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### **Punishing Families for Being Poor: How Child Protection Interventions Threaten the Right to Parent While Impoverished**

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PUNISHING FAMILIES FOR BEING POOR:  
HOW CHILD PROTECTION INTERVENTIONS  
THREATEN THE RIGHT TO PARENT  
WHILE IMPOVERISHED

DAVID PIMENTEL\*

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### *Introduction*

A small child is ripped from her parents' arms by a uniformed officer. The parents are afforded little to no due process. The family has been brought to this point based on its own desperate circumstances, often its own inability to provide adequately for the child. The child is placed in a program that is understaffed and overfilled, and that in most cases exposes the child to serious trauma and harm—particularly given the separation from her family. The child, despite her tender years, is interrogated and strip-searched. Parents are typically helpless to have the child restored to them in the foreseeable future.

While similar practices by U.S. immigration authorities in early 2018 sparked outrage and backlash,<sup>1</sup> it is a fairly accurate description of child protective service policies and practices that occur across the country hundreds of times every day.<sup>2</sup> Authorities act on tips, or mere suspicion of child endangerment, and are empowered to remove children from their parents and homes without notice or hearing and subject even very young children to questioning and invasive physical examinations.<sup>3</sup> The degree of discretion exercised by law enforcement and child protection agencies in these interventions is enormously broad, consistent with the perceived importance of protecting children from abuse and neglect.<sup>4</sup> The exercise of that discretion, however, is suspect. In particular, it appears to unfairly target impoverished families, disrupting those families and punishing parents for the audacity of attempting to parent while poor.

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1. See Haley Sweetland Edwards, *Parents Are Facing a Nightmare at the U.S. Border*, TIME (June 25, 2018), <http://time.com/5311971>; Lindsey Tanner, *Science Says: How Family Separation May Affect Kid's Brains*, AP NEWS (June 28, 2018), <https://www.apnews.com/348936a5a306404ab20125d39a683a40>.

2. Obviously, the policy rationales underlying the two systems diverge sharply, but both systems function in a way profoundly disruptive to family integrity and deleterious to the well-being of children. The fact that both operate under the color of law makes the systems ripe for comparison. As for the number of children removed from their parents and placed in foster care, see *infra* note 5 and accompanying text.

3. See RICHARD WEXLER, *WOUNDED INNOCENTS* 109-15 (1990).

4. See *id.* at 116-17.

Every day, the government, through law enforcement and child protective services, removes approximately 750 children from their homes.<sup>5</sup> Approximately seventy-five percent of those removals are based not on any crime committed by the parents or harm received by the child, but solely on suspicion and fear that the child may come to harm in the future.<sup>6</sup> Vague child neglect laws conflate poverty and neglect so that families that are already disadvantaged face the prospect of being forcibly broken up for the *putative* protection of the children,<sup>7</sup> but for the *actual* protection and, indeed, the actual benefit, of no one.<sup>8</sup> Overwhelmingly, poor families are singled out not because of their conduct, but because of their socioeconomic status.<sup>9</sup>

This is not to say that the recent outcry over separating families at the border does not deserve the national attention it has received; such separation is enormously harmful to children and arguably a serious encroachment on the fundamental human rights of their parents. But comparable outrages committed against poor families inside the United States remain off the media's radar screen despite the magnitude of the problem. More children are taken from their homes in a single week under vague child neglect laws than have been separated from their families at the border in the last year.<sup>10</sup>

Difficult issues arise when state authorities start second-guessing the parenting style and choices made in individual families. The child welfare imperative may prompt the state to intervene in the family, even to remove the children from the custody of their parents, if the state believes that the

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5. See CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., NO. 24, THE AFCARS REPORT: PRELIMINARY FY 2016 ESTIMATES AS OF OCT. 20, 2017, at 1 (2017), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf> [hereinafter AFCARS REPORT NO. 24] (illustrating through data, last available from 2016, an upward trend in child removals indicating even more may be removed now).

6. See CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2016, at 20 (2018), <https://www.acf.hhs.gov/sites/default/files/cb/cm2016.pdf#page=29> [hereinafter CHILD MALTREATMENT 2016].

7. See *infra* Part IV.

8. See *infra* Part III.

9. See *infra* Part V.

10. Approximately 3000 children have been separated from their parents at the border (as of July 9, 2018), compared to over 5000 removed *every week* in the interior of the country under child neglect laws. See Philip Bump, *The Children Separated from Their Parents, by the Numbers*, WASH. POST (July 9, 2018), [https://www.washingtonpost.com/news/politics/wp/2018/07/09/the-children-separated-from-their-parents-by-the-numbers/?utm\\_term=.aa141b8215e7](https://www.washingtonpost.com/news/politics/wp/2018/07/09/the-children-separated-from-their-parents-by-the-numbers/?utm_term=.aa141b8215e7); AFCARS REPORT NO. 24, *supra* note 5, at 1.

children are being neglected or endangered.<sup>11</sup> But neglect is in the eye of the beholder, and vague statutes in the various states offer little protection for the sanctity and integrity of the family against a meddling agency that purports to “know better” about what is best for the children.<sup>12</sup>

The author’s earlier articles have focused on the problems of state intervention when the family practices “free-range parenting,” defined as a hands-off parenting style that gives children greater autonomy and, in theory at least, helps them develop a sense of independence and self-sufficiency.<sup>13</sup> There have been some celebrated news stories about how police and child-protection authorities have clashed with parents who, espousing the free-range philosophy, are deliberately declining to provide the kind of close supervision that those authorities appear to favor in today’s world.<sup>14</sup>

But most often, parents who run afoul of the new highly protective parenting orthodoxy are not well-to-do parents espousing a counter-cultural parenting philosophy. Usually they are just ordinary parents without much money or many resources who suffer occasional lapses in parenting, or at least in adhering to the new highly protective parenting orthodoxy.<sup>15</sup> These lapses are inevitable for even the best of parents, especially those with small children. Dealing, as they frequently are, with sleep deprivation, tantrums, defiance, demands for time and attention, demands for totally inappropriate comestibles and entertainments, etc., it is unrealistic to expect that parents always meet the exacting expectations that have emerged in

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11. See David Pimentel, *Protecting the Free-Range Kid: Recalibrating Parents’ Rights and the Best Interest of the Child*, 38 CARDOZO L. REV. 1, 25 (2016) [hereinafter Pimentel, *Protecting*].

12. See David Pimentel, *Criminal Child Neglect and the “Free Range Kid”: Is Overprotective Parenting the New Standard of Care?*, 2012 UTAH L. REV. 947, 949 [hereinafter Pimentel, *Criminal Child Neglect*].

13. See *id.*; David Pimentel, *Fearing the Bogeyman: How the Legal System’s Overreaction to Perceived Danger Threatens Families and Children*, 42 PEPP. L. REV. 235, 238 (2015); Pimentel, *Protecting*, *supra* note 11, at 2-3.

14. See, e.g., Donna St. George, *Parents Investigated for Neglect After Letting Kids Walk Home Alone*, WASH. POST (Jan. 14, 2015), [https://www.washingtonpost.com/local/education/maryland-couple-want-free-range-kids-but-not-all-do/2015/01/14/d406c0be-9c0f-11e4-bcfb-059ec7a93ddc\\_story.html?utm\\_term=.6b267886719a](https://www.washingtonpost.com/local/education/maryland-couple-want-free-range-kids-but-not-all-do/2015/01/14/d406c0be-9c0f-11e4-bcfb-059ec7a93ddc_story.html?utm_term=.6b267886719a).

15. See generally Caitlin Fuller & Diane Redleaf, *When Can Parents Let Children Be Alone?: Child Neglect Policy and Recommendations in the Age of Free Range and Helicopter Parenting*, FAMILY DEF. CTR., (Aug. 5, 2015), <https://www.familydefensecenter.net/wp-content/uploads/2015/08/When-Can-Parents-Let-Children-Be-Alone-FINAL.pdf> (analyzing research and the child neglect policy in the Illinois Child Welfare System “in the [a]ge of [f]ree [r]ange and [h]elicopter [p]arenting”).

recent years.<sup>16</sup> Little wonder that parenting young children has become strongly associated with “anxiety, confusion, frustration, [and] depression.”<sup>17</sup>

The prevalence of state intervention in the families of the poor is an issue of particular concern. In a day when highly protective parenting is deemed to be not only the norm, but the legal minimum, those with the fewest resources are particularly vulnerable to state intervention.<sup>18</sup> For a family that is already living on the edge, there is little margin for error,<sup>19</sup> and the occasional parenting lapse is likely to be viewed as genuine endangerment—particularly against the hyper-protective parenting norms of the American upper and middle class. It is an alarming development, as it threatens the rights of the poor and disempowered to have families at all.<sup>20</sup>

The presumed justification for these interventions is the primacy of child protection as a public policy priority. But given the trauma caused by the interventions to both families and children, and the abysmal track record of the foster care system,<sup>21</sup> the interventions are difficult to justify in terms of child welfare. Indeed, to the extent that the risks to children are the product of poverty, the resources devoted to these interventions would be far better spent alleviating the poverty and strengthening the family, rather than tearing it apart. The prevailing tactic of blaming and shaming parents, particularly poor parents, is misguided. Protecting children and protecting families requires a different approach.

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16. Michal Regev, *The Myth of Motherhood: The Way Unrealistic Social Expectations of Mothers Shape Their Experience*, DR. REGEV: BLOG (Mar. 29, 2013), <https://drregev.com/blog/the-myth-of-motherhood-the-way-unrealistic-social-expectations-of-mothers-shape-their-experience/>.

Because of society’s expectations of mothers and their own expectations as a result, mothers often feel guilty for not being perfect. Many mothers have expressed to me a worry about harming their child in some way by not being perfectly cheery or enthusiastic at all times, by not singing or smiling enough or simply by not wanting to be with the baby every minute of every day and night.

They fear that if anything goes wrong with their child, they are going to be blamed and held responsible for it.

*Id.* (emphasis added).

17. Alice G. Walton, *How to Enjoy the Often Exhausting, Depressing Role of Parenthood*, ATLANTIC (Jan. 9, 2012), <http://www.theatlantic.com/health/archive/2012/01/how-to-enjoy-the-often-exhausting-depressing-role-of-parenthood/250901>.

18. *See infra* Part V.

19. *See infra* Section V.A.3.

20. *See infra* Part IV.

21. *See infra* Part III.

### *I. Child Protection Is an Important State Interest*

Protection of one's young is an evolutionary imperative, deeply ingrained in the instincts and learned behavior of most, if not all, mammals—humans included.<sup>22</sup> It makes sense, therefore, for the legal system to allocate the task and burden of child protection to the child's parents. The parents are invested in the safety and welfare of their offspring—no one knows their kids as well as they do, and typically no one cares about their kids as much as they do.

