THE NEGLECTFUL *PARENS PATRIAE*: USING CHILD PROTECTIVE LAWS TO DEFEND THE SAFETY NET

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INTRODUCTION

Two-month-old Tyler Walrond died of malnutrition on August 27, 1997 in the Bronx. His mother, Tabitha Walrond, had tried several times to obtain medical care for him, but was turned away each time by public assistance caseworkers and medical clinic staff who told her she needed Tyler's Medicaid number before he could receive care.[1] These denials of aid to Tyler were unlawful. He should have been automatically provided with Medicaid coverage because his mother was on Medicaid. Unfortunately, Tyler's case became part of a pattern which was later uncovered in federal investigations and a federal lawsuit. The City had been wrongly turning away poor parents who sought assistance to which they were legally entitled.[2]

The forces at fault in Tyler's death were clear: an unresponsive public benefits system that turned away Ms. Walrond and her son in their hour of need, and doctors and administrators in the newly privatized Medicaid managed-care system who should have recognized this need. The federal government had recently enacted the Welfare Reform Act, creating financial incentives for states to limit access to benefits and to place strict conditions on their receipt.[3] The City's response was to place barriers in the way of needy families seeking help. Families applying for assistance were met with a presumption that they were not truly needy, and were forced to overcome a slew of bureaucratic obstacles blocking access to the benefits they so desperately needed. Simply by making the application process difficult and discouraging, the City deterred participation

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1. Nina Bernstein, *Placing the Blame in an Infant's Death: Mother Faces Trial After Baby Dies from Lack of Breast Milk*, N.Y. TIMES, Mar. 15, 1999, at B1.

2. *See* Reynolds v. Giuliani, 35 F. Supp. 2d 331, 346–48 (S.D.N.Y. 1999) (granting preliminary injunction requiring, among other things, timely review of applications for benefits), *modified*, 43 F. Supp. 2d 492 (S.D.N.Y. 1999).

3. Personal Responsibility and Work Opportunities Act of 1996, Pub. L. No. 104-193, § 103(a)(1), 110 Stat. 2105, 2112–60 (1996) (amending 42 U.S.C. § 601).

and succeeded in decreasing the welfare rolls tremendously.[4] At the same time, these barriers to access meant that families were also unlawfully excluded from federal programs such as Medicaid and food stamps, which were supposed to remain available even as cash assistance was being cut.[5] Thus, the door to government assistance from all levels of government was shut in the faces of needy families like Tyler Walrond's.

One might imagine that Tyler's death would have set off a wave of activist backlash against the new punitive welfare policies. Instead, Tyler's mother, Tabitha Walrond, was prosecuted for and convicted of criminally negligent homicide in her son's death. Even though Ms. Walrond had attended every prenatal appointment and Lamaze class, even though doctors had failed to warn her that her earlier breast-reduction surgery might make breastfeeding dangerous, and even though both her welfare center and her Medicaid HMO had unlawfully rebuffed her attempts to obtain the medical care that could have saved her son's life, it was she who eventually took the legal blame for his death.[6]

Government entities seeking to respond to a tragedy like the death of Tyler Walrond often find it simpler and politically less risky to blame individual parents than to engage in any kind of systemic critique about why bad things happen to children.[7] Blaming parents who, like Ms. Walrond, are poor and of color is easier still, since it takes advantage of their relative lack of political power and of negative stereotypes about them.[8] Meanwhile, the inaccessibility of resources such as health care and other public benefits prevents those parents from providing materially for their children according to a standard set by those

4. Between July 1996 and July 1997, forty-eight percent of New York City parents receiving public assistance who were assigned to workfare were sanctioned. TASK FORCE FOR SENSIBLE WELFARE REFORM, ROBERT J. MILANO GRADUATE SCHOOL OF MANAGEMENT AND URBAN POLICY, WELFARE REFORM IN NEW YORK 4 (1999), http://www.newschool.edu/milano/nycaffairs/welfare/welfarereport1.pdf. During the same period, the number of individuals receiving public assistance in New York City decreased by approximately 94,000. INDEPENDENT BUDGET OFFICE, CITY OF NEW YORK, WELFARE CASELOAD REDUCTIONS IN NEW YORK CITY (1997), http://www.ibo.nyc.ny.us/newsfax/caseload.html.

5. *See Reynolds*, 35 F. Supp. 2d at 346–47.

6. Bernstein, *Placing the Blame in an Infant's Death*, *supra* note 1; Nina Bernstein, *Bronx Woman Convicted in Starving of Her Breast-Fed Son*, N.Y. TIMES, May 20, 1999, at B1; Mark Hamblett, *Mother Convicted for Baby's Starvation,* N.Y.L.J., May 20, 1999, at 1; Sharon Lerner, *HMO Watch: Tragedy of Errors: How Bureaucracy May Have Helped Starve Tyler Walrond*, VILLAGE VOICE, May 18, 1999, at 27; Katha Pollitt, *A Bronx Tale,* THE NATION, June 14, 1999, at 11.

7. *See* BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE 2 (1984) (describing how this version of the blame game affected passage of the Child Abuse Prevention Act in the early 1970s). Duncan Lindsey refers to the prevailing view that child poverty, abuse, and neglect are the result of individual parents' deficiencies as the "residual" model of child welfare. DUNCAN LINDSEY, THE WELFARE OF CHILDREN 25–28 (2d ed. 2004).

8. *See generally* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002). *See also* Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 244–50.

with greater access to wealth and power.[9]

Tabitha Walrond is an example of a parent who was prosecuted criminally for the horrific fate suffered by her son when the public assistance safety net failed him. More often, however, it is the child welfare system, not the criminal justice system, that prosecutes poor parents for neglect when poverty makes it impossible for them to provide for their children. The child welfare system responds to neglect primarily by removing children from their families and placing them in foster care.[10]

Nationwide, the vast majority of the children who are placed in foster care come from poor families.[11] Studies have shown that decreases in family income increase the likelihood of child neglect, abuse, and foster care placement.[12] Most children in foster care are removed from their families due to allegations of neglect, not abuse.[13] Certain types of neglect, such as a parent's failure to provide adequate housing, food, or shelter to her children, often result from a parent's inability to obtain sufficient income.[14] A parent who cannot afford safe, adequate, or reliable child care can be charged with neglect due to inadequate supervision.[15] Poor families are less likely than other families to have access to

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9. *See* Daan Braveman & Sarah Ramsey, *When Welfare Ends: Removing Children from the Home for Poverty Alone*, 70 TEMP. L. REV. 447, 462 (1997) (noting the high likelihood that needy families receiving no public assistance or below-poverty-line benefits will live in situations that expose parents to allegations of neglect); *infra* notes 11–18 and accompanying text.

10. *See infra* parts I.B–C.

11. Mark E. Courtney, *The Costs of Child Protection in the Context of Welfare Reform*, FUTURE OF CHILDREN, Spring 1998, No. 1, at 95.

12. The same studies also show that decreases in welfare benefits have led to increases in reported abuse and foster care placement. *See* Joel F. Handler, *"Ending Welfare as We Know It": The Win/Win Spin or the Stench of Victory*, 5 J. GENDER RACE & JUST. 131, 163–64 (2001) (reporting "a twenty percent increase in the number of child abuse cases reported and a ten percent increase in the number of children who entered the child welfare system" after a six percent Aid to Families with Dependent Children (AFDC) cut in 1992). Conversely, increased benefit levels decrease the risk of abuse and neglect as well as the risk of foster care placement. Researchers Christina Paxson and Jane Waldfogel found that "[a] 10 percent increase in benefit levels is predicted to reduce neglect by 31.5 percent and to reduce out-of-home placements by 7.96 percent." Christina Paxson & Jane Waldfogel, *Welfare Reform and Child Maltreatment*, *in* JOINT CTR. FOR POVERTY RESEARCH, THE INCENTIVES OF GOVERNMENT PROGRAMS AND THE WELL-BEING OF FAMILIES, at 16 (Bruce Meyer and Greg Duncan eds., 2000). In the state of Washington, increasing the welfare grants of families dependent on child care decreased rates of reported child neglect. ROBERTS, *supra* note 8, at 186.

13. MICHAEL R. PETIT, PATRICK A. CURTIS, KRISTEN WOODRUFF, LYNDA ARNOLD, LAURA FEAGANS & JENNIFER ANG, CHILD WELFARE LEAGUE OF AMERICA, CHILD ABUSE AND NEGLECT: A LOOK AT THE STATES 35 fig.1.10 (1999).

14. *See* ROBERTS, *supra* note 8, at 180–81. Roberts recounts a study in which sociologists interviewed a group of 379 single mothers receiving welfare and found that all but one were forced to supplement their income from informal sources to feed and clothe their children. The one who did not was unable to provide adequately for her child and was in danger of losing her to the foster care system on grounds of neglect. *Id.*

15. *See, e.g.*, Nina Bernstein, *Daily Choice Turned Deadly: Children Left on Their Own*, N.Y. TIMES, Oct. 19, 2003, at A1 (reporting an incident in which two children died in an arson fire: their mother was charged with reckless endangerment because she had left them unattended in

substance abuse and mental health treatment which could avert the need for foster care placement.[16] Even physical abuse is more likely to happen when parents are experiencing the stresses caused by poverty.[17] There is strong evidence that many of the children in foster care in the United States could be living safely with their families if their families had adequate income.[18]

For many parents accused of abuse or neglect, public assistance has not provided an adequate safety net to keep their families together.[19] Like Tyler Walrond, many children would be better served by a more responsive system of public assistance capable of providing their parents with the economic means to care for them adequately in their own homes. Instead, our society has chosen to use foster care as a way to ensure that children's material needs are met.

While foster care might seem like a reasonable way to help needy children without helping their politically unpopular parents, the truth is that there are many costs and few benefits to relying on foster care. Psychologists generally agree that separation from parents is at least as devastating and traumatic for children as poverty and perhaps even neglect.[20] Experts fear that the rate of child abuse in foster homes may be far higher than in the general population.[21] Children in foster care have higher rates of emotional, behavioral, and educational problems than children who live at home with their parents, even when their parents' homes are considered "high-risk."[22] Adults who grew up in foster care are much more likely than the general population to drop out of school, to succumb to substance abuse, or to experience homelessness or incarceration.[23] These negative outcomes are traceable at

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order to keep her job).

16. ROBERTS, *supra* note 8, at 138–39. *See also* Shaila Dewan, *Parents of Mentally Ill Children Trade Custody for Care*, N.Y. TIMES, Feb. 16, 2003, at 35; Robert Pear, *Mental Care Poor for Some Children in State Custody*, N.Y. TIMES, Sept. 1, 2003, at A1.

17. *See* Paxson & Waldfogel, *supra* note 12 ("States that impose shorter lifetime limits (fewer than 60 months) on receipt of welfare see higher substantiation rates and cases of physical abuse.").

18. *See* Kristen Shook, Does the Loss of Welfare Income Increase the Risk of Involvement with the Child Welfare System?, at 12 (Joint Ctr. for Poverty Research, Working Paper Series, Paper No. 65, 1999), *available at* http://www.jcpr.org/wpfiles/shook.pdf; LINDSEY, *supra* note 7, at 168–69.

19. ROBERTS, *supra* note 8, at 91–92, 136–37, 182, 185–87.

20. *See, e.g.*, ROBERTS, *supra* note 8, at 106 (outlining critiques of the theory that children recover quickly from the trauma of removal by bonding with foster parents). *See also* Alyssa Katz, *Impaired Judgment*, CITY LIMITS, Feb. 1999, at 21, in which the executive director of a New York City foster care agency explains:

> Separation is traumatic. In the vast majority of neglect cases, most kids, despite their circumstances, experience a debilitating sense of losing control. There's a fear that anyone can knock on the door and take them away. And more often than not, in the mind of the child it's "what have I done wrong?" *Id.*

21. Timothy Roche, *The Crisis of Foster Care*, TIME, Nov. 13, 2000, at 75.

22. Sandra Bass, Margie K. Shields & Richard E. Behrman, *Children, Families and Foster Care: Analysis and Recommendations*, FUTURE OF CHILDREN, Winter 2004, at 10.

23. *Id.* at 13; ROBERTS, *supra* note 8, at 202–05.

least in part to the many failings of the foster care system.[24]

Underlying these many concrete failures is the foster care system's inability to provide children with new homes that replicate the strong bonds they shared with their parents. The state has not proven to be a competent provider of long-term family relationships for children removed from their biological families.[25] Indeed, this country has a long legal tradition of recognizing that parents are better able than the state to provide the love and guidance necessary to a child's upbringing.[26] Unfortunately, the past decade has seen a policy shift toward using the foster care system, in spite of its recognized weaknesses, as this country's primary means of caring for poor children.

As Dorothy Roberts has documented, this policy decision disproportionately affects poor African-American children.[27] While only seventeen percent of the nation's children are African American, African-American children account for forty-two percent of the children in foster care. In major cities, the racial disparities are even more glaring. For example, in Chicago, ninety-five percent of the children in foster care are African American,[28] and in New York City, African-American children are seventeen and one half times more likely and Latino children are six and one half times more likely to be placed in foster care than white children.[29] The vast racial disparities in rates of foster care placement can be attributed to two factors: the system's disparate treatment of families of color, and the fact that families of color are more likely to be poor, and thus more likely to be accused of neglect.[30]

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24. ROBERTS, *supra* note 8, at 202–05.

25. *See, e.g.*, Leslie Kaufman, *Cash Incentives for Adoptions Seen as Risk to Some Children*, N.Y. TIMES, Oct. 29, 2003, at A1; Marisol A. *ex rel.* Forbes v. Giuliani, 929 F. Supp. 662, 669–70 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 372 (2d Cir. 1997); LaShawn A. v. Dixon, 762 F. Supp. 959, 960–61 (D.D.C. 1991), *aff'd*, 990 F.2d 1319 (D.C. Cir. 1993); Braam v. State, 81 P.3d 851, 854 (Wash. 2003).

26. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 229–34 (1972) (holding that a state's interest in assuring children a secondary education can be trumped by parents' right to raise their children in accordance with their religion, assuming that children's physical and mental health will not be threatened); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (recognizing the right of parents to control their children's education); Meyer v. Nebraska, 262 U.S. 390, 400–02 (1923) (holding that a state cannot interfere with "the power of parents to control the education of their own" by prohibiting the teaching of German).

27. *See* ROBERTS, *supra* note 8.

28. *Id* at 9 .

29. In New York City in 1998, one out of every twenty-two African-American children and one out of every fifty-nine Latino children was in foster care, versus only one out of every 385 white children. Andrew White, John Courtney & Adam Fifield, *Race, Bias & Power in Child Welfare*, CHILD WELFARE WATCH, Spring/Summer 1998, at 1.

30. *See generally* ROBERTS, *supra* note 8. Poverty increases the likelihood of a parent being reported for abuse or neglect, as well as the likelihood that her children will be removed, and parents of color are more likely than white parents to be poor. However, these objective factors alone do not explain the vast discrepancies between the rate of foster care placement for white children and that for children of color. To assess risk and determine when intervention is necessary, the child welfare system must rely on the discretion of many individuals of varying backgrounds and prejudices, and the result is a system rife with racial bias. For example, one

All fifty states have chosen to implement some type of child protective system with the power to intervene by removing children from their families coercively. This intervention is an exercise of the state's *parens patriae* power, the power derived from the state's role as the caretaker of last resort for individuals whose health or safety is in imminent danger. Courts have not interpreted the *parens patriae* power as an obligation to help needy individuals—only as a tool to be used when the state chooses to intervene.

In this article I will argue that the state's choice to exercise its *parens patriae* power to help children should bring with it affirmative obligations toward families. Child welfare law imposes on parents an affirmative obligation to provide for their children according to minimum standards. The government, having chosen to take on a parental responsibility toward its citizens' children, should provide parents with the resources they need to meet those standards when they cannot do so on their own. Requiring poor parents to provide materially for their children will not help those children unless their parents have the financial means to do so.

Child welfare law charts a path for government officials carrying out the *parens patriae* function of protecting children from harm. Unlike welfare reform, which is intended to modify the behavior of poor, unemployed and underemployed adults, child welfare law is intended to serve the best interests of children. I will argue that when these goals conflict, the government should provide assistance in the manner which best serves children, even if this means abandoning its punitive policies toward adults. Child welfare law can and should be used to establish that children have a right to be materially provided for according to minimum standards, without being unnecessarily separated from loving families.

Part I of this article places the current relationship between welfare reform and child welfare in a historical and political context. In part II, I discuss possible applications of the proposition that child welfare law, viewed within a federal constitutional framework, imposes on the state affirmative obligations toward poor families. In part III, I argue that state law is a better tool than federal law for advocates of families' rights to government assistance, and I examine recent developments in New York State, where poor families have used child welfare laws as a defense against certain punitive policies derived from welfare reform.

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study of abuse and neglect reporting found that although white and African-American women were equally likely to test positive for substance abuse during pregnancy, African-American women were ten times more likely to be reported to authorities. Bass, Shields & Behrman, *supra* note 22, at 14. Once in foster care, children of color receive fewer services and remain in care longer than white children. Sandra Stukes-Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, FUTURE OF CHILDREN, Winter 2004, at 79.

I.
THE HISTORY AND POLITICS OF THE SAFETY NET FOR FAMILIES

A. Welfare Reform: Abandoning AFDC's Promise of Assistance to Families

In 1996, the Personal Responsibility and Work Opportunity Reconciliation Act ("Welfare Reform Act") ended the status of federally funded public assistance as an entitlement for needy families.[31] The Welfare Reform Act gave states wide latitude in deciding whether to use federal and state funds for direct cash grants to families or to use them for other types of programs, such as workfare,[32] and it encouraged states to impose time limits of up to five years on individual families' cumulative lifetime receipt of benefits.[33] It also provided that in order to receive federal funds, states would have to move the majority of their welfare recipients into jobs or workfare programs.[34]

The Welfare Reform Act eliminated Aid to Families with Dependent Children (AFDC), a direct subsidy program for poor families that originated in the 1935 Social Security Act.[35] AFDC was designed to help children without removing them from their families.[36] The structure of the program recognized that families with only one parent, or only one employable parent, needed the support of the state to survive.[37] The 1996 Welfare Reform Act not only ended

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31. Personal Responsibility and Work Opportunities Act of 1996, Pub. L. No. 104-193, § 103(a)(1), 110 Stat. 2105, 2112–60 (1996) (amending 42 U.S.C. § 601).

32. 42 U.S.C. § 601(a) (2000). Key provisions of 1996 welfare reform were reauthorized in November 2005, in the Deficit Reduction Act of 2005, which was signed into law February 8, 2006. S. 1932, 109th Cong. (2005) (enacted). *See* "President Signs S.1932, Deficit Reduction Act of 2005," Feb. 8, 2006, http://www.whitehouse.gov/news/releases/2006/02/20060208-8.html. None of the changes made in that reauthorization affects the sections of the statute discussed in this article.

33. *Id.* § 608(a)(7).

34. *Id.* § 607.

35. Social Security Act of 1935, Pub. L. No. 74-271, §§ 401–06, 49 Stat. 620, 627–29, *repealed by* Personal Responsibility and Work Opportunities Act of 1996 § 103(a)(1).

36. *See* S. REP. NO. 74-628, at 17 (1935) ("Through cash grants adjusted to the needs of the family it is possible to keep the young children with their mother in their own home, thus preventing the necessity of placing the children in institutions. This is recognized by everyone to be the least expensive and altogether the most desirable method for meeting the needs of these families that has yet been devised."). *See also* Dandridge v. Williams, 397 U.S. 471, 510 (1970) (Marshall, J., dissenting).

37. *See* S. REP. NO. 74-628, at 17 ("[F]amilies without a father's support require public assistance."). This purpose of the Social Security Act was confirmed in *King v. Smith*, 392 U.S. 309, 325–27 (1968), in which the Supreme Court found Alabama's "man-in-the-house" regulation inconsistent with the federal statute. The regulation denied AFDC benefits to families in which the unmarried mother was "cohabitating" with a man. While acknowledging a long history of the use of the Social Security Act's public assistance provisions for purposes of social control, Chief Justice Warren's majority opinion rejected the regulation because it denied benefits based on criteria other than need. *Id.* He reasoned that because the "substitute father" living with the mother had no legal duty to support, his existence could not be deemed to alleviate the family's need unless he was actually providing for them. *Id.* at 327. The clear implication is that, unlike a "substitute father," the state *did* have an affirmative legal duty to support a single-parent household

this statutory entitlement; it did so by replacing it with Temporary Assistance for Needy Families (TANF), a subsistence-level benefit which can be discontinued or denied for reasons entirely unrelated to need,[38] leaving the single parent to shoulder alone the legal burden of both caring for and supporting her family.[39] At the same time, the Welfare Reform Act left intact the federal guarantee of funding for foster care placement. Thus, when a family is dropped from the welfare rolls, the children can continue to be cared for with federal funds as long as they are separated from their families and placed in foster care, so that the money goes to the foster care system instead of to their parents.[40]

The 1935 Social Security Act required states to provide single-parent families with public assistance benefits according to their need. When states imposed "man-in-the house" provisions denying benefits to a single mother who "cohabited" with a man to whom she was not married, the Supreme Court struck down these provisions under the AFDC statute because the denial was based on criteria other than need.[41] By eliminating the federal entitlement to financial assistance for the needy, the Welfare Reform Act eliminated this obstacle to using welfare programs as instruments of social control, and even invited states to use welfare administration to punish recipients for unwanted behavior by denying benefits for reasons unrelated to need.[42] The Welfare Reform Act gave states the option of denying assistance to the families of single parents who, for example, fail to work outside of the home;[43] fail to attend parenting skills or money management classes;[44] fail to ensure that their children attend school;[45] fail to have their children immunized;[46] or fail to participate in substance abuse treatment.[47]

Furthermore, the Welfare Reform Act gave states the option of imposing financial sanctions on entire families when the adult head of household failed to

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under the AFDC statute. In essence, the Welfare Reform Act imposes the very demand that the AFDC statute and Chief Justice Warren deemed unrealistic—that single mothers must both work and care for their children without an entitlement to any outside support.

38. *See* 42 U.S.C. § 601(b) (no individual entitlement); *id.* § 607(e)(1) (generally requiring states to discontinue or reduce federally funded benefits to families of individuals who do not comply with work requirements); *id.* §§ 601(b), 608 (a)(7) (setting time limits on assistance).

39. Technically, a child may be legally entitled to an absent parent's support in the event that her custodial parent's TANF benefits expire or are cut off. However, unlike AFDC, TANF benefits may be discontinued due to time limits, *see* 42 U.S.C. §§ 601(b), 608(a)(7), or sanctions for noncompliance with work requirements, *see* §§ 601(b), 607(e)(1) regardless of whether there is a second known, living parent who can support the child.

40. ROBERTS, *supra* note 8, at 178.

41. *See King*, 392 U.S. 309.

42. Brito, *supra* note 8, at 246–47.

43. 42 U.S.C. § 607(e)(1) (2000).

44. 42 U.S.C. § 608(b)(2)(A)(ii) (2000).

45. *Id.*

46. *Id.*

47. 42 U.S.C. § 608(b)(2)(A)(v) (2000).

comply with public assistance regulations or requirements.[48] Under AFDC, states could impose sanctions on families only by reducing the family's public assistance grant by the portion attributable to the responsible adult.[49] After welfare reform, however, a parent's failure to comply with public assistance requirements may lead to discontinuance of the entire family's benefits.

Before AFDC, charitable programs of various kinds had long attempted to protect children. These programs had traditionally focused on removing children from their poverty-stricken homes.[50] The cruel realities of the labor market and economic inequality were considered less acceptable when they harmed innocent children than when they harmed adults or tore apart families. Separation from parents was not considered a significant harm to children, especially when their parents were poor.[51] Many of these programs focused on saving children from the homes of immigrants living in urban poverty. These homes were considered not just materially, but culturally deficient.[52] Children were removed from their families and placed in institutions, or with non-immigrant families living in rural areas. The charities believed they were saving children from depraved parents, from poor neighborhoods, and from all the negative influences they associated with urban poverty.[53]

This practice of removing children from poor minority families, purportedly because of their poverty, did not end with the advent of AFDC and a nationwide public assistance safety net. Beginning in the 1960s, some of the funding for the AFDC program was used instead to create what became today's foster care system.[54] This funding was used to support out-of-home placement, often through the same charitable organizations that had been removing children from poor families for decades.[55] Gradually, cash assistance to families diminished, leading to an increase in the number of children removed from their homes and placed in the newly funded foster care system.[56] The children in

48. 42 U.S.C. § 607(e)(1) (2000).

49. 45 CFR § 250.34(c)(1) (1995).

50. *See, e.g.*, NELSON, *supra* note 7, at 84 (describing an example of late nineteenth-century child welfare legislation that "fell squarely within the poor law tradition, which supported the breakup of families for reasons of poverty"); LINDSEY, *supra* note 7, at 17–28 ("[Toward the end of the nineteenth century] foster care began to be directed toward children whose mothers were viewed as being unable to properly provide for them.").

51. NELSON, *supra* note 7, at 84.

52. LINDSEY, *supra* note 7, at 18 (describing early reformers' disdainful view of the character of poor parents).

53. *Id.*

54. In 1961, the federal government authorized states to use Title IV-A (AFDC) funds to make payments to foster parents, dramatically increasing the amount of foster care funding available. Courtney, *supra* note 11, at 90.

55. *See* Susan Vivian Mangold, *Protection, Privatization and Profit in the Foster Care System*, 60 OHIO ST. L.J. 1295, 1306 (1999).

56. *See generally* NINA BERNSTEIN, THE LOST CHILDREN OF WILDER: THE EPIC STRUGGLE TO CHANGE FOSTER CARE (2001). The 1960s saw a vast reduction in child poverty, as the Kennedy and Johnson administrations expanded public assistance programs as part of the "War on Poverty."

the care of this system are overwhelmingly poor children of color.[57]

B. Foster Care: The Last Entitlement

Given the relationship between poverty and foster care placement, it was predictable that the Welfare Reform Act's provisions restricting families' access to public assistance would result in increased foster care placements. With the passage of the Act, children previously provided for by public assistance were suddenly at risk of being separated from their families and placed in foster care should their parents be unable to meet child welfare standards without such assistance. Republican lawmakers who supported the Act recognized this, but argued it was appropriate for the foster care system to replace welfare as a safety net. Poor children, they pointed out, would still be provided for at government expense—just not in their parents' homes.[58] As a way to help children, foster care is not only less humane but also significantly more expensive than cash assistance to families.[59] However, policymakers who supported the Welfare Reform Act garnered support for it by focusing their rhetoric on the politically unpopular welfare recipients: adults who live off taxpayers' money.

Because every state has implemented its own unique version of welfare

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Beginning with Nixon's administration in 1968, however, welfare programs became more restrictive, and the rapid decrease in child poverty ground to a halt. LINDSEY, *supra* note 7, at 262–63. In 1978, researchers David Fanshel and Eugene Shinn observed that "[c]utting public assistance budgets, ending support for public housing, terminating mental health after-care clinics—all grim phenomena of this recent period—are sure ways to increase the number of families where parental breakdown will occur and children will require foster care." DAVID FANSHEL & EUGENE B. SHINN, CHILDREN IN FOSTER CARE: A LONGITUDINAL INVESTIGATION 507 (1978).

57. *See, e.g.*, Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1718 n.11 (2000) (reviewing ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE (2000)).

58. *See* Braveman & Ramsey, *supra* note 9, at 448 (noting that, during debates surrounding its passage, proponents of the Welfare Reform Act recognized that government spending in some form would be necessary to provide for children whose families became ineligible for benefits).

59. Courtney, *supra* note 11, at 93 ("In 1993, the median monthly AFDC payment for one child ($212) was more than $100 per month less than the median foster home maintenance payment. Costs of care for children living in group homes and residential treatment centers, rather than foster family homes, averaged about $3,000 per month. Furthermore, foster care rates are proportional to the number of children placed . . . while AFDC per capita payment rates decreased with increased family size."). Taking into account the costs of administering foster care, Courtney calculates that "the federal government spent about $11,698 per child on foster care maintenance and administration costs in 1995, but only $1,012 for each person receiving AFDC." *Id.* The figures cited in Courtney's article do not include the state share of foster care costs. According to a report issued by New York City's Office of the Public Advocate, in 2000, foster care costs to government as a whole totaled approximately $14,000 per child per year, while residential care (institutional foster care) costs more than $100,000 per year per child. In contrast, preventive services, which include a wide variety of support services that have been shown to be effective at keeping at-risk families intact, cost only two to three thousand dollars per *family* per year. BETSY GOTBAUM, PUBLIC ADVOCATE, OFFICE OF THE PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, FAMILIES AT RISK: A REPORT ON NEW YORK CITY'S CHILD WELFARE SERVICES 15, 15 n.52 (2002).

reform, it is difficult to measure the Act's effect on the numbers of children in foster care nationwide. However, certain states that have decided to terminate families' benefits have already seen an increase in the rate of foster care placement among the families no longer receiving benefits.[60] In fact, studies have shown that welfare's work requirements and the sanctions imposed on families if they fail to comply with them—both products of the Welfare Reform Act—are associated with significant increases in cases of child abuse and neglect.[61]

AFDC ultimately failed as a way to keep families together. From the 1970s to the 1990s, the real value of benefits decreased dramatically,[62] while more and more public funds were being used to remove children from their families and place them in foster care.[63] Nevertheless, the abolition of AFDC in 1996 dealt an enormous blow to low-income parents fighting to keep their families together on welfare. The Welfare Reform Act meant that more families would be thrown into destitute poverty, fewer parents would be able to provide adequate care for their children at home, and thus more children would be forced into foster care.

The Adoption and Safe Families Act (ASFA) followed on the heels of the Welfare Reform Act, a further step along the federal government's path away from assisting poor families and toward finding new homes for poor children.[64] ASFA, passed in 1997, changed the focus of child welfare policy from family reunification to permanency, which the Act described as any one of several permanent legal arrangements other than foster care. ASFA conditioned federal funding of state child welfare programs on the speed with which children in foster care leave the system, either because they are reunified with their families or because they are adopted, placing equal value on these unequal outcomes. In order to qualify for funding after ASFA, a state child protective agency must file a petition to terminate the parental rights of any parent whose child has been in

60. *See, e.g.*, Nell Bernstein, *Is Welfare Reform Sending More Kids to Foster Care?*, Salon.com (Sept. 1, 1999), *at* http://archive.salon.com/news/feature/1999/09/01/welfare ("In Wisconsin—which embarked on welfare reform early and avidly—5 percent of former welfare recipients, or one in 20, reported being forced to abandon their children. In San Diego County, foster care placements doubled after the new welfare law took effect. When researchers interviewed San Diego families who had become homeless after losing their benefits, 18 percent said their children subsequently went into foster care."). *See also* Nina Bernstein, *Side Effect of Welfare Law: The No-Parent Family*, N.Y. TIMES, July 29, 2002, at A1.

61. *See* Paxson & Waldfogel, *supra* note 12 (finding that work requirements, tougher sanctions, and time limits are all associated with increases in substantiated cases of abuse and neglect). *See also* Shook, *supra* note 18, at 12–13, 15–18.

62. From 1970 to 1995, the real value of average AFDC benefits per person fell twenty-six percent. STAFF OF HOUSE COMM. ON WAYS AND MEANS, 104TH CONG., 1996 GREEN BOOK 442, 449 tbl.8-16 (Comm. Print 1996), *available at* http://www.gpoaccess.gov/wmprints/green/1996.html. In five states (Idaho, New Jersey, Pennsylvania, Texas, and Virginia), maximum family benefit levels fell sixty percent or more in real value between 1970 and 1996. *Id.* at 442, 446–47 tbl.8-15.

63. *See supra* notes 54–57 and accompanying text.

64. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.).

foster care for fifteen out of the last twenty-two months, unless the agency finds that the case falls under one of several exceptions enumerated in the statute.[65] Individual states were required to enact statutes implementing these provisions as a condition of continued federal funding.[66]

ASFA amended the Adoption Assistance and Child Welfare Act of 1980[67] ("Child Welfare Act"), which focused on family preservation.[68] The 1980 Act had mandated the provision of services to birth parents, requiring states to use reasonable efforts to reunite children in foster care with their families.[69] Under ASFA, however, child protective agencies can petition to be relieved of the reasonable efforts requirement and proceed directly to terminating parental rights and freeing the child for adoption.[70] The enactment of ASFA represented a policy shift toward separating families in the interest of child protection and away from providing services in the interest of family reunification. By creating incentives for states to terminate parental rights and making it easier for them to do so, ASFA ensured that many more children in foster care would be permanently separated from their families.

C. The Limitations of Helping Children Without Helping Their Parents: Why Foster Care–Centered Child Welfare Policy Falls Short

Funding foster care programs for abused and neglected children has always been more politically palatable than funding public assistance for families or single adults. The popularity of welfare reform reveals that many Americans and many of their elected officials believe that poor adults, including parents, are responsible for their own poverty, and therefore undeserving of assistance. In addition, the Welfare Reform Act's limitations on assistance to poor families betray a deeply ingrained belief that poor parents—and particularly single mothers—act irresponsibly if they decide to bear children but are unable to provide for those children financially.[71] At the same time, the enactment of ASFA reveals that policymakers remain concerned with the plight of children, who are considered to be innocent victims of their families' poverty.

The tension between the desire to help "innocent" children and the reluctance to help "undeserving" parents gives rise to a policy dilemma. In the

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65. *See* 42 U.S.C. § 675(5)(E) (2000) (describing rule and exceptions and clarifying mandatory nature); 42 U.S.C. § 671(a) (2000) (describing required characteristics of federally funded state foster care plans).

66. *See id.*

67. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500.

68. Braveman & Ramsey, *supra* note 9, at 452.

69. Adoption Assistance and Child Welfare Act of 1980 § 101(a)(1), 94 Stat. at 503 (codified at 42 U.S.C. § 671(a)(15)(B) (2000)).

70. Adoption and Safe Families Act of 1997 § 101(a), 111 Stat. 2116 (codified at 42 U.S.C. § 671(a)(15)(C) (2000)).

71. *See generally* Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 168–84 (2002).

wake of welfare reform, state social services agencies have a federal mandate to punish those parents who stay on welfare for too long or fail to comply with workfare or other public assistance requirements. Yet punishing parents leads to the unintended and politically unpalatable consequence of punishing children.[72] When parents are thrown off welfare and evicted from their homes, their children are evicted with them.[73] When parents are forced to work without child care, their children are the ones left home alone.[74]

One possible answer to this dilemma came from Congressman Newt Gingrich, who, during the debates surrounding the Welfare Reform Act, proposed a throwback to the nineteenth century: placing children in orphanages when their parents were unable to support them financially.[75] Not surprisingly,

72. *See generally* Leroy Pelton, *Welfare Discrimination and Child Welfare*, 60 OHIO ST. L.J. 1479, 1481 (1999). *See also* ROBERTS, *supra* note 8, at 173, 194–99.

73. Two years after the Welfare Reform Act was passed, a survey of families seeking services at nonprofit agencies showed that twenty-five percent of families who had stopped receiving welfare during the previous six months had their heat cut off, as compared with only seventeen percent of those who still received welfare. Twenty-three percent of families no longer receiving welfare had to move because they could not pay their rent, while only eleven percent of those still on welfare had to move. Twenty-five percent were living doubled up to save money, but only fifteen percent of those still on welfare did so. ARLOC SHERMAN, CHERYL AMEY, BARBARA DUFFIELD, NANCY EBB & DEBORAH WEINSTEIN, CHILDREN'S DEFENSE FUND & NAT'L COALITION FOR THE HOMELESS, WELFARE TO WHAT?: EARLY FINDINGS ON FAMILY HARDSHIP AND WELL-BEING 13 (1998), *available at* http://www.wkkf.org/Pubs/Devolution/NCH_Welfare_to_what_early_findings_on_family_hardship_and_well_being_00331_02813.pdf. And, more recently, as time-limited benefits run out and families begin to feel the full effect of the Welfare Reform Act, the number of homeless families has increased dramatically nationwide. *See, e.g.*, U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES, at ii (2001) (documenting a twenty-two percent increase in requests for shelter by homeless families in U.S. cities between 2000 and 2001); U.S. CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY, at ii (2003) (documenting a fifteen percent increase in such requests between 2002 and 2003). New York City, which is not included in these reports, has experienced enormous increases in family homelessness as well. *See, e.g.*, Michael Cooper, *More Children in New York City Are Homeless, Report Finds*, N.Y. TIMES, Feb. 14, 2003, at B6 (describing report finding increase in family homelessness in the decade preceding 2003); Andrea Elliott, *Record Number of Homeless, but City Says It's Prepared*, N.Y. TIMES, July 2, 2003, at B1 (reporting that the number of homeless families in New York City reached a record high in 2003); DEP'T OF HOMELESS SERVICES, NEW YORK CITY, EMERGING TRENDS IN CLIENT DEMOGRAPHICS 2 (2003), *at* http://www.nyc.gov/html/dhs/downloads/pdf/demographic.pdf (reporting "dramatic increase" in the number of homeless families with children from 1999 to 2002); DEP'T OF HOMELESS SERVICES, NEW YORK CITY, HISTORIC DATA 2–3 (2004), *at* http://www.nyc.gov/html/dhs/downloads/pdf/histdata.pdf (illustrating same trend through 2003).

74. The Welfare Reform Act eliminated the federal entitlement to child care for parents engaged in work programs required by welfare and for those working parents at risk of needing welfare if child care were not subsidized. *See* ROBERTS, *supra* note 8, at 188; Jo Ann C. Hong, *Child Care in the Wake of the Federal Welfare Act*, 30 CLEARINGHOUSE REV. 1044 (1997). Furthermore, the block grant which funds subsidized child care for low-income working families only provides assistance to approximately one out of seven eligible families. *See* CHILDREN'S DEFENSE FUND, GOOD CHILD CARE ASSISTANCE POLICIES HELP LOW-INCOME WORKING FAMILIES AFFORD QUALITY CARE AND HELP CHILDREN SUCCEED 145, 153 n.22 (2003), *available at* http://www.childrensdefense.org/earlychildhood/childcare/keyfacts2003_childcare_2.pdf.

75. ROBERTS, *supra* note 8, at 177.

this proposal did not satisfy the public's concern for the plight of poor children. Instead, the years since welfare reform have seen an increasing reliance on the child protective system—that is, on foster care and adoption—to protect children from poverty.[76]

American reliance on child protection instead of family assistance has little to do with how effectively each method helps children—it is really about whom society is willing or unwilling to help.[77] Proponents of welfare reform made their case by focusing on why poor parents should not be receiving cash assistance. Their argument relied upon a false image of irresponsible, lazy, dysfunctional parents[78] who did not deserve to have their lifestyle subsidized by hardworking Americans.[79] Popular perceptions emphasizing such supposed character flaws overlook or ignore the fact that parents receiving public assistance are often, like Tabitha Walrond, people who have endured racism, suffered the effects of poverty and urban decay, and been disproportionately underserved by poorly funded and mismanaged government programs in such areas as subsidized housing, foster care, public assistance, public education, health care, and criminal justice.[80] In lieu of this more complete portrait of the circumstances that commonly surround a family's need to resort to public assistance, many Americans focus on a snapshot of one seemingly blameworthy individual.

The result of this rhetoric of blame is that even if providing cash assistance to poor families is the best way to help children, this option will remain politically untenable to many policymakers, even those who claim that helping children is their principal goal. Opposition to helping the politically unpopular parents of destitute children all too frequently prevails over the public's instinctive knowledge that parents are the best caretakers for their children.

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76. Between 1996 and 1999 the number of children in foster care increased by 48,000, and the number of children waiting to be adopted doubled. ROBERTS, *supra* note 8, at 159.

77. As Mark Courtney points out, welfare reform and child welfare systems have different goals. Welfare reform is designed to change adults' behavior, while child welfare agencies try to maximize the best interests of children. Courtney, *supra* note 11, at 101.

78. *See, e.g.*, Charles Murray, *The Coming White Underclass*, WALL ST. J., Oct. 29, 1993, at A14.

79. *See* Thomas Byrne Edsall & Mary D. Edsall, *Race*, ATLANTIC MONTHLY, May 1991, at 53, 73–80 (describing Ronald Reagan's role in conjuring popular images of the "welfare queen" who lives well at the expense of working taxpayers).

80. *See generally* ROBERTS, *supra* note 8, 47–74 (describing various cultural stereotypes that attach to single African-American parents).

II.
CHILDREN'S FEDERAL CONSTITUTIONAL RIGHT TO STATE ASSISTANCE IN PRESERVING FAMILY RELATIONSHIPS

A. The Fundamental Right to Family Integrity

The Supreme Court has long recognized family integrity to be a fundamental liberty interest protected by the U.S. Constitution.[81] Laws infringing on self-determination in family life, such as mandatory schooling and child labor laws, must be narrowly tailored to serve a compelling state interest—in this case the prevention of harm to children—without unnecessarily restricting the right of parents to manage their children's upbringing.[82] The state may deny an individual parent this right and remove her child from her custody only upon a showing that the parent is unfit.[83] Parents must also be afforded due process rights in any removal proceedings, including notice and a timely opportunity to be heard.[84] Importantly, many courts hold that children share their parents' constitutionally protected interest in preserving family integrity.[85]

Writing for the majority in *Wisconsin v. Yoder*,[86] one of the central cases establishing the fundamental right to family integrity, Chief Justice Burger hinted that the Court was willing to enforce such a right only within certain limits. In *Yoder*, the State of Wisconsin had criminally prosecuted a group of Amish parents for failing to send their children to high school. The Court found that the application of the state's compulsory schooling law to this particular group of parents violated their Constitutional right to raise their children without unnecessary government intrusion, in accordance with their religion.[87] In dicta, the Chief Justice noted that the Amish are financially independent and do not take advantage of public assistance programs.[88] This observation suggests that the Court would have been less enthusiastic about reaffirming the "primary role of the parents in the upbringing of their children . . . now established . . . as an

81. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 229–34 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510, 518–19 (1925); Meyer v. Nebraska, 262 U.S. 390, 400–02 (1923).

82. *Id. See also* Prince v. Massachusetts, 321 U.S. 158, 165–68 (1944) (upholding a state child labor statute that conflicted with parental control, because the statute was narrowly tailored to achieve an important state interest).

83. Stanley v. Illinois, 405 U.S. 645, 651–52, 657–58 (1972) (the state may only take custody of a child over her parent's objection upon a showing of parental unfitness).

84. *Stanley*, 405 U.S. at 657–58; Duchesne v. Sugarman, 566 F.2d 817, 824–28 (2d Cir. 1977).

85. *See, e.g.*, Marisol A. *ex rel.* Forbes v. Giuliani, 929 F. Supp. 662, 676–77 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 372 (2d Cir. 1997).

86. 406 U.S. 205 (1972).

87. *Id.* at 229–34.

88. *Id.* at 222 ("[The Amish] are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms.").

enduring American tradition"[89] if the plaintiffs had been poor families who depended on the state for financial assistance.

B. Public Assistance and the Constitution

Given the status of family integrity as a fundamental right protected by the Constitution, one might expect the federal courts to require the government to ensure poor families a subsistence-level income to preserve the integrity of their families. Yet the Supreme Court has declined to treat financial assistance as a constitutionally protected right, viewing it instead as an economic issue, an area in which the government enjoys wide discretion.[90]

In *Dandridge v. Williams*,[91] the Court upheld Maryland's public assistance scheme, which capped benefits at a fixed maximum once the family reached a certain size. Additional children born after the family reached that size would not receive the benefits to which additional children in smaller families were entitled.[92] The Court held that this differential treatment of children based on the size of their families did not violate the Equal Protection Clause of the Fourteenth Amendment. Finding that the benefit cap did not impact the families' constitutionally protected fundamental rights,[93] the Court declined to apply a heightened standard of equal protection review[94] and concluded that the state should be allowed great discretion in deciding how to allocate its limited funding for social services.[95]

In dissent, Justice Marshall, joined by Justice Brennan, pointed to a case in which the Court had struck down a state law that penalized illegitimate children for their status—the fact that they were born to unmarried parents.[96] In that case and in subsequent, similar decisions, the Court reasoned that children should not be punished for their parents' actions.[97] Applying the same rationale, the dissenters argued that the regulation at issue in *Dandridge* was unconstitutional

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89. *Id.* at 232.

90. Dandridge v. Williams, 397 U.S. 471 (1970).

91. *Id.*

92. *Id.* at 473–74.

93. *See id.* at 484 ("[H]ere we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights[.]")

94. *Id.* at 485.

95. *Id.* at 487.

96. *Dandridge,* 397 U.S. at 523–25 (Marshall, J., dissenting) (citing Levy v. Louisiana, 391 U.S. 68 (1968) (ruling that where a state allowed legitimate children to pursue their dead mother's action for pain and suffering, it could not deny the same right to illegitimate children)).

97. *See, e.g., Levy*, 391 U.S. at 72. *See also* Gomez v. Perez, 409 U.S. 535, 537–38 (1973) (applying the principle in *Levy* to invalidate a Texas statute denying illegitimate children the right to paternal support); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 174–75 (1972) (applying *Levy* to invalidate a workers' compensation statute that treated illegitimate children of a beneficiary differently from legitimate children, and stating that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing").

because it penalized children solely for being born into already large families.

The *Dandridge* dissent's argument has broad implications. If it had been adopted by the majority, it would have rendered unconstitutional policies designed to modify adults' behavior if they cause collateral harm to innocent children. It could also conceivably invalidate many provisions of the Welfare Reform Act, such as the provision allowing states to discontinue benefits to an entire family when the parents violate workfare regulations, or time limits designed to penalize parents who stay on welfare too long, because these provisions penalize children who cannot be deemed responsible for their families' economic situations.

C. Poverty as a Barrier to the Exercise of Fundamental Rights

The Constitution prohibits the state from acting affirmatively to inhibit the exercise of fundamental rights except in a manner that is narrowly tailored to achieve an important state purpose. Yet the federal courts have generally resisted imposing any affirmative obligation upon the federal or state governments to remove barriers to the exercise of fundamental rights. Courts have drawn a distinction between unconstitutional state action that directly prevents individuals from exercising these rights, and social conditions, such as income inequality, which are viewed by courts as inevitable realities outside the realm of state responsibility. For example, while access to abortion is a fundamental right, the fact that poor women are often unable to afford abortions is not considered a constitutional violation.[98] Because poverty is the only barrier to access, and poverty is not considered a creation of the state,[99] the Supreme Court has ruled that it is not within the constitutional responsibilities of the state to remove this barrier.

Exceptions exist for rights closely related to the functions of the state itself,

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98. Webster v. Reprod. Health Serv., 492 U.S. 490, 509–11 (1989). In his article *The Curvature of Constitutional Space: What Lawyers can Learn from Modern Physics*, Professor Lawrence Tribe compares the view of the majority in cases like *Webster* and Deshaney v. Winnebago County, 489 U.S. 189 (1989) (discussed *infra* notes 124–130 and accompanying text) to Newtonian physics, which viewed the scientist as a neutral, detached observer, entirely separate from the natural world being observed, and advocates instead for a paradigm more consistent with modern physics, which acknowledges that the actions of the observer affect the surrounding environment. Tribe argues that the Newtonian view of the state as entirely separate from a natural, pre-political existence of private individuals ignores the inevitable process by which every policy choice and mediation of private rights by the state shapes the world in which those individuals live. If they adopted Tribe's post-Newtonian analysis, federal courts would be more likely to impose greater responsibilities on states to remedy economic inequalities. Lawrence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989).

99. *But see, e.g.*, FRANCIS FOX PIVEN AND RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 4–5 (1971) (detailing the history of state interventions in the operations of the free market, which the authors trace back to early sixteenth-century Europe); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 43 ("What has the state 'done'? The answer is a lot.").

such as the right to obtain a divorce and the right to vote.[100] Access to these fundamental rights must be subsidized by the state because the Court has held that it is unacceptable for an individual to be prevented from enjoying them due to her poverty. However, the Supreme Court has never held that supporting a family in a home is such an activity. While recognizing the importance of family integrity, the Court has not interpreted the Constitution as requiring states to provide funds to parents that will enable them to bring up their own children.[101] Instead, rights associated with family life, such as reproductive choice and family integrity, have been defined negatively—as the right to be let alone by the government.[102] Thus the self-sufficient Amish plaintiffs in *Yoder* were free to keep to themselves, while the families in *Dandridge* were rebuffed when they asked the Court to protect them from a threat—poverty—considered not of the state's creation.

Despite the absence of any mention in the *Dandridge* decision of the fundamental right to family integrity,[103] lower courts have interpreted this decision as precluding any claim that the inadequacy of a public assistance program for families struggling to stay together is a violation of their

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100. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 383 (1971) (holding that a state may not limit access to divorce based on litigants' ability to afford a court fee); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966) (striking down Virginia's poll tax as a violation of the Equal Protection clause). *See also* Ake v. Oklahoma, 470 U.S. 68, 74 (1985) (holding that a capital defendant who cannot afford to retain a psychiatrist to assist in his insanity defense must be provided with one by the state); Little v. Streater, 452 U.S. 1, 16–17 (1981) (holding that the Due Process Clause requires that indigent respondent in paternity action be provided with blood tests free of charge); Lubin v. Panish, 415 U.S. 709, 718 (1974) (holding that a filing fee requirement for a candidate to get on the ballot is unconstitutional without provision for alternative means not tied to wealth); Griffin v. Illinois, 351 U.S. 12, 18–19 (1956) (holding that a state system which denies appellate review to criminal defendants who cannot afford the cost of trial transcripts violates the Due Process and Equal Protection Clauses). Tribe, *supra* note 98 at 11–14, argues for an expansion of the holding in *Boddie* acknowledging the state's responsibility to right wrongs caused indirectly by state action that creates and sustains a landscape of power inequities. *Boddie* recognized that marriage and divorce are controlled exclusively by the state, and that, therefore, the state should shoulder the responsibility of making sure that access to the legal structures necessary to obtain a divorce is not precluded by poverty. *Boddie*, 401 U.S. at 376–77, 382–83. Tribe suggests that Brennan's dissent in *Deshaney* (discussed *infra* notes 124–130 and accompanying text) would have been stronger if he had argued that the state had created an entire realm of child protection, which, like divorce, could not be arbitrarily denied to some while it was granted to others. Tribe, *supra* note 98 at 12. In entering the realm of child protection, the state should take on the responsibility of doing a thorough, equitable job.

101. In Dandridge v. Williams, 397 U.S. 471 (1970), the Court implied that states are under no constitutional obligation to provide even a minimum of assistance to needy families. *See supra* notes 90–97 and accompanying text.

102. Tribe, *supra* note 98.

103. The *Dandridge* decision did not explicitly address the fundamental right to family integrity. The plaintiffs did claim that the welfare cap forced them to send children to live with relatives so that they could receive adequate financial support, *Dandridge*, 397 U.S. at 477, but the majority considered and rejected their claim that the policy therefore violated the AFDC statute's legislative purpose. The Court did not address the constitutional implications of this effect of the policy.

constitutional rights.[104] For example, in *Black v. Beame*[105] a group of children from the same household argued that their interest in family integrity was violated by the inadequacy of their public assistance grant, which made it necessary for their mother to place some of them in foster care. They urged the court to hold that "once the state decides to offer public assistance to the poor, it is constitutionally required to do so in a manner that is not unnecessarily destructive of family integrity."[106] The Second Circuit rejected their argument, finding that *Dandridge* precluded strict scrutiny of the government's public assistance policies, regardless of their effects on family integrity.[107]

Because the Court has both protected families from state intrusion and refused to recognize a right to state assistance, the state treats poor and non-poor families with stark disparity. Families who depend on public benefits are subject to numerous regulations and requirements which seek to control behavior and family relationships[108]—requirements which would be deemed unconstitutional if imposed on the general population, including state intrusions into the freedom parents enjoy to raise their children as they see fit. By holding that the Constitution does not require the government to fund the exercise of fundamental rights, the Court has permitted the government to deny welfare recipients the same freedoms other families enjoy.

D. Requiring Assistance as a Condition of Intervention: The Least Restrictive Alternative

A family facing involuntary placement of children in foster care has stronger claims to constitutional protections than the plaintiffs in *Dandridge* did. Courts recognize that removal of a child from her parents involves a significant state infringement on the family's fundamental rights, and therefore, due process protections are required. Unlike government decisions about how to allocate funding for welfare programs, the state's decision to remove a child from her parents' care requires an individualized determination by a court.[109] The court must afford parents an opportunity to be heard in opposition to any removal. Parents may use this opportunity to argue that the placement is both harmful to the child and unnecessary, because the child could be better helped through financial assistance to the family. Having announced its intention to use its *parens patriae* power to intervene coercively for the good of an individual child, the state can be expected to do so in a way that actually benefits her.

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104. *See, e.g.*, Lipscomb v. Simmons, 962 F.2d 1374 (9th Cir. 1992) (en banc); Black v. Beame, 550 F.2d 815 (2d Cir. 1977).

105. 550 F.2d 815 (2d Cir. 1977).

106. *Id.* at 816.

107. *Id.*

108. *See* Brito, *supra* note 8, at 247.

109. *See, e.g.*, Tenenbaum v. Williams, 193 F.3d 581, 593 (2d Cir. 1999); Roe v. Conn, 417 F. Supp. 769, 779 (N.D. Ala. 1976).

A parallel requirement can be found in the law governing civil commitment of adults due to mental illness, another function of the state's *parens patriae* power. When the government invokes this power, it infringes upon a constitutional liberty interest—personal freedom and bodily integrity in the case of civil commitment and family integrity in the case of foster care placement of children. Therefore, courts require the government to follow strict due process requirements when involuntarily committing mentally ill adults or removing children from their families.[110] Additionally, in *O'Connor v. Donaldson*, the Supreme Court held that a state may coercively institutionalize an adult for her own safety only if commitment is the least restrictive alternative available to achieve this goal.[111] Lower courts have applied this reasoning to require states to provide care to the mentally ill civilly committed in the least restrictive environment consistent with their needs.[112]

Courts have also applied the least restrictive alternative doctrine to government actions that infringe on the fundamental right to family integrity. For example, in *Franz v. United States*,[113] the Court of Appeals for the District of Columbia held that the federal government, in relocating a mother and her children through a witness protection program, had an obligation to take affirmative steps to facilitate the children's continued visitation with their father. Even after showing that the relocation was necessary to protect the children from harm or to advance other important government interests, the state was still required to administer the program in a way that would preserve, to the extent reasonably possible, the relationship between father and child.[114]

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110. *See* Addington v. Texas, 441 U.S. 418, 425 (1979) ("[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."); Stanley v. Illinois, 405 U.S. 645, 657–58 (1972).

111. 422 U.S. 563, 576 (1975) ("[A] State cannot constitutionally confine without more a [mentally ill but] nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."). The *O'Connor* Court cited *Shelton v. Tucker*, 364 U.S. 479, 488 (1960), which held that state statutes infringing on fundamental rights—in that case, the First Amendment right to free association—must have a legitimate purpose and must use the least restrictive means available to achieve that purpose. *Shelton* was also cited by the plaintiffs in *Black*, who sought to apply the same reasoning to public assistance programs and their effect on the fundamental right to family integrity. Black v. Beame, 550 F.2d 815 (2d Cir. 1977).

112. *See, e.g.*, Lynch v. Baxley, 744 F.2d 1452 (11th Cir. 1984) (holding that detention of civilly committed mentally ill patients in county jails is unconstitutional because it is not the least restrictive alternative, and that states must instead place patients in hospitals, even if that means paying for a private facility); Covington v. Harris, 419 F.2d 617, 623 (D.C. Cir. 1969) (holding, before the Supreme Court decided *O'Connor*, that states must choose the least restrictive alternative when deciding whether to provide an involuntarily committed person with a maximum or minimum security placement); Lessard v. Schmidt, 349 F. Supp. 1078, 1096 (E.D. Wis. 1972) (holding, before *O'Connor* was decided, that when recommending full-time involuntary commitment, the state must demonstrate that alternatives such as outpatient treatment, placement in a nursing home and home health aide services were considered and why they were rejected.).

113. 707 F.2d 582 (D.C. Cir. 1983), *supplemented by* 712 F.2d 1428 (D.C. Cir. 1983).

114. *See* Franz v. United States, 707 F.2d at 607 ("To justify restriction of constitutionally protected activity, the government must do more than show that such curtailment would promote,

The federal courts have not addressed the question of whether a family facing involuntary foster care placement has a constitutional right to financial assistance for the purpose of preventing such a placement. In *Black*, the Second Circuit interpreