it should include helping parents access benefits from other agencies to which they are entitled.<sup>345</sup> When states do separate families, financial supports must enable them to participate in the services demanded of them by the state.<sup>346</sup>

Expenditures on such supports should be significant. Removing a child triggers a host of costs to the state—foster care maintenance payments to foster parents, case management costs, court and legal costs, and more. As I have argued elsewhere, CPS agencies' reasonable efforts to preserve and reunify families should, at a minimum, require spending equivalent resources as would be spent if children were removed from their family and placed in state custody.<sup>347</sup> Operationalizing this suggestion requires quantifying the real dollars states would have to spend on families. This task should be relatively straightforward: Consider all of the jurisdiction-specific costs imposed by removing a child<sup>348</sup> and multiply it by the median length of time that families

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345. One leading parents' attorney described cases in which the CPS agency could have helped a parent find a home that did not present a health hazard. Ketteringham, *supra* note 24; see also ELLIOTT, *supra* note 66, at 368–80 (describing a case in which a CPS agency removed children from their parent due to housing conditions rather than assist him in seeking necessary repairs or providing other financial supports).

346. Human Rights Watch and the ACLU specifically list paying the cost of transportation for visits as one example of such financial assistance. HUM. RTS. WATCH & AM. C.L. UNION, *supra* note 10, at 141–42. Such assistance should also include paying the cost of all services mandated for parents, a minimal step not always done. See Gupta-Kagan, *supra* note 68, at 230 n.67 (describing one case in which the state ordered mental health evaluations of questionable necessity but failed to pay for them, then held the parent's inability to obtain such evaluations against her).

347. *Id.* at 283–84. This proposal has one antecedent—a 1981 West Virginia federal court consent decree requiring the agency to provide “financial assistance up to amounts which may be provided foster families when the primary reason for an anticipated removal is that the family lacks sufficient resources to adequately care for a child.” PELTON, *supra* note 15, at 160 (quoting consent decree). Such consent decrees are no longer permitted under subsequent Supreme Court precedent, see *supra* note 140 and accompanying text, but an analogous principle could be codified in federal or state statutory or regulatory definitions of reasonable efforts.

348. Some of these costs are precise and easy to quantify. For instance, in the New York City metro area, the amount of money paid to foster parents to take care of children is \$1,072.08 per month for children zero-to-five without significant disabilities, with higher figures for older children and children with such disabilities. N.Y. OFF. OF CHILD. & FAM. SERVS., *supra* note 341, at 1. Figures for other costs could be obtained by dividing total expenditures by total number of cases. See, e.g., THE COUNCIL OF THE CITY OF N.Y., REPORT OF THE FINANCE DIVISION ON THE FISCAL 2021 PRELIMINARY FINANCIAL PLAN: THE LEGAL AID SOCIETY AND INDIGENT DEFENSE 2 (2020), <https://council.nyc.gov/budget/wp-content/uploads/sites/54/2020/04/LAS-and-Indigent-Defense.pdf> [<https://perma.cc/U546-8WRG>] (providing total expenditures for appointed counsel in family regulation cases in one jurisdiction).

remain separated via foster care<sup>349</sup> to reach the amount of money that the state must spend in each case.<sup>350</sup>

To illustrate how this test would operate, consider the case at the center of the Pulitzer Prize-winning book, *Invisible Child: Poverty, Survival & Hope in an American City*, which involves a close-knit and loving family of eight children whose parents struggle financially and with health problems, a mental health condition, and substance use, and who appear only to be harmed by CPS agency involvement.<sup>351</sup> The family's separation followed concerns about poverty; after incorrectly being denied public benefits, the family was low on food and their housing conditions deteriorated, despite multiple calls to the landlord and the city (which was subsidizing the apartment).<sup>352</sup> The CPS agency failed to alleviate those problems and failed to provide material assistance so the family could do so.<sup>353</sup> Then, citing the housing conditions, the agency convinced a family court judge to remove the children, a step which triggered costs including foster care maintenance payments to the various foster homes, and case management fees to a foster care agency; the total cost surpassed \$33,000 per month.<sup>354</sup> A multi-year saga followed before the family reunified.<sup>355</sup>

Had the proposed rule—that the agency's reasonable efforts had to include spending equivalent to what would be spent on state custody—been implemented, it would have eliminated the reason for family separation. This rule would create a strong incentive for the CPS agency to have provided direct assistance to the family—first to replace the public benefits that were incorrectly denied, then to repair the housing conditions or obtain alternative housing. Even in the New York City real estate market, the \$33,000 per month was multiple times more than what the family needed (especially when multiplied by the children's length of stay in CPS custody); the agency would have had enough left over to provide what it called “preventative homemaking services” (something one case worker indicated would be appropriate, but the agency did not provide) to help the parents manage the children's various appointments and other tasks, especially considering the parents' medical and mental health conditions.<sup>356</sup> Notably, these interventions would not seek to correct a parental pathology. Rather, they would provide direct financial

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349. Using national numbers, this would be 17.5 months, which is the median length of time children remain in state custody before leaving it. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., THE AFCARS REPORT: PRELIMINARY FY 2021 ESTIMATES AS OF JUNE 28, 2022—NO. 29, at 3 (2022), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-29.pdf> [<https://perma.cc/LU2M-JPEY>]. The median could be adjusted for each jurisdiction.

350. Additionally, state CPS agencies could be required to spend at least as much on such supports and services to parents in total each year as they spend on separating families.

351. See generally ELLIOTT, *supra* note 66.

352. *Id.* at 341–42, 349–50, 368–76.

353. *Id.*

354. *Id.* at 405.

355. *Id.* at 406–515.

356. *Id.* at 405–06.

supports and a service designed to ease the burden of parenting. This step would empower the family to take the same steps a middle-class family could take—pay to repair the home and hire assistance to maintain it, or obtain counsel to force the landlord to meet its legal obligation to maintain the apartment.

Consider another scenario: a parent leaves an infant child home alone for multiple hours. Concerned about the lack of supervision, especially of an infant, the CPS agency could provide child care, paying for the parent to have access to regular child care or back-up care in case the regular child care option fails. By federal law, child care costs form a part of the “foster care maintenance payments” that would be provided to foster parents if the state took the child into its custody.<sup>357</sup> The state should offer equivalent access before removing a child and to develop a plan for the safe return of a child. Such child care support might eliminate any need for further involvement. Or, if the lack of supervision continues even after the provision of such assistance, that continued behavior suggests a likelihood that some challenge beyond pure poverty exists.

This rule would impose significant added financial obligations to CPS agencies whenever they separate a family, and thus mark a significant shift from the present federal funding structure. That structure presently makes it less expensive to separate poor families than it otherwise would be,<sup>358</sup> a reality which has rightly been criticized as making it too easy for CPS agencies to separate families.<sup>359</sup> Imposing more significant reasonable efforts requirements would take away that perverse incentive to separate families.

Second, the law should address the challenge that state CPS agencies do not generally operate anti-poverty financial benefits programs. And they should not—otherwise, a strong incentive would exist to send families to CPS agencies for anti-poverty services better provided by other agencies. As a result, a reasonable efforts requirement pointed solely at CPS agencies cannot evaluate whether a state has made reasonable efforts to support families and keep them intact.

Resolving this challenge requires a dramatic change in law: a *systemic* reasonable efforts finding. As a condition of receiving any federal funds to help pay for the cost of separating families and placing children in foster care, Congress should require states to provide a minimally adequate system of anti-poverty supports. This system of supports should include the various options shown to have a statistically significant impact on child maltreatment and CPS agency involvement.<sup>360</sup> It should include assistance for the most frequent

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357. 42 U.S.C. § 675(4) (A). Federal law provides a useful list of what such expenditures must cover when a child is in state custody, including child care: “the cost of . . . food, clothing, shelter, *daily supervision*, school supplies, [and] a child’s personal incidentals.” *Id.* (emphasis added).

358. See *supra* text accompanying notes 232–33 (“[I]t is cheaper for states to separate poor families than rich families.”).

359. E.g., Wexler, *supra* note 233, at 58–59.

360. See, e.g., *supra* notes 88–96 and accompanying text.

poverty-related services required by CPS-agency-involved families, which can include both direct aid to families and payment for essential services for families such as rental assistance, supportive housing, or other forms of housing assistance,<sup>361</sup> and child care assistance.<sup>362</sup> It should include supports shown to both reduce overall child poverty and deep poverty, which refers to families earning less than fifty percent of the poverty line. The distinction is important because many *generally* powerful anti-poverty supports are tied to parental employment, but those do little to help families with unemployed parents who are more likely to live in deep poverty.<sup>363</sup> If a state refuses to provide minimally adequate anti-poverty supports, it creates a greater risk that poor families will face unnecessary CPS agency regulation and separation, and the state then should lose its entitlement to obtain federal funding to support such regulation and separation.

This proposal would remedy one of the historical errors from the Flemming Rule. In targeting states which cut families off from welfare benefits without providing anything else, the rule allowed states to provide foster care *instead of* welfare benefits. A state can fail to provide adequate child care or housing assistance, leading to a dangerous situation for children. But rather than require the state to fill these gaps in its safety net, federal funding continues to subsidize state separations of such families, which include the cost of strangers providing housing and child care to the children<sup>364</sup> to whom the state failed to provide such assistance when they lived with their parents. This Article's proposal would ensure states had to provide some minimum level of welfare benefits, and for some harmful or unacceptably risky parental behavior to occur despite those benefits, before separating the family. Moreover, this proposal remedies a "mismatch"<sup>365</sup> between the limited authority of state

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361. *E.g.*, ANNE F. FARRELL ET AL., CHAPIN HALL AT THE UNIV. OF CHI., FINAL REPORT: CONNECTICUT'S INTENSIVE SUPPORTIVE HOUSING FOR FAMILIES PROGRAM 73–78 (2018), <https://www.chapinhall.org/wp-content/uploads/ISHF-Report-FINAL.pdf> [<https://perma.cc/L2HF-B7PV>] (analyzing Connecticut's housing assistance program). A 2012 study found that supportive housing sharply decreased the likelihood of CPS agency involvement with families and family separations. Saahoon Hong & Kristy Piescher, *The Role of Supportive Housing in Homeless Children's Well-Being: An Investigation of Child Welfare and Educational Outcomes*, 34 CHILD. & YOUTH SERVS. REV. 1440, 1445–46 (2012).

362. Beyond these points, defining a minimally-adequate system of anti-poverty supports in detail is beyond the scope of this Article. Various groups have compiled a set of existing state policies which correlate strongly with reduced child maltreatment and CPS agency involvement. *See generally* CLARE ANDERSON, Y. GREWAL-KÖK, G. CUSICK, D. WEINER & K. THOMAS, CHAPIN HALL AT THE UNIV. OF CHI., CHILD AND FAMILY WELL-BEING SYSTEM: ECONOMIC & CONCRETE SUPPORTS AS A CORE COMPONENT (2023), <https://www.chapinhall.org/wp-content/uploads/Economic-Supports-deck.pdf> [<https://perma.cc/T97P-Z4UD>].

363. *See, e.g.*, COMM. ON BLDG. AN AGENDA TO REDUCE THE NO. OF CHILD. IN POVERTY BY HALF IN 10 YEARS, *supra* note 109, at 7–8 (contrasting the EITC, which reduces poverty generally but not deep poverty, with SNAP, which reduces both).

364. 42 U.S.C. § 675(4)(A).

365. Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *The Institutional Mismatch of State Civil Courts*, 122 COLUM. L. REV. 1471, 1475 (2022).

family courts to order agencies other than CPS agencies to perform certain services.<sup>366</sup> Instead of relying on family courts' authority, federal oversight and funding power can provide a more meaningful guarantee that adequate anti-poverty supports are provided before authorities turn to family separation.

*D. ONE OMISSION, AND A REAL POLITIC SUGGESTION*

One anachronism from the historic linkages between poverty and neglect conspicuously missing from the above set of reforms is the link between AFDC eligibility and state agencies' eligibility for federal funding support in individual cases.<sup>367</sup> There is no reason federal funding should rest on whether a family would qualify for a now-repealed public benefits program from the mid-1990s. Moreover, there is no reason to tie federal funding to any measure of family income; if foster care systems are worth federal financial support, it is to protect children when no other intervention will keep them safe, independent of their family income. At best, this link is a vestige of a historical era that explicitly targeted poor families who received public assistance for policing and frequent separation. At worst, it continues to incentivize the separation of disproportionate numbers of poor families by making it cheaper for state CPS agencies to separate those families as compared to families who are not poor enough to qualify. If one was designing a federal funding system on a blank slate, the AFDC-Title IV-E link would surely not exist.

But nobody can write child neglect law on a blank slate, and one must acknowledge the practical result of eliminating the AFDC-Title IV-E link. That link serves as a limitation on federal financial support to state CPS agencies, which operate a system that separates many families, disproportionately poor, Black, and Indigenous, unnecessarily, including cases in which removal is used to respond to concerns rooted in poverty.<sup>368</sup> It is more important to use any new public funding to increase anti-poverty supports to families than to increase funding for CPS agencies.

Accordingly, this Article does not recommend repealing the AFDC-federal funding link. Repealing that link without any other steps would simply expand the number of cases in which state agencies receive federal funds. That step would do nothing to meet the goals of this Article—especially, developing legal tools to distinguish cases about poverty from those about unrelated factors. Worse, to the extent state CPS agencies do, even sometimes, unnecessarily intervene in families due to their poverty, providing the intervening state agencies with more funds could worsen that phenomenon.

As a matter of real politics, the AFDC-federal funding link serves an additional purpose: AFDC eligibility is frozen in time at limits from the mid-1990s, without any adjustment for inflation, meaning the number of cases in

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366. See *supra* notes 136–39 and accompanying text.

367. See *supra* Section III.B.2.

368. See *supra* note 231 and accompanying text.

which agencies may claim IV-E funding steadily decreases. And that gradual reduction in federal funding to CPS agencies gradually increases pressure on those same agencies to accept significant reforms to how they operate.<sup>369</sup> That pressure could help overcome state resistance to the expansion of anti-poverty financial supports called for in Section V.C, and the additional costs those would impose. Loosening or even removing the AFDC-Title IV-E link—something dangerous if done on its own—could usefully form part of a compromise—an expansion of funding to states in exchange for expansions of states' financial safety nets and obligations to use that funding to pay for supports to families to prevent removals and reunify families.<sup>370</sup>

### CONCLUSION

For most of its history, child neglect law and the child neglect legal system presumed that state authorities would separate poor children from their families, and that legal system was structured to do precisely that. Following an insistence that poverty and neglect were separate concepts, the law has simultaneously assumed that families subject to such separation would not receive anti-poverty financial supports, even when their poverty significantly contributed to authorities' decision to intervene in those families. In recent years, critics have insisted that the present legal system confuses neglect and poverty, and that the two must be distinguished.

The law has not yet adapted to this perspective. Family regulation and family separations based on poverty situations continue in some cases, and many more cases involve some mix of family poverty and troublesome parental actions—where there is a complex and significant connection between the two, and where no single legal test could adequately distinguish them. To put the core point that poverty is not neglect into practice, a range of legal reforms are necessary.

Most simply, the law should provide that situations such as homelessness or inadequate supervision due to a lack of adequate child care—that is, situations of poverty without more—do not amount to neglect and therefore do not justify family regulation or separation. When other grounds do justify family regulation, issues related purely to a family's financial situation should not be made conditions of family reunification or removing state surveillance. In particular, family integrity should not depend on CPS agency or family court requirements that parents maintain stable employment or housing.

More complicated—and more important—is the need for the legal system to distinguish cases that are about poverty and do not require CPS agency or

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369. *C.f.* Wexler, *supra* note 233, at 64–65 (describing how inflation will reduce those eligible for federal government foster care payments over time).

370. The proverbial devil in such a compromise is in the details. Congress should require states to use any increase in funding that came from removing the AFDC-Title IV-E link to expand supports provided to families, and thus avoid the problem of making family separations less expensive.

family court involvement, even if there is some concerning parental behavior. The presence of such behaviors, however, does not mean a family's situation is not about poverty. If more financial supports to the family would mitigate those behaviors or help the family keep children safe despite them, then the case is about poverty. There is no legal doctrinal test available that could parse poverty from neglect in more complex cases. The best test available is to provide financial supports and determine if they directly or indirectly mitigate risks to children. Implementing that test requires legal change—especially to reasonable efforts requirements—to require states to provide such supports to families.