At the same time, however, we know that child abuse occurs.<sup>23</sup> There are situations where parents cannot or do not protect their children. This is where the state's power of *parens patriae* comes into play, defining the state's critical role in protecting vulnerable persons who are incapable of protecting themselves.<sup>24</sup> A bit of history helps put the principle in context:

Until the decision in *Eyre v. Countess of Shaftsbury* [24 Eng. Rep. 659 (Ch. 1722)] . . . , the king's *parens* authority was exercised on behalf of lunatics (the temporarily insane) and idiots (the permanently insane). In *Eyre*, the court extended the king's protection to minors, citing as authority *Beverley's Case*, decided over a hundred years earlier. The only problem is that Lord Coke's report of that case somehow substituted the word "enfant" for the word "ideot" in the 1610 edition. The error was ultimately corrected in the 1826 edition, but by that time the *Eyre* holding, apparently based on a printer's error, was well entrenched as precedent. The expansion of this relatively limited role to the present law of *parens patriae* has taken place incrementally and almost stealthily. As Justice Fortas noted in 1967, *parens patriae*'s "meaning is murky and its historic credentials are of dubious relevance. The phrase was taken from

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22. See Mark Elgar, *Maternal Instinct and Biology*, CONVERSATION (Oct. 23, 2015, 12:59 AM EDT), <https://theconversation.com/maternal-instinct-and-biology-evolution-ensures-we-want-sex-not-babies-46622> ("[T]hat version of the maternal instinct that relates to a mother's ability and need to nurture and protect her child may indeed be hardwired, facilitated by the release of certain hormones and other necessary biological changes."); Tara Parker-Pope, *Maternal Instinct Is Wired into the Brain*, N.Y. TIMES (Mar. 7, 2008, 2:00 PM), <https://well.blogs.nytimes.com/2008/03/07/maternal-instinct-is-wired-into-the-brain/>; Gillian Ragsdale, *The Maternal Myth*, PSYCHOL. TODAY (Dec. 18, 2013), <https://www.psychologytoday.com/us/blog/kith-and-kin/201312/the-maternal-myth> ("We are mammals, and all other female mammals seem to have [a maternal instinct].").

23. See CHILD MALTREATMENT 2016, *supra* note 6, at 18-19.

24. *Parens Patriae*, BLACK'S LAW DICTIONARY (4th pocket ed. 2011).

chancery practice, where, however, it was used to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child.”<sup>25</sup>

At the same time, the doctrine remains well entrenched and is reflected in an array of child protection statutes.<sup>26</sup> Accordingly, in these exceptional circumstances, when children actually need protection *from* their parents, the state has power to intervene in the family.<sup>27</sup> In so doing, state officials will necessarily second-guess parental judgments and take such action as is necessary to protect the children.<sup>28</sup>

## *II. Parens Patriae v. the Compelling Interest in Family Autonomy and Integrity*

Whenever the state intervenes in a family, it dramatically undermines the family’s stability and the child’s sense of security, particularly when the state takes children from their parents or threatens to do so.<sup>29</sup> Accordingly, as parents are already entrusted by nature, by moral duty, and by law, with the care and welfare of their children, the state’s intervention can be justified only by the most serious dereliction of that parental duty. Otherwise, because such disruptive interventions are inherently harmful to children,<sup>30</sup> the state abuses its *parens patriae* power to protect children when it intervenes in the parent-child relationship. Indeed, the intervention comes at expense of the right to parent—a fundamental liberty interest protected by the U.S. Constitution<sup>31</sup>—and at the expense of the integrity of the family unit.

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25. Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1850-51 (2000) (citing *In re Gault*, 387 U.S. 1, 16 (1967); *Beverley’s Case*, 76 Eng. Rep. 1118 (K.B. 1603); George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895 (1976); Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195, 202-03 (1978)).

26. *See, e.g.*, UTAH CODE ANN. § 62A-4a-201(2) (2015) (“[T]he state, as *parens patriae*, has an interest in and responsibility to protect children whose parents abuse them or do not adequately provide for their welfare.”).

27. *See, e.g.*, AFCARS REPORT NO. 24, *supra* note 5; Fuller & Redleaf, *supra* note 15.

28. *See* Fuller & Redleaf, *supra* note 15.

29. *See* Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 418–19 (2005).

30. *Id.*

31. *See* *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *see also* Pimentel, *Protecting*, *supra* note 11, at 5.



The problems come with the critical decision of when to intervene. Someone has to make a judgment call, and the risk of getting it wrong is enormous. A formal investigation into suspected child neglect can be enormously harmful to family and child.<sup>32</sup> At the same time, failure to intervene can expose a child not only to risk and danger (the seriousness of which is subject to debate), but to actual harm.<sup>33</sup> Making that judgment call is difficult, inherently subjective, and vulnerable to the biases of the decision maker and the system.

### *III. Erring on the Side of “Safety” (i.e., Intervention)*

Too often, our systems have been set up to err on the side of intervention. The blowback an agency suffers for failing to intervene can be devastating if the child comes to harm.<sup>34</sup> The decision maker’s calculus often tips that direction as well, trying to “play it safe” if there is any chance that the child is at risk.<sup>35</sup> The dramatic harm done by such interventions, however, particularly taking children away from their parents, suggests that such strategies that err on the side of intervention have catastrophic and disproportionate consequences for children.<sup>36</sup>

The statistics paint a bleak picture of the prospects for children once they are placed in foster care. Of those placed in foster care, forty percent never return to their families.<sup>37</sup> At the same time, kids in foster care are three times as likely to be subjected to abuse in the foster home as kids who are spared the foster care experience.<sup>38</sup> Most disturbing of all, the overwhelming majority of the kids placed in foster care are later found to

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32. See Coleman, *supra* note 29.

33. See, e.g., Symposium, *The Rights of Parents with Children in Foster Care: Removals Arising from Economic Hardship and the Predicative Power of Race*, 6 N.Y.C. L. REV. 61, 61-62 (2003) (describing a case, in 1995 in New York City, of a six-year-old girl who was the subject of a report to the child protection authorities, but the agency afterwards failed to intervene, and the girl later died at the hands of her own mother).

34. See *id.* at 61-62 (the agency’s failure to act to prevent the tragedy sparked outrage); WEXLER, *supra* note 3, at 83.

35. See Coleman, *supra* note 29, at 418.

36. See *id.*; Lynn S. Kahn, *The 95% Failure Rate of Foster Care in America*, DEMOCRACY CHRON. (Sept. 16, 2017), <https://democracychronicles.org/95-failure-rate-foster-care-america/>.

37. See AFCARS REPORT NO. 24, *supra* note 5, at 1.

38. See J. William Spencer & Dean D. Knudsen, *Out-of-Home Maltreatment: An Analysis of Risk in Various Settings for Children*, 14 CHILD. & YOUTH SERVS. REV. 485, 488 (1992).

have been mistakenly identified as at-risk.<sup>39</sup> Further, the system is sufficiently dysfunctional that even when kids are wrongly removed from their families, it is difficult to return them to their families.<sup>40</sup> For such a kid (and family), any time in foster care is too long, and the data shows that they stay in foster care an average of over twenty months.<sup>41</sup>

The negative effects of foster care are well documented, as kids who grow up in such environments suffer in almost every area of growth and development: physical health,<sup>42</sup> mental health,<sup>43</sup> education,<sup>44</sup> crime,<sup>45</sup> drug use,<sup>46</sup> even career prospects.<sup>47</sup> Once children age out of the foster care system, the problems do not stop, as the foster care baggage continues to dog them into their adult lives. Only ten percent of them go to college, and only three percent ever graduate from college.<sup>48</sup> The poor outcomes for these kids as adults are sobering:

- One in three former foster youth will be homeless during their first two years after exiting foster care.

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39. “About [ninety-five percent] of the time when state agencies take children away from families, the accusations turn out to be false or unsubstantiated.” Kahn, *supra* note 36.

40. Kurt Mundorff, Note, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 CARDOZO PUB. L. POL’Y & ETHICS J. 131, 150 (2003) (citing Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 137 (2001)).

41. See AFCARS REPORT NO. 24, *supra* note 5.

42. See Kristin Turney & Christopher Wildeman, *Mental and Physical Health of Children in Foster Care*, PEDIATRICS, Nov. 2016, at 1.

43. See June M. Clausen et al., *Mental Health Problems of Children in Foster Care*, 7 J. OF CHILD. & FAM. STUD. 283, 284 (1998).

44. See Elysia V. Clemens et al., *The Effects of Placement and School Stability on Academic Growth Trajectories of Students in Foster Care*, 87 CHILD. & YOUTH SERV. REV. 86 (2018).

45. See Melissa Jonson-Reid & Richard P. Barth, *From Placement to Prison: The Path to Adolescent Incarceration from Child Welfare Supervised Foster or Group Care*, 22 CHILD. & YOUTH SERVS. REV. 493 (2000).

46. See Catherine Roller White et al., *Alcohol and Drug Use Among Alumni of Foster Care: Decreasing Dependency Through Improvement of Foster Care Experiences*, 35 J. BEHAV. HEALTH SERVS. & RES. 419 (2008).

47. See Jennifer L. Hook & Mark E. Courtney, *Employment Outcomes of Former Foster Youth as Young Adults: The Importance of Human, Personal, and Social Capital*, 33 CHILD. & YOUTH SERVS. REV. 1855 (2011).

48. See Toni Airaksinen, *Only 3% of Foster Care Youth Graduate College. Felicitas Reyes Is One of Them*, USA TODAY (June 12, 2017, 11:58 AM), <http://college.usatoday.com/2017/06/12/only-3-of-foster-care-youth-graduate-college-felicitas-reyes-is-one-of-them/>.

- Sixty percent of girls become pregnant by age nineteen after leaving the foster care system.
- Forty percent of girls will have a second child by age twenty-one.
- Forty-seven percent of youth leaving foster care are unemployed.
- Thirty-three percent receive public assistance.<sup>49</sup>

One study suggests that separating children from their parents—even deeply flawed parents—has a serious traumatizing effect, starting at the earliest stages of life.<sup>50</sup> The University of Florida examined the fate of infants born with cocaine in their systems due to their mothers' use of the drug during pregnancy.<sup>51</sup> Some of the children were placed in foster care; others were left with their mothers.<sup>52</sup> “[T]he results were stunning: After six months, the babies were tested using the usual measures of infant development. Typically, the children left with their birth mothers did better. For the foster children, the separation from their mothers was more toxic than the cocaine.”<sup>53</sup>

Given the high false-positive rates for removals, as well as the devastating impact on children when they are separated from their parents, it should be clear that “erring on the side of removals” is a policy without a credible justification. Removal is certainly appropriate in the extreme cases—e.g., when the child is suffering physical or sexual abuse—but it should be reserved for those extreme cases. It needs to be a remedy of last resort, not of first resort.<sup>54</sup>

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49. *Foster Care Facts*, PROMISES2KIDS, <http://promises2kids.org/facts-figures/> (last visited Nov. 21, 2018).

50. See *Melanie Fridl Ross, To Have and to Hold: University of Florida Shows Cocaine-Exposed Infants Fare Better with Their Biological Mothers*, SCI. DAILY (May 5, 1998), <https://www.sciencedaily.com/releases/1998/05/980505092617.htm>.

51. *Id.*

52. *Id.*

53. Richard Wexler, *SB 1473 Is a Detour from Real Child Welfare Reform*, ARIZ. DAILY STAR (Mar. 25, 2018), [https://tucson.com/opinion/local/richard-wexler-sb-is-a-detour-from-real-child-welfare/article\\_924ddd90-1333-5559-8b31-9533ff522c49.html](https://tucson.com/opinion/local/richard-wexler-sb-is-a-detour-from-real-child-welfare/article_924ddd90-1333-5559-8b31-9533ff522c49.html).

54. Unfortunately, there are compelling financial incentives for local agencies to invoke the foster care system and to keep kids there. Once a child is in foster care, federal funding kicks in to pay for it, relieving the local agency of the financial burden of dealing with that family and with that problem. See OFFICE OF THE ASSISTANT SEC’Y FOR PLANNING AND EVALUATION, U.S. DEP’T OF HEALTH & HUMAN SERVS., FEDERAL FOSTER CARE FINANCING: HOW AND WHY THE CURRENT FUNDING STRUCTURE FAILS TO MEET THE NEEDS OF THE CHILD

#### IV. Legal Standards

##### A. Vague Standards

The legal standards for a finding of neglect, or for an intervention in the family, are often vague,<sup>55</sup> and yet they have been upheld despite their vagueness.<sup>56</sup> This vagueness is a problem for parents, who are left without clear guidance as to what is permissible and what is not. But vagueness is also a problem for the state authorities, as they are left to trust their instincts in determining when it is appropriate to intrude upon the otherwise sacred space between parent and child.<sup>57</sup>

Statutes that use “risk of harm” or other broad terms do not help parents, authorities, or potential reporters. Every parenting decision involves some level of risk.<sup>58</sup> Allowing children to play outside in the front yard carries the risk that they might run into the road, step on something painful, or come to some other form of physical harm. On the other hand, having a child play inside instead could decrease their activity level, increasing their chance of childhood obesity. Providing constant supervision may increase physical security, but risks the child not developing independence or creativity, which may be much more harmful to the child in the long run than a broken arm.<sup>59</sup> Virtually all parenting choices bear some risk of harm, so using “risk of harm” terminology in child neglect statutes effectively makes parenting itself illegal.

##### B. Legal Standards That Conflate Poverty and Neglect

Some of the legal standards that define neglect appear skewed to characterize poverty as neglect. “The broad definitions of neglect used in most state statutes,” Richard Wexler complains, “are virtually definitions of poverty.”<sup>60</sup> Looking to statutory language, “[n]eglect is frequently defined as the failure of a parent or other person with responsibility for the child to provide needed food, clothing, shelter, medical care, or supervision to the degree that the child’s health, safety, and well-being are threatened with

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WELFARE FIELD 15 (2005), <http://aspe.hhs.gov/hsp/05/fc-financing-ib/> (discussing the weaknesses of the federal foster care funding structure).

55. See, e.g., Kenneth D. Dwyer, *Indiana’s Neglect of a Dependent Statute: Uses and Abuses*, 28 IND. L. REV. 447, 449–50 (1995).

56. Milton Roberts, Annotation, *Validity and Construction of Penal Statute Prohibiting Child Abuse*, 1 A.L.R. 4TH 38, § 4[a] (1980).

57. See WEXLER, *supra* note 3, at 116–17.

58. Pimentel, *Criminal Child Neglect*, *supra* note 12, at 961.

59. *Id.* at 961–62.

60. WEXLER, *supra* note 3, at 18.

harm.”<sup>61</sup> South Dakota law defines a neglected child to include one “[w]hose environment is injurious to [his or her] welfare.”<sup>62</sup> As Dorothy Roberts characterizes it, “[n]eglect is usually better classified as child maltreatment *defined* by poverty rather than maltreatment *caused* by poverty.”<sup>63</sup>

Only about twelve states and the District of Columbia make a specific exception for parents who lack the financial means or ability to provide these necessities for their children.<sup>64</sup> But most of these states exempt impoverished parents from liability for neglect only if the acts or omissions are “solely” or “primarily” the result of their lack of financial means, meaning that poverty can still play a role in supporting the finding of neglect.<sup>65</sup>

Wexler goes even further when he argues that the government has always maintained its right to intrude into the lives of poor families, and that neglect laws were first instituted only when it became socially unacceptable for poverty to be given as the only reason for such intervention.<sup>66</sup> These laws are effective substitutes for intervention based on poverty alone because their vague definitions encompass poverty alone.<sup>67</sup>

Foster care, along with orphanages, group homes, and other predecessors, were originally used as a “solution” to poverty.<sup>68</sup> When this practice became distasteful, child removal advocates changed the focus to character deficiencies in the parents, which were the supposed root cause of

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61. CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., DEFINITIONS OF CHILD ABUSE AND NEGLECT 2 (2016), <https://www.childwelfare.gov/pubPDFs/define.pdf#page=1&view=Introduction> [hereinafter DEFINITIONS OF CHILD ABUSE AND NEGLECT].

62. S.D. CODIFIED LAWS § 26-8A-2 (2018), [http://sdlegislature.gov/Statutes/Codified\\_Laws/DisplayStatute.aspx?Type=Statute&Statute=26-8A-2](http://sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=Statute&Statute=26-8A-2).

63. DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 33 (2002).

64. See DEFINITIONS OF CHILD ABUSE AND NEGLECT, *supra* note 61; see also, e.g., D.C. CODE § 16-230(9)(A)(ii) (2017) (including in the definition of “neglected child” that “the deprivation is not due to the lack of financial means of his or her parent, guardian, or custodian”).

65. See DEFINITIONS OF CHILD ABUSE AND NEGLECT, *supra* note 61, at 5-85 (e.g., Arkansas (“primarily”), Florida (“primarily”), Kansas (“solely”), Louisiana (“for that reason alone”), New Hampshire (“primarily”), North Dakota (“primarily”), Texas (“primarily”), and West Virginia (“primarily”).

66. See WEXLER, *supra* note 3, at 32.

67. See *id.*

68. See LEROY H. PELTON, FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES x-xi (1989) [hereinafter PELTON, FOR REASONS OF POVERTY].

their poverty.<sup>69</sup> In the 1980s, that theory was replaced by the Medical Model of Child Abuse, which focused on supposed psychological deficiencies of the parents.<sup>70</sup> Perhaps today the psychological deficiencies have been replaced by other alleged parenting problems; however, the underlying connection between neglect and poverty remains. Poverty is evidence of some deficiency, and that deficiency constitutes some form of neglect that justifies government intervention and removal of the child.<sup>71</sup> While the intervening justification may change, the connection between neglect and poverty remains and can be traced all the way back to the beginning of child neglect law.<sup>72</sup>

*V. The Child Welfare Deck Is Stacked Against Poor Parents  
and Against Poor Kids*

Parenting small children is an enormously difficult task for anyone in any circumstance; parents of small children live in a continuous cloud of sleep deprivation, “anxiety, confusion, frustration, [and] depression.”<sup>73</sup> The problem of limited material resources—of poverty—must necessarily exacerbate every one of these burdens. The stress associated with being unable to make ends meet can only make all the other demands—to feed, care for, transport, protect, and nurture—that much more difficult to cope with and respond to.<sup>74</sup>

At the same time, life for a poor kid is far more dangerous than life for a more affluent kid. Poor kids “lack safe play spaces and access to affordable and healthful food; they are also exposed to physical dangers and psychological stress,” as well as “localized environmental risks.”<sup>75</sup> Accordingly, law enforcement and child protection officials who are on the

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69. *Id.* at 107.

70. *Id.* at 108.

71. *Id.*

72. *See generally id.*

73. Walton, *supra* note 17.

74. *See* CHILD CARE AWARE OF AM., PARENTS AND THE HIGH COST OF CHILD CARE (2014), <http://usa.childcareaware.org/wp-content/uploads/2016/12/costofcare20141.pdf>; Danielle Paquette, *The Staggering Cost of Day Care When You Make Only the Minimum Wage*, WASH. POST: WONKBLOG (Oct. 6, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/10/06/the-staggering-cost-of-daycare-when-you-make-only-the-minimum-wage>.

75. LINDA C. FENTIMAN, *BLAMING MOTHERS: AMERICAN LAW AND THE RISKS TO CHILDREN’S HEALTH* 9 (2017) (citing NAT’L RESEARCH COUNCIL & INST. OF MED., *U.S. HEALTH IN INTERNATIONAL PERSPECTIVE: SHORTER LIVES, POORER HEALTH* (Stephen H. Woolf & Landon Arons eds., 2013)).

lookout for dangers to children are simply far more likely to find them in poorer neighborhoods and in poorer homes. At the same time, the stereotypes and biases of decision makers at every level of the child protection infrastructure—reporters, investigators, adjudicators—are likely to work to the detriment of poor families.<sup>76</sup> And those families may be particularly poorly positioned to stand against this onslaught of judgmentalism, or to otherwise assert their rights.

*A. Poor, and Therefore “Unsafe”*

*1. Unsafe Neighborhoods*

As a practical matter, impoverished children grow up at greater risk. All biases and stereotypes aside, there is more crime and more violence in poorer neighborhoods.<sup>77</sup> In a neighborhood where street crime and gang activity are common, it may be particularly dangerous for a child to play outside or walk to school;<sup>78</sup> accordingly, allowing a child to do so may be viewed as neglect. For a family that can afford a house in a more affluent suburb, the conclusion might be entirely different, because the suburban community may be relatively free of such threats to a child’s safety and well-being. In both families, the level of supervision provided by the parents is exactly the same, but only the poor family may be deemed to be endangering its children by allowing them to play outside or otherwise spend time out in the neighborhood.

Robert Putnam, in his seminal sociology work, *Bowling Alone*, observed that childhood maltreatment decreased as neighborhood cohesion and social capital increased.<sup>79</sup> Additionally, social capital generally increases with wealth.<sup>80</sup> Thus, as wealth increases, neighborhoods improve, and that corresponds to lower child maltreatment.

As their children grow older, parents in nicer neighborhoods are more likely to leave them alone for short periods of time while they are at work,

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76. See WEXLER, *supra* note 3, at 49.

77. See Ching-Chi Hsieh & M.D. Pugh, *Poverty, Income Inequality, and Violent Crime: A Meta-Analysis of Recent Aggregate Data Studies*, 18 CRIM. JUST. REV. 182 (1993).

78. See generally MICHELLE LIEBERMAN & SARA ZIMMERMAN, TAKING BACK THE STREETS AND SIDEWALKS: HOW SAFE ROUTES TO SCHOOL AND COMMUNITY SAFETY INITIATIVES CAN OVERCOME VIOLENCE AND CRIME (2015), <https://saferoutespartnership.org/sites/default/files/pdf/Taking-Back-the-Streets-and-Sidewalks.pdf>.

79. See ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 298 (2000).

80. *Id.* at 319.

running errands, or otherwise unavailable.<sup>81</sup> This same option may not be available to the parents living in poorer and more dangerous neighborhoods, creating even greater strain on their time and extremely limited resources.

## 2. *Unsafe Homes*

There is considerable evidence to suggest that the homes of the poor are similarly more dangerous, particularly for children.<sup>82</sup> It goes without saying that poor homes are far more likely to lack adequate heat or air conditioning, to suffer from insect or rodent infestation, and to have inadequate electrical, plumbing, and sewage systems.<sup>83</sup> Indeed, even drinking water may be unsafe in substandard housing, as illustrated by the 2015 water crisis in Flint, Michigan:

Several advocates . . . charge that . . . race and poverty factored into how Flint wasn't adequately protected and how its water became contaminated with lead, making the tap water undrinkable. "Would more have been done, and at a much faster pace, if nearly 40 percent of Flint residents were not living below the poverty line? The answer is unequivocally yes," the NAACP said in a statement. Others go further. "While it might not be intentional, there's this implicit bias against older cities . . . with poverty (and) majority-minority communities," said Democratic U.S. Rep. Dan Kildee, who represents the Flint area. "It's hard for me to imagine the indifference that we've seen exhibited if this had happened in a much more affluent community," he said.<sup>84</sup>

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81. See Casper M. Lynne & Kristin E. Smith, *Self-Care: Why Do Parents Leave Their Children Unsupervised?*, 41 *DEMOGRAPHY* 285, 299-300 (2004).

82. See Gary W. Evans, *The Environment of Childhood Poverty*, 59 *AM. PSYCHOLOGIST* 77 (2004).

83. James Krieger & Donna L. Higgins, *Housing and Health: Time Again for Public Health Action* 92(5) *AM. J. PUBLIC HEALTH* 758 (2002), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447157/>.

84. Michael Martinez, *Flint, Michigan: Did Race and Poverty Factor into Water Crisis?* CNN (Jan. 28, 2016, 11: 16 AM ET), <https://www.cnn.com/2016/01/26/us/flint-michigan-water-crisis-race-poverty/index.html>; see also MICH. CIVIL RIGHTS COMM'N, *THE FLINT WATER CRISIS: SYSTEMIC RACISM THROUGH THE LENS OF FLINT* 32-33 (2017), [https://www.michigan.gov/documents/mdcr/VFlintCrisisRep-F-Edited3-13-17\\_554317\\_7.pdf](https://www.michigan.gov/documents/mdcr/VFlintCrisisRep-F-Edited3-13-17_554317_7.pdf) ("[P]oor housing, like poverty, was present everywhere in Flint, but nowhere were they more severe than in St. John and Floral Park. Because these two areas



This story is a compelling, even horrifying, example of how poor communities get overlooked, even on issues of basic health. Children are necessarily endangered by these circumstances, simply by virtue of their living where they do.

Similar issues arise in the context of individuals: the assessment of individual families is tainted or even driven by poverty concerns. Annette Appell gives a compelling example:

[The case] *In re P.F. & E.F.* [involved] a review of a trial court's decision not to return home two children whom the state removed due to inadequate housing. . . . The appellate court notes that the children came into care because they were living with their parents in inadequate housing, without hot water or cooking facilities. What the opinion does not reveal is that the children came into care when the family home was all but destroyed in a flood that damaged the family's entire community. Although the opinion notes that the children stayed with their grandparents for the better part of each week, it does not indicate that [the mother] left the children there precisely because her living conditions were inadequate. The court focuses on extensive testimony that [the mother], her husband, and the children were usually dirty and unkempt, but does not note the obvious fact that the family's hygiene problems were primarily a result of living without water and, at times, electricity.<sup>85</sup>

Leroy Pelton suggests that instances of neglect simply have greater consequences in impoverished homes:

Leaving a child alone or unattended is the most prevalent form of child neglect, occurring in 50% of all neglect cases. A middle-class parent's inadequate supervision will not put the children in as great danger as will that of the impoverished parent, because the middle-class home is not as drastically beset with health and

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also were home to almost all of Flint's 6,000 black residents, the study documented the correlation between poverty, poor housing, declining value and deteriorating living conditions and race.”).

85. Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 589-90 (1997) (citing *In re P.F. & E.F.*, 638 N.E.2d 716 (Ill. App. Ct. 1994)).

safety hazards. The context of poverty multiplies the hazards of a mother's neglect.<sup>86</sup>

Roberts reports similar issues from a discussion with Chicago attorney Anita Rivkin-Carothers, who had filed suit against the Department of Child and Family Services (DCFS):

"You have families who don't have funds to pay their light or their gas bills, families in a cold house. There are funds available for that, but DCFS doesn't give them to Black families," Rivkin-Carothers told me. "They take the children out of the home and put them in foster care and separate the family. And once you're separated, forget it—you're not going to get back together in less than a year."<sup>87</sup>

A specific example related by Roberts is compelling:

Child welfare authorities investigated [Ernestine] Davis and her four children when the city condemned the family's house because of exposed electrical wiring. Davis was required to move out of the house and obtain counseling to address her neglect of the children's safety. At a court conference with her caseworker and the judge, Davis claims, everyone agreed that the case could close if the house were made habitable. The caseworker assured Davis that DCFS would provide state funds earmarked specifically to solve housing problems like hers. Four months later, with no funds forthcoming, the court gave custody of her children to DCFS based on newly raised charges that her house was filthy and overrun with roaches. If . . . , [as her] complaint alleges, Davis would have received housing assistance, . . . her children never would have entered the court system.<sup>88</sup>

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86. Leroy H. Pelton, *Child Abuse and Neglect: The Myth of Classlessness*, 48 AM. J. ORTHOPSYCHIATRY 608, 615 (1978) [hereinafter Pelton, *The Myth of Classlessness*] (citing LEROY H. PELTON, BUREAU OF RESEARCH, N.J. DIV. OF YOUTH & FAMILY SERVS., CHILD ABUSE AND PROTECTIVE INTERVENTION IN MERCER COUNTY, NEW JERSEY: A PARENT INTERVIEW AND CASE RECORD STUDY (1977)).

87. ROBERTS, *supra* note 63, at 70-72. Rivkin-Carothers went on to argue that white families were treated more generously, *id.*, but the fact remains that these removals are linked to poverty more than to any particular failure of good parenting.

88. *Id.* at 73 (stating that Davis's complaint was one of racial discrimination, as she contends she *would* have received the needed financial assistance had she been white).

While no one could argue that the children living in such conditions did not face risks to health and well-being, labeling the problem as one of neglect is a serious mischaracterization of the issue.

### 3. *Vulnerable Situations*

There can be little doubt that life is harder on kids who grow up poor. When the living situation of a poor family is evaluated by contemporary middle-class standards—the comparatively comfortable situation occupied by most of the decision makers in the legal system (law enforcement officials, social services agency staff, prosecutors, judges, etc.)—it is likely to appear “inadequate.” This system generates a pattern of charging mothers with neglect for merely living in a poor home, or for resorting to practical but less expensive child care options that fail to meet minimum expectations of white, middle-class America:

These mothers do not have access to affordable childcare. They depend on informal kinship and community networks for babysitting. If a mother leaves her child with a neighbor or an aunt, rather than with a nanny or in a licensed day-care center, she is considered to have neglected her child. In fact, extended family and kin networks so prevalent in non-white communities do not fit the white middle class norm in which the mother is primary care-giver, supported by her husband and paid childcare. Because the rich tradition of extended family or kin care is not normative, the child protection system does not recognize it as family and views the mothers who rely on that tradition as having abrogated their maternal roles and duties.<sup>89</sup>

Moreover, a family living on the edge is vulnerable to even minor lapses of parental judgment or care, and that places children at risk. Something like financial mismanagement (e.g. an irresponsible purchase), is unlikely to affect the children of a more affluent family, while “[i]dentical lapses in

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89. Appell, *supra* note 85, at 585-86 (citing Julia Danzy & Sondra M. Jackson, *Family Preservation and Support Services: A Missed Opportunity for Kinship Care*, 76 CHILD WELFARE 31 (1997); Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 360 (1996); Peggy C. Davis & Richard G. Dudley, Jr., *The Black Family in Modern Slavery*, HARV. BLACKLETTER J., Spring 1987, at 9, 12-13; Rebecca Hegar & Maria Scannapieco, *From Family Duty to Family Policy: The Evolution of Kinship Care*, 74 CHILD WELFARE 200 (1995); Madeline L. Kurtz, *The Purchase of Families into Foster Care: Two Case Studies and the Lessons They Teach*, 25 CONN. L. REV. 1453 (1994); Carol B. Stack, *Cultural Perspectives on Child Welfare*, 12 N.Y.U. REV. L. & SOC. CHANGE 539 (1984)).

responsibility of the part of an impoverished mother might cause her children to go hungry during the last few days of the month.”<sup>90</sup> As Pelton put it:

A middle-class parent’s inadequate supervision will not put the children in as great danger as will that of the impoverished parent, because the middle-class home is not as drastically beset with health and safety hazards. The context of poverty multiplies the hazards of a mother’s neglect. Thus poor people have very little margin for irresponsibility or mismanagement of either time or money.<sup>91</sup>

But again, the resources to provide protection and supervision of children are difficult to come by.<sup>92</sup>

Indeed, there is a strong correlation between single-parent households—which are working with a bare minimum of supervisory resources—and poverty.<sup>93</sup> Which is the cause and which is the effect is of little moment for purposes of this discussion, but the cumulative effect can be devastating. The single mother must divide her attention among her children, as well as among her various household responsibilities, including (1) earning a living, (2) shopping, (3) cooking, (4) cleaning, etc.,<sup>94</sup> and failure to stay on top of any one of these responsibilities can be characterized as neglect. The lack of financial resources combines with the paucity of human resources to make it impossible for her to provide the level of care and supervision that middle-class, two-parent households can provide. And again, the level of care and supervision needed in the impoverished home may be much higher—after all, she cannot turn her kids loose to play on the streets or in the parks, not in *that* neighborhood.

The result is a double standard that deals far more harshly with poor families. Adequate parenting in a poor neighborhood and in a poor home may require a lot more, and a lot closer, supervision of the children, with far less margin for error. It results in a *de facto* higher standard of care for

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90. Pelton, *The Myth of Classlessness*, *supra* note 86, at 615.

91. *Id.*

92. *Id.*

93. See Robert J. Samuelson, *Don’t Deny the Link Between Poverty and Single Parenthood*, WASH. POST (Mar. 18, 2018), [https://www.washingtonpost.com/opinions/dont-deny-the-link-between-poverty-and-single-parenthood/2018/03/18/e6b0121a-2942-11e8-b79d-f3d931db7f68\\_story.html?utm\\_term=.6394c6852c7f](https://www.washingtonpost.com/opinions/dont-deny-the-link-between-poverty-and-single-parenthood/2018/03/18/e6b0121a-2942-11e8-b79d-f3d931db7f68_story.html?utm_term=.6394c6852c7f).

94. Nidhi Kotwal & Bharti Prabhakar, *Problems Faced by Single Mothers*, 21 J. SOC. SCIENCES 197, 199-201 (2009).

the impoverished parent. Ironically, those families, bearing the greater burden, have the fewest resources available to provide that level of supervision.

*B. Abuse and Neglect Rates Across the Socio-Economic Spectrum*

It should come as no surprise, therefore, to find that neglect cases arise disproportionately in low-income homes and families.<sup>95</sup> There may be many reasons—and there certainly are many theories—for why this is the case, however. Some theories are about why neglect is more likely to occur in poor families,<sup>96</sup> and others suggest that the problem is one of skewed perception, detection, and enforcement.<sup>97</sup> The issues are hotly debated, of course, and burdened with a lot of ideological and political baggage.<sup>98</sup>

While many argue that institutionalized racism is the primary problem here,<sup>99</sup> the high correlation between poverty and race makes it difficult to disaggregate the effects. Moreover, there is compelling evidence that poverty plays a major role.<sup>100</sup> One persistent idea in this discussion is that the problem of child abuse and neglect is “classless.” This argument became part of a political narrative in the 1970s, during the consideration of the Child Abuse Prevention and Treatment Act, and has been replayed during its reauthorizations since.<sup>101</sup> It helped, in terms of garnering support for the bill, to insist that child abuse and neglect existed in all socio-economic strata of American society, and that Congress needed to act to help the children so victimized.<sup>102</sup> It was important for political reasons that

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95. See U.S. DEP'T OF HEALTH & HUMAN SERVS., FOURTH NATIONAL INCIDENT STUDY OF CHILD ABUSE AND NEGLECT (NIS-4) (2016), [https://www.acf.hhs.gov/sites/default/files/opre/nis4\\_report\\_congress\\_full\\_pdf\\_jan2010.pdf](https://www.acf.hhs.gov/sites/default/files/opre/nis4_report_congress_full_pdf_jan2010.pdf).

96. See *infra* Section V.B.1.

97. See *infra* Section V.B.2.

98. See generally Matthew O. Hunt & Heather E. Bullock, *Ideologies and Beliefs about Poverty*, in THE OXFORD HANDBOOK OF THE SOCIAL SCIENCE OF POVERTY (David Brady & Linda M. Burton eds., 2016).

99. See, e.g., Robert B. Hill, *Institutional Racism in Child Welfare*, 7 RACE & SOC'Y 17, 18 (2004); see also ROBERTS, *supra* note 63.

100. Pelton, *The Myth of Classlessness*, *supra* note 86, at 613.

101. See NANCY KASSEBAUM, CHILD ABUSE PREVENTION AND TREATMENT ACT AMENDMENTS OF 1995, S. REP. NO. 104-117, at 3 (1995), <https://www.congress.gov/congressional-report/104th-congress/senate-report/117/1> (“While child maltreatment occurs in all socioeconomic and cultural groups poverty makes child maltreatment much more likely to be reported.” (emphasis added)).

102. Pelton, *The Myth of Classlessness*, *supra* note 86, at 613.

it not be perceived as a bill that threw more money at the poor or at the problems of poor people.<sup>103</sup>

Pelton has pushed back hard on this notion, however, insisting that child abuse and neglect *are* highly correlated with socio-economic class.<sup>104</sup> He notes that “the lower socioeconomic classes are disproportionately represented among all child abuse and neglect cases known to public agencies, to the extent that an overwhelming percentage—indeed, the vast majority—of the families in these cases live in poverty or near-poverty circumstances.”<sup>105</sup>

*1. Financial Instability and Insecurity Creates Stress That Makes It Much Harder to Parent Responsibly*

Some have argued that “[t]he extreme stress caused by economic hardship and social isolation makes some parents more aggressive toward their children and less able to focus on their needs,”<sup>106</sup> or that “[t]he conditions of poverty are abusive, and some families break under the pressure.”<sup>107</sup> Indeed, Gary Evans observed that “[c]ompared with their economically advantaged counterparts, [poor children] are exposed to more family turmoil, violence, separation from their families, instability, and chaotic households.”<sup>108</sup> If this hypothesis is true, then abuse and neglect may actually be more common among the poor than among the affluent, and the high rate of intervention in poor families may have some justification. At the same time, this perception opens the door to stereotypes and generalizations that impact all poor families, even those with the most conscientious parents.

Even more fundamentally, however, this hypothesis would mean that the neglect and abuse investigations and interventions are merely reacting to and treating the symptoms of poverty rather than the root causes of abuse and neglect. It is a type of victim blaming—punishing those parents already oppressed by poverty for their circumstances and the hardships their kids suffer by taking away their kids. Given the bleak prospects for kids in foster care, it may be punishing the kids as well for their parents’ penury.<sup>109</sup> As

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103. *Id.*

104. *Id.* at 610.

105. *Id.*

106. ROBERTS, *supra* note 63, at 31.

107. RENNY GOLDEN, DISPOSABLE CHILDREN: AMERICA’S CHILD WELFARE SYSTEM 74 (1997).

108. Evans, *supra* note 82, at 77.

109. *See* discussion *infra* Part VII.

noted earlier, a far more meaningful approach to the problem is to ease the hardships of poverty itself, or at least to alleviate its impact on families with children; this approach would be far more productive to keeping children safe and well.<sup>110</sup>

## 2. *Detection and Reporting Biases*

Another way that the poor suffer disproportionately in the child protection system comes from biases in detection and reporting of neglect. The idea here is not so much that the rate of neglect and abuse is higher among the poor, but rather that neglect and abuse are simply detected at higher rates among the poor. Roberts suggests that “heightened monitoring of poor families results in the discovery of a great deal of child maltreatment—especially neglect—that would have gone unnoticed had it occurred in the privacy afforded wealthier families.”<sup>111</sup>

Statutes in every state make certain individuals “mandatory reporters” who have a legal obligation to report possible maltreatment when they suspect it, and the poor are far more likely to encounter such mandatory reporters, simply because their lives are more public.<sup>112</sup> Appell explains:

Poor families are more susceptible to state intervention because they . . . are more directly involved with governmental agencies. For example, the state must have probable cause to enter the homes of most Americans, yet women receiving aid to families with dependent children (AFDC) are not entitled to such privacy. In addition to receiving direct public benefits (like AFDC and Medicaid), poor families lead more public lives than their middle-class counterparts: rather than visiting private doctors, poor families are likely to attend public clinics and emergency rooms for routine medical care; rather than hiring contractors to fix their homes, poor families encounter public building inspectors; rather than using their cars to run errands, poor mothers use public transportation.<sup>113</sup>

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110. See discussion *infra* Part VII; see also *supra* notes 87-88 and accompanying text (discussing how withholding of financial assistance in Chicago resulted in neglect findings and removals of children).

111. ROBERTS, *supra* note 63, at 32.

112. See *id.* at 32-33.

113. Appell, *supra* note 85, at 584 (citing *Wyman v. James*, 400 U.S. 309 (1971) (noting “that women receiving AFDC must permit state social workers to enter their homes” without a warrant despite Fourth Amendment protections against warrantless search and seizure); Annie Woodley Brown & Barbara Bailey-Etta, *An Out-of-Home Care System in Crisis*:

While some commentators have challenged the popular view about detection and reporting bias—asserting that the data does not show significant bias in the CPS data—this conclusion finds support in the data involving actual abuse.<sup>114</sup> Even the staunchest critics of Roberts’s and Appell’s theories on detection and reporting bias acknowledge that the data is significantly less clear in cases of mere neglect.<sup>115</sup> And neglect, of course, is where we would expect to see the most “close calls” on whether intervention is warranted and, hence, the most false positives.

Of course, one of the primary reasons for selective detection and reporting lies in the biases of the decision makers: those who decide what or whom to investigate and report. The problem of stereotyping and bias is addressed in the next Section (on bias in the decision-making), but an example from Linda Fentiman on selective detection is illustrative:

In the late 1980s, prosecutors outside of Charleston [SC] began to charge drug-using pregnant women with the crime of child abuse. When a nurse at Charleston City Hospital learned about these prosecutions, she contacted local law enforcement officials. Together they devised a policy to covertly test the urine of many women who delivered at the hospital. Under this policy, all positive drug tests were turned over to the police and local

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*Implications for African American Children in the Child Welfare System*, 76 CHILD WELFARE 65, 71 (1997); Ira J. Chasnoff, et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1205 (1990) (stating that poor women are more likely than their middle-class counterparts to be reported to government authorities because doctors serving paying clients are less likely to make child abuse reports)). Pelton articulates the argument this way:

Poor people, it is suggested, are more available to public scrutiny, more likely to be known to social agencies and law enforcement agencies, whose workers have had the opportunity to enter their households. The family lives of middle-class and upper-class people, on the other hand, are less open to inspection by public officials; they are less likely than people in poor neighborhoods to turn to public agencies when help is needed. Thus, injuries to children of the middle and upper classes are less likely to arouse outside suspicion of abuse and neglect; even when they do, the private physicians whom the parents consult, and with whom they may have a rather personal relationship, will be reluctant to report their suspicions to public authorities.

Pelton, *The Myth of Classlessness*, *supra* note 86, at 610.

114. See Brett Drake & Susan Zuravin, *Bias in Child Maltreatment Reporting: Revisiting the Myth of Classlessness*, 68 AM. J. OF ORTHOPSYCHIATRY 295, 296-99 (1998) (examining evidence of visibility, labeling, reporting, and substantiation biases).

115. See *id.* at 302.



prosecutors. The criteria for deciding whom to test were aimed, consciously or not, at indigent African American patients. Women who had received late, “incomplete,” or no prenatal care, as is common among poor women, were automatically drug-tested . . . . Initially all women with a positive drug test were automatically arrested. Some women who had just delivered babies were taken to jail in shackles, still bleeding.<sup>116</sup>

This practice of covert testing was ultimately shut down by the U.S. Supreme Court, which found it to be a Fourth Amendment violation.<sup>117</sup> Indeed, the impact of the practice was profound and starkly disproportionate, as more affluent white mothers were apparently never tested, while poor, predominantly black mothers were routinely tested.<sup>118</sup> This “detection bias” targeted and discriminated against poor mothers with devastating impact. Despite the fact that, according to “a landmark 1990 study,” women of the two different demographics “were equally likely to use drugs,” “African-American women were *ten times* more likely than white women to be reported to public health or law enforcement authorities.”<sup>119</sup> More recent studies confirm that “15 percent of women in communities across the United States continued to use [drugs or alcohol] after learning that they were pregnant,” and that the wealthiest community had the highest rate of substance use.<sup>120</sup> Needless to say, these affluent women have been far more likely to escape detection and reporting.

### C. Decision Maker Biases

Although bias may skew the reporting and detection of perceived neglect, the bias does not necessarily stop there. Once the issue is detected and reported, someone must make a judgment call about whether and to what degree to act upon the report, and here the problem of bias rears its head once again. Intervention and disruption of a family in the name of child welfare involves discretionary decisions also at the investigation and adjudication stages. Bias can infect the decision maker at these latter stages every bit as much as in the earlier stages.

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116. FENTIMAN, *supra* note 75, at 127.

117. *See* Ferguson v. City of Charleston, 532 U.S. 67, 84-85 (2001).

118. *See* FENTIMAN, *supra* note 75, at 127.

119. *Id.* at 141 (citing Chasnoff et al., *supra* note 113, at 1202).

120. *Id.* (citing Ira J. Chasnoff et al., *The 4P's Plus© Screen for Substance Abuse in Pregnancy: Clinical Application and Outcomes*, 25 J. PERINATOLOGY 368, 372-73 (2005)). These results were driven by significant use of wine by women in the highest income brackets. *Id.*

Even where the poorer neighborhood or the impoverished household is not demonstrably less safe, the decision makers, who would never live in such a neighborhood themselves and cannot imagine living in such squalid conditions, may deem it unacceptable for the child.<sup>121</sup> This same socioeconomic bias can also be seen when prosecutors bring charges after child removal or even death.<sup>122</sup> With only the vaguest of guidelines available, well-meaning officials are reduced to making intervention decisions based on their own visceral sense of when such extraordinary measures are warranted.<sup>123</sup> That situation makes already vulnerable populations of impoverished families all the more vulnerable, as biases and stereotypes are inevitably indulged, and as the already disempowered in society are victimized by this exercise of power.

### *1. Demonization of the Poor in General*

Trends in political discourse have reinforced the idea that the poor are to blame for their own poverty and that they are a burden on the rest of society. Ronald Reagan used this rhetoric, condemning “welfare queens” whom he characterized as greedy and lazy freeloaders, living in comparative luxury on the dole, while more virtuous and industrious citizens are forced to foot the bill.<sup>124</sup> The rhetoric has been resurrected in more recent elections, including comments attributed to Presidential candidate Mitt Romney in 2012,<sup>125</sup> and with the new administration in

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121. See ROBERTS, *supra* note 63, at 59 (“The model for many caseworkers is a white, middle-class family composed of married parents and their children. . . . [C]aseworkers ‘seem to believe that unless the family meets white suburban class standards, the children are “at risk.”’” (citing Symposium, *Racial Bias in the Judicial System*, 16 HAMLINE L. REV. 624, 631 (1993))).

122. See Jennifer M. Collins, *Crime and Parenthood: The Uneasy Case for Prosecuting Negligent Parents*, 100 NW. U. L. REV. 807, 831-32 (2006) (noting that blue collar parents are nearly four times as likely to be prosecuted following the death of their children from fatal neglect); Fuller & Redleaf, *supra* note 15, at 16-20 (lamenting that while higher income parents are more likely to rely on self-care for their children, the overwhelming majority of parents prosecuted for related neglect are in poverty).

123. See Fuller & Redleaf, *supra* note 15, at 28-30.

124. See Gene Demby, *The Truth Behind the Lies of the Original ‘Welfare Queen’*, NPR (Dec. 20, 2013, 5:03 PM ET) (“In the popular imagination, the stereotype of the ‘welfare queen’ is thoroughly raced—she’s an indolent black woman, living off the largesse of taxpayers.”), <https://www.npr.org/sections/codeswitch/2013/12/20/255819681/the-truth-behind-the-lies-of-the-original-welfare-queen>.

125. During the 2012 Presidential campaign, Mr. Romney was recorded making a statement that was dismissive of the poor as “dependent,” and that depicted a “makers” vs. “takers” narrative:

2016.<sup>126</sup> This type of rhetoric and attitude—blaming the poor for their own poverty—can prejudice decision makers against the poor, denying poor parents the benefit of the doubt in the sensitive judgment as to whether intervention in the family is warranted.

We have seen these factors at play in the context of police confrontations with black men. The police must exercise judgment and discretion (often with no time to deliberate) on when they may be justified in using force, including deadly force, and they appear to be subject to the influence of stereotypes of black men as violent and dangerous.<sup>127</sup> If officials are predisposed to think of the poor as indolent and irresponsible, they are far more likely to question the parenting in a poor family and to intervene in those family relationships “for the protection of the children.”

Fortunately, in the family-intervention context, the problems of bias should be easier to address. Unlike the situation of a police officer who feels threatened and must, in an instant, decide whether to shoot, removal of a child from the home is a far more deliberative process. There will usually be more time to evaluate, to consult with others, perhaps, and to consider the decision before striking.<sup>128</sup>

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[T]here are 47 percent of the people who will vote for the president no matter what . . . who are dependent upon government, who believe that they are victims . . . . These are people who pay no income tax . . . [a]nd so my job is not to worry about those people. I’ll never convince them that they should take personal responsibility and care for their lives.

*Romney’s Speech from Mother Jones Video*, N.Y. TIMES (Sept. 19, 2012), <https://www.nytimes.com/2012/09/19/us/politics/mitt-romneys-speech-from-mother-jones-video.html>; Ezra Klein, *Romney’s Theory of the “Taker Class,” and Why It Matters*, WASH. POST: WONK-BLOG (Sept. 17, 2012), <https://www.washingtonpost.com/news/wonk/wp/2012/09/17/romneys-theory-of-the-taker-class-and-why-it-matters/>.

126. See Aaron Tobert, *The Trump Administration Is Waging War on the Poor*, HUFF. POST (Apr. 18, 2018, 5:45 AM ET), [https://www.huffingtonpost.com/entry/opinion-tobert-trump-work-requirements-medicaid\\_us\\_5ad6222ae4b077c89ced2c70](https://www.huffingtonpost.com/entry/opinion-tobert-trump-work-requirements-medicaid_us_5ad6222ae4b077c89ced2c70); see also Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 26, 2013, 6:32 PM), <https://twitter.com/realDonaldTrump/status/394245079051010049> (“If you’re born poor, it’s not your mistake. But If you die poor, it’s really your mistake.”).

127. See Benedict Carey & Erica Goode, *Police Try to Lower Racial Bias, but Under Pressure, It Isn’t So Easy*, N.Y. TIMES (July 11, 2016), <https://www.nytimes.com/2016/07/12/science/bias-reduction-programs.html>.

128. Under the law in the State of Washington, for example, in cases of “immediate danger,” CPS must act within twenty-four hours, so even in the urgent cases, there is a full day in which to deliberate before action must be taken. NORTHWEST JUSTICE PROJECT, CHILD PROTECTIVE SERVICES (CPS) AND DEPENDENCY ACTIONS (October 2018), <https://www.washingtonlawhelp.org/resource/child-protective-services-cps-and-dependency-actions#iEEBBB2C3-23CA-416C-B9AF-A7916C08A488>. That twenty-four hours provides

## 2. Cultural Factors Linked to Poverty

The Supreme Court cited the particular vulnerability of such families in *Santosky v. Kramer*, which involved an attempt to terminate parental rights: “Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias.”<sup>129</sup> Indeed, Linda Gordon laments a history of “[c]hild-saving agencies remov[ing] children on the basis of culturally biased standards of child raising.”<sup>130</sup> She goes on:

Even when the agencies committed themselves to not removing children “for poverty alone,” they could not keep this promise because poverty is never alone; rather, it often comes packaged with depression and anger, poor nutrition and housekeeping, lack of education and medical care, leaving children alone, exposing children to improper influences.<sup>131</sup>

Family size can be an issue as well, as in certain cultures it has been traditional to have large families in which it is difficult, if not impossible, for the parents to supervise all of the children as closely as white middle-class culture would dictate. It is traditional in large Latino families, for example, for older siblings to provide care for younger siblings,<sup>132</sup> a practice that child protection officials have frowned upon.<sup>133</sup> The same has been true in Native American communities:

Issues of lack of supervision of young children surface most frequently in referrals for Native American and Hispanic families. Older, but still young children are expected to care for their younger siblings. In Native American families, being responsible for one’s siblings is an indication of maturity and ability. In Hispanic families, especially migrant families, caring

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time during which the decisions can be reconsidered and second-guessed by others in the agency, against concerns of possible bias.

129. 455 U.S. 745, 763 (1982) (citing *Smith v. Org. of Foster Families*, 431 U.S. 816, 833-35 (1977)).

130. LINDA GORDON, *THE GREAT ARIZONA ORPHAN ABDUCTION* 309 (1999).

131. *Id.*

132. NAT’L CENTER ON CHILD ABUSE & NEGLECT, *MULTI-CULTURAL GUIDELINES FOR ASSESSING FAMILY STRENGTHS AND RISK FACTORS IN CHILD PROTECTIVE SERVICES* ch. IV, 5 (Diana J. English & Peter J. Pecora eds., 1993).

133. See Bridget Kevane, *Guilty as Charged*, *BRAIN, CHILD* (Jan. 14, 2014), <http://www.brainchildmag.com/tag/bridget-kevane/>.

for younger siblings may be [a] role associated with younger children's contribution to family survival.<sup>134</sup>

Family size, of course, is also tied up with the issue of poverty, as the birth rate for poor mothers is higher than that of more affluent mothers, with the gap between them widening all the time.<sup>135</sup> Moreover, impoverished parents are not in a position to hire help—housekeepers, au pairs, nannies, etc.—to help share the burden of caring for a large family.

#### *D. Inability to Push Back on Intrusions*

Poor and disempowered families are also more vulnerable to assertions of state power. Families with substantial cultural capital, including education, are far more likely to know and assert their rights—calling officials' bluffs and demanding to see a warrant, for example, before their homes are invaded.<sup>136</sup> Police on the doorstep asking questions are likely to be far more intimidating to an impoverished family than to an affluent one; conflict theory suggests that authorities will actively seek to exploit that effect.<sup>137</sup>

The point is illustrated by contrasting two specific instances. In 2014, the Meitiv family, in a comfortable suburb of Washington, D.C., was confronted by police because the parents had consciously allowed their two

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134. NAT'L CENTER ON CHILD ABUSE & NEGLECT, *supra* note 132, at ch. IV, 5 (citing DIANA J. ENGLISH, WASH. STATE DEP'T OF SOCIAL & HEALTH SERVS., CULTURAL ISSUES RELATED TO THE ASSESSMENT OF CHILD ABUSE AND NEGLECT (1990); REBECCA HEGAR & LOYDA RODRIGUEZ, ADMIN. FOR CHILDREN YOUTH AND FAMILIES, PERMANENT PLANNING FOR MEXICAN-AMERICAN CHILDREN IN FOSTER CARE: A HANDBOOK SUPPLEMENT, PUB. NO. 8 (1982)).

135. See Sharon Lerner, *Knocked Up and Knocked Down: Why America's Widening Fertility Class Divide Is a Problem*, SLATE (Sept. 26, 2011, 4:11 PM), [http://www.slate.com/articles/double\\_x/doublex/2011/09/knocked\\_up\\_and\\_knocked\\_down.html](http://www.slate.com/articles/double_x/doublex/2011/09/knocked_up_and_knocked_down.html).

136. See DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 28, 31 (1999) (“[T]hose who are coerced into giving their consent are most likely to be the young, the poor, the uneducated, and the nonwhite. . . . The current system creates two Fourth Amendments—one for people who are aware of their right to say no and confident enough to assert that right against a police officer, and another for those who do not know their rights or are afraid to assert them.”).

137. See Matthew Petrocelli, Alex R. Piquero & Michael R. Smith, *Conflict Theory and Racial Profiling: An Empirical Analysis of Police Traffic Stop Data*, 31 J. OF CRIM. JUST. 1 (2003), <https://pdfs.semanticscholar.org/6e8b/fcf5c14e5a5c800d24a9c4c44d9beeb4eb93.pdf> (“Conflict theory holds that law and the mechanisms of its enforcement are used by dominant groups in society to minimize threats to their interests posed by those whom they label as dangerous, especially minorities and the poor.”).

children (ages ten and six) to walk home from the park unaccompanied.<sup>138</sup> The authorities felt that this behavior was endangering the children, but the Meitivs insisted that giving their children this type of independence was important for the children's development.<sup>139</sup> The self-identified free-range parents, both highly educated, insisted on their right to parent as they saw fit and pushed back legally against the intrusions in their family.<sup>140</sup> Ultimately, the investigations against them were dropped.<sup>141</sup>

As a contrasting example, consider Valerie Borders, the woman in Jonesboro, Arkansas, who insisted that her ten-year-old walk to school. The child had been kicked off the school bus for misbehavior (a fifth offense), and his mother wished to teach him a lesson.<sup>142</sup> A police officer confronted the mother, apparently a single mother from a less affluent community and with only a high school education,<sup>143</sup> insisting that it was not safe for the child to be walking to school.<sup>144</sup> In that case, lacking the resources, financial and otherwise, that the Meitivs enjoyed, the mother ended up with a criminal conviction for endangering her child.<sup>145</sup>

As noted elsewhere, when faced with the threat of having their children taken away, almost any parent will be vulnerable to pressure.<sup>146</sup> The result is likely to be a wholesale waiver of parental rights, as meek cooperation, apologies, and groveling may well be the best means of forestalling a

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138. See St. George, *supra* note 14.

139. See *id.*

140. See *id.*

141. See Donna St. George, 'Free Range' Parents Are Cleared in Second Neglect Case, WASH. POST (June 22, 2015), [https://www.washingtonpost.com/local/education/free-range-parents-cleared-in-second-neglect-case-after-children-walked-alone/2015/06/22/82283c24-188c-11e5-bd7f-4611a60dd8e5\\_story.html](https://www.washingtonpost.com/local/education/free-range-parents-cleared-in-second-neglect-case-after-children-walked-alone/2015/06/22/82283c24-188c-11e5-bd7f-4611a60dd8e5_story.html).

142. See *Mother Who "Forced 10-Year-Old Son to Walk 5 Miles to School Faces Jail Time for Endangerment,"* DAILY MAIL, <http://www.dailymail.co.uk/news/article-2103412/Mother-forced-10-year-old-son-walk-5-miles-school-faces-jail-time-endangerment.html> (last updated Feb. 19, 2012, 12:54 EST) [hereinafter *Mother Faces Jail Time*].

143. See *Valerie Borders*, PEEKYOU, [https://www.peekyou.com/valerie\\_borders/56715228](https://www.peekyou.com/valerie_borders/56715228) (last visited Oct. 18, 2018).

144. See *Mother Faces Jail Time*, *supra* note 142. This may be a classic example of the "unsafe neighborhood" bias discussed *supra*, at Section V.A.1. Kids in more affluent, predominantly white neighborhoods, can walk to school. But this kid, in what may have been a less affluent, predominantly black neighborhood, cannot do so without authorities bringing criminal charges against his mother.

145. See *Mom Makes Son Walk to School, No Jail Time*, KAIT (Apr. 30, 2012, 11:30 PM CDT), <http://www.kait8.com/story/17957538/mom-makes-kid-walk-to-school-no-jail-time>.

146. See Pimentel, *Protecting*, *supra* note 11, at 37-38.

removal.<sup>147</sup> While any parent is likely to respond in such a way, when faced with such a threat, the least privileged in society are even more vulnerable; of all parents, they are perhaps the least equipped, the least emboldened, and therefore the least likely to put up meaningful legal resistance.<sup>148</sup>

Jessica McCrory Calarco documents how middle-class and “well-off” parents interact with schools, pushing on behalf of their children and making unreasonable requests and demands.<sup>149</sup> The beleaguered teachers get worn down and often capitulate, affording educational advantages to the more affluent kids that would never be requested by, much less given to, the poorer families.<sup>150</sup> This profound cultural difference between the impoverished and the affluent, the chutzpah to push back against authority and bureaucracy to demand more from the system on behalf of their children, is certainly a factor that renders poor families at greater risk. The investigating authorities—be they child protection workers or law enforcement—are unlikely to run roughshod over the rights of parents and the integrity of families in higher income brackets even if they tried, and there is considerable evidence that they do not try.<sup>151</sup> It is the poor who are likely to come out losers in these interactions.

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147. *See id.*; *see also* text accompanying note 91-116. In 2000, the American Bar Association published a guide to representing parents in child welfare cases that advised attorneys to urge cooperation and to avoid confrontation:

Although you must zealously represent the parent, experience shows that confrontational and obstructionist tactics often tend to be counterproductive to the parent’s interests. Since the agency and the court wield enormous and continuing power over the life of the child and, therefore, the parent, it benefits your client when you are selective in deciding which issues to contest.

DIANE BOYD RAUBER & LISA A. GRANIK, REPRESENTING PARENTS IN CHILD WELFARE CASES 4 (Mimi R. Laver ed., Am. Bar Ass’n 2000). “[A] productive working relationship with the agency . . . may help . . . minimize needlessly contentious relationships between the parents and agency caseworkers, and facilitate negotiated settlements that ensure the protection of the child without unnecessarily infringing on the family’s integrity.” *Id.* (altered original source formatting).

148. *See supra* notes 136-137 and accompanying text.

149. *See* Jessica McCrory Calarco, ‘Free-Range’ Parenting’s Unfair Double Standard, ATLANTIC (Apr. 3, 2018), <https://www.theatlantic.com/family/archive/2018/04/free-range-parenting/557051/>.

150. *See generally* JESSICA MCCLORY CALARCO, NEGOTIATING OPPORTUNITIES: HOW THE MIDDLE CLASS SECURES ADVANTAGES IN SCHOOL (2018).

151. *See supra* notes 136-137 and accompanying text.

*E. Access to Counsel*

Closely associated with the problem that the poor are insufficiently resourced to push back is their lack of access to counsel. Impoverished families will be unable to enlist the assistance of professional legal counsel to resist the state's attempts to intervene in their families. In *Lassiter v. Department of Social Services*, the Supreme Court held that parents facing the termination of their parental rights have no right to appointed counsel under the Due Process Clause of the Fourteenth Amendment, the Sixth Amendment (unless they are also charged with a crime, in which case the Sixth Amendment right to counsel applies), or apparently any other provision of the Constitution.<sup>152</sup> Justices Blackmun, Brennan, and Marshall dissented in the case, finding it to be fundamentally unfair,<sup>153</sup> given that "[t]he State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense."<sup>154</sup>

Justice Stevens dissented separately, going "one further step" and equating the parents' rights in cases contemplating termination of parental rights to the rights of criminal defendants.<sup>155</sup> The right to parent and to keep one's kids is no less sacred, he reasoned, than the right to liberty. The eloquence of the dissenters notwithstanding, the majority opinion holds that the right to counsel is limited to those who can afford it, severely

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152. See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 33 (1981). Outside the criminal context, the Supreme Court has used the Due Process Clause of the Fourteenth Amendment to make the determination if appointed counsel is constitutionally required. Specifically, the court will use the *Mathews v. Eldridge* test, which balances (1) the nature of the private interest, (2) the risk of erroneous deprivation of the private interest without the requested procedure, and (3) the government's interest. 424 U.S. 319, 335 (1976).

153. *Lassiter*, 452 U.S. at 35-59 (Blackmun, J., dissenting).

154. *Id.*; *Santosky v. Kramer*, 455 U.S. 745, 763 (1982). In *Santosky*, the Supreme Court gave a detailed listing of the advantages the state has in parental termination proceedings. Specifically, the Court stated that there are

[n]o predetermined limits restrict[ing] the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.

*Id.*

155. *Lassiter*, 452 U.S. at 59-60 (Stevens, J., dissenting).



diminishing the power of the parents to resist the state's interventions in their families.

A case worth noting in this context is that of Debra Harrell, a single mom who worked at McDonald's in North Augusta, South Carolina.<sup>156</sup> Her nine-year-old daughter begged to play in the park while her mom worked her shift, and the mother agreed. Harrell ended up spending seventeen days in jail for that decision, losing custody of her child, and facing felony charges for child neglect.<sup>157</sup> On her McDonald's paycheck, she was not in a position to press her case, but nationwide publicity about her plight resulted in a fundraising campaign on her behalf.<sup>158</sup> It is worth noting that after she was armed with a \$43,000 war chest of donations for her legal defense, the case quietly went away.<sup>159</sup> But precious few impoverished parents in her position are so lucky.<sup>160</sup>

#### *VI. Losing the Right to Parent Altogether*

Every parent, at one time or another, will have a bad day. Struggling with the burdens and trials of caring for children, any parent will make a poor judgment call; he or she deserves some slack.<sup>161</sup> And the rights of parents become, perhaps, most compelling in the case of the struggling parent who is desperately trying to hold her family together and for whom free-range parenting is not so much a conscious choice as a last resort. Shanisha Taylor, for example, an unemployed single mom trying to provide for her two children, left them alone in her car while she interviewed for a desperately needed job and ended up facing serious

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156. See *S.C. Mom's Arrest over Daughter Alone in Park Sparks Debate*, CBS NEWS (July 28, 2014, 8:01 PM), <https://www.cbsnews.com/news/south-carolina-moms-arrest-over-daughter-alone-in-park-sparks-debate/>.

157. See *id.*

158. See *Support Debra Harrell*, FACEBOOK, <https://www.facebook.com/supportdebraharrell/> (last visited Oct. 18, 2018).

159. *Id.*; *Support Debra Harrell*, YOUCARING, <https://web.archive.org/web/20140825095959/https://www.youcaring.com/help-a-neighbor/support-debra-harrell/204837> (last visited Oct. 18, 2018).

160. See *supra* notes 142-145 and accompanying text; *infra* notes 162-164 and accompanying text (Valerie Borders and Shanisha Taylor both ended up with criminal convictions).

161. See, e.g., Kim Brooks, *The Day I Left My Son in the Car*, SALON (June 3, 2014, 11:00 PM UTC), [http://www.salon.com/2014/06/03/the\\_day\\_i\\_left\\_my\\_son\\_in\\_the\\_car](http://www.salon.com/2014/06/03/the_day_i_left_my_son_in_the_car) ("I made a split-second decision to run into the store. I had no idea it would consume the next years of my life.").

criminal charges as a result.<sup>162</sup> Hers was an awful dilemma—“having to make a desperate choice between providing for [her] children and caring for [her] children”—and it put her in serious legal peril.<sup>163</sup> As one commentator put it, “To many she represented the plight of single and underemployed parents who face tough decisions each day related to child care.”<sup>164</sup>

But if the reality of poverty means that the momentary lapse of parental good judgment will trigger child neglect charges, then poor parents have only the most tenuous hold on their rights to have and raise children. Indeed, the impoverished family who chooses to have a child may be in a situation where it knows its child could be taken away at any time, with the inevitable characteristics of its impoverishment cited as neglect.

Taking away the poor’s right to parent is not original to child protection law. America has an ugly history of forced sterilization, targeting the poor as well as the mentally disabled.<sup>165</sup> The suggestion, for both groups, was that these individuals should not be having children that they cannot adequately care for.<sup>166</sup> Such procedures, without consent, are now widely viewed as cruel, and international bodies consider them a violation of fundamental human rights.<sup>167</sup> Courts in the United States have expressed queasiness with *Buck v. Bell*<sup>168</sup> and have been reluctant to cite it or rely upon it, as the concept of eugenics has fallen into disfavor.<sup>169</sup> But if we

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162. See Emanuella Grinberg, *When Justice Is ‘Merciful’ in Child Abuse Cases*, CNN (Aug. 7, 2014, 1:33 PM ET), <https://www.cnn.com/2014/08/07/living/shanesh-taylor-plea-deal/index.html>.

163. *Id.* Although she escaped jail time, she ended up with a criminal conviction and eighteen years’ probation. See Sarah Jarvis, *Mom Who Left Kids in Car Sentenced to 18 Years Probation*, ARIZ. REPUBLIC (May 15, 2015, 2:26 PM ET), <https://www.usatoday.com/story/news/nation/2015/05/15/shanesh-taylor-kids-in-car/27375405/>.

164. Grinberg, *supra* note 162.

165. See Kathryn Krase, *History of Forced Sterilization and Current U.S. Abuses*, OUR BODIES OURSELVES (Oct. 1, 2014), <https://www.ourbodiesourselves.org/health-info/forced-sterilization/>.

166. See Lisa Ko, *Unwanted Sterilization and Eugenics Programs in the United States*, PBS: INDEP. LENS (Jan. 29, 2016), <http://www.pbs.org/independentlens/blog/unwanted-sterilization-and-eugenics-programs-in-the-united-states/>.

167. Forty-six European countries have signed the Istanbul Convention, a Council of Europe Convention on Human Rights that outlaws forced sterilization as a violation of basic human rights. Convention on Preventing and Combating Violence Against Women and Domestic Violence art. 39, May 11, 2011, C.E.T.S. No. 210.

168. 274 U.S. 200 (1927). This is the case in which Oliver Wendell Holmes wrote that forced sterilization of the feeble-minded was constitutional, concluding notoriously that “[t]hree generations of imbeciles [is] enough.” *Id.* at 207.

169. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (overturning an Oklahoma statute providing for sterilization of thrice-convicted felons and establishing procreation as a

agree that we are no longer comfortable with sterilization of the poor, denying them a fundamental human right and biological imperative to procreate, why should we be comfortable with denying them the right to raise their children once they are born? But if poor mothers are going to have their babies taken from them on the ground that their poverty itself constitutes actionable neglect, then our public policy is not far removed from denying them the right to bear those children in the first place. Indeed, the cruelty is arguably greater to allow poor women to bear children and bond with them, only to take them away later.

The upshot is that our policies may be restricting the right to parent and threatening to systematically deny that right to those who struggle with limited means. Income inequality is already a flash point in American society and politics.<sup>170</sup> The legacy of the poll tax<sup>171</sup> and pre-*Gideon* criminal defense<sup>172</sup> should remind us that conditioning fundamental rights on the ability to pay is destructive to democracy and to justice. We should be concerned if our child protection mechanisms are making family and child rearing a luxury good, beyond the reach of the poor in our society.

### *VII. Prioritizing Child Welfare over Parental Blame*

There can be little question that children who grow up in poverty suffer as a result of the poverty.<sup>173</sup> It is not particularly helpful, however, to blame or punish their parents for it, much less to “rescue” these deprived children by depriving them of some of the most important things they have left: their parent(s) and the family relationships that bind them together. The affixing of blame and the punishing of the hapless parent can only make the situation worse for the children. A public policy genuinely concerned with the well-being of children should focus its scarce public resources not on fixing blame and breaking up families, but on ensuring that families have

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fundamental right); *Fieger v. Thomas*, 74 F.3d 740, 750 (6th Cir. 1996) (stating that criticism of selective prosecution claim is the only unreputed part of *Buck*).

170. The Occupy Wall Street movement, and many of its spiritual successors, focused on income inequality and the political and societal systems behind them. See Michael Levitin, *The Triumph of Occupy Wall Street*, ATLANTIC (June 10, 2015), <https://www.theatlantic.com/politics/archive/2015/06/the-triumph-of-occupy-wall-street/3954081>.

171. See *Harper v. Virginia*, 383 U.S. 663 (1966) (holding that poll taxes violated the equal protection clause of the Fourteenth Amendment).

172. See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that states are required to provide attorneys to criminal defendants under the Sixth Amendment).

173. See Nicholas Kristof, *America Is Guilty of Neglecting Kids: Our Own*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/opinion/nikki-haley-united-states-extreme-poverty.html>.

sufficient resources to meet their children's needs. Poverty-based suffering can be eased for children,<sup>174</sup> but labeling and treating the deprivations as moral failings of the parents will only make the circumstances worse for the already vulnerable children.

While policymakers may claim, and truly believe, that what is “best for the child” motivates the state in child welfare cases, history and current practices suggest otherwise. The earliest child protection societies, beginning in the 1870s, focused on removing children from their parents not for the good of the child but as “punishment of the parents as a deterrent to others.”<sup>175</sup> The evidence is increasingly clear that, absent serious neglect or abuse, the best outcome for children is almost always to remain with their families;<sup>176</sup> however, it was not until the 1920s that the state agencies even began to claim that family preservation was a priority.<sup>177</sup>

Marsha Garrison traced the history of family law and observed that while divorce law, which functions as the family law of the rich, has focused “on maintaining family relationships,” foster care and child welfare law, the family law of the poor, has focused instead “on providing one unconditional relationship,” regardless of whether that relationship is with a biological parent or a complete stranger.<sup>178</sup> This trend suggests a disturbing devaluation of the parent-child relationships within impoverished families.

The causes and dangers of poverty are naturally multi-faceted, and blaming the parents for them is a dangerous oversimplification of the problem.<sup>179</sup> Indeed, it may be an exercise in misdirection: the parents themselves are likely victims of their own poverty as well. Accordingly, making the parents’ “neglect” the focal point for intervention may be characterized as victim blaming rather than problem solving.

### *Conclusion*

The state must strike a delicate balance, deciding when to invade the sacred province of the family and disrupt those relationships. Separating children from their parents at the U.S.-Mexico border was justified on a number of grounds, including objectives of both retribution and deterrence

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174. See generally CHILDREN'S DEFENSE FUND, ENDING CHILD POVERTY NOW (2018), <http://www.childrensdefense.org/library/PovertyReport/EndingChildPovertyNow.html>.

175. PELTON, FOR REASONS OF POVERTY, *supra* note 68, at 11.

176. See *supra* notes 50-53 and accompanying text.

177. See PELTON, FOR REASONS OF POVERTY, *supra* note 68, at 11.

178. Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 454 (1983).

179. See PELTON, FOR REASONS OF POVERTY, *supra* note 68, at 41.

for the parents. But victimizing the innocent children in that manner was too bitter a pill even for a number of law-and-order conservatives, who stepped up and pushed back against the policy.<sup>180</sup>

We see similar issues at play, but with far less publicity, as child protection agencies remove children from their parents who are suspected of some kind of neglect. There are certainly situations where such intervention is warranted—for example, to rescue children from situations where they may be the victims of physical or sexual abuse—but under the vaguely drafted statutes, the authorities enjoy broad discretion in making that call. And there is considerable evidence that they intervene far too often and that they disproportionately target poor families for such actions.

The reasons poor families are singled out for this type of victimization are complex and overlapping, but they start with the conflation of poverty and neglect. Poverty places children at risk, and so does neglect; if the statute defines neglect as exposing a child to risk, then every impecunious parent is a neglectful parent. That problem is compounded by prejudices, biases in detection and reporting, and classist and ethnocentric judgments of the parenting of others.

At the same time, the poor are, by definition, insufficiently resourced to defend themselves or to resist such intrusions. Their rights and their family integrity are casualties of the process, and everyone suffers, including the children whose welfare motivated the intrusions in the first place. Indeed, the ultimate consequence may be a denial of the poor's right to parent at all.

The United States and its several states devote staggering resources to the cause of child protection,<sup>181</sup> including paying for the systems that separate poor children from their parents.<sup>182</sup> Given the terrible outcomes these systems generate, including but not limited to family separation and foster care, we are overdue to reconsider our approach to the problem.

If one of the primary causes of child suffering is poverty, then it makes little sense to devote our resources to punishing parents for being poor and destroying the already at-risk families. Indeed, the trauma of the separation from their parents typically serves only to compound the harm to the

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180. See Eli Stokols & Noah Bierman, *Backlash Builds Against Trump's Policy Splitting Families at Border as He Falsely Blames Democrats*, L.A. TIMES (June 18, 2018, 3:25 PM), <http://www.latimes.com/politics/la-na-pol-trump-family-separation-20180618-story.html>.

181. Federal, State, and local agencies spent about \$29.1 billion in 2014 fiscal year. CHILD TRENDS, CHILD WELFARE FINANCING SFY 2014: NATIONAL OVERVIEW (2016), <https://www.childtrends.org/wp-content/uploads/2016/10/2016-52ChildWelfareFinancingSFY2014Overview-1.pdf>.

182. *Id.*

children. If our primary concern is child protection and child welfare, then the focus should be on alleviating the poverty. Public monies would be far better spent on easing the impact of poverty.

Indeed, a society that values children's well-being should work assiduously to preserve and strengthen family relationships. If poverty is straining those families, then the child-welfare priority should be to ease the impact of poverty on that family, and therefore on the children affected by it. Punishing poor families for their poverty, labeling it as actionable "neglect," is a misguided and cruel ideology. We can do better than that, and we owe it to the children to try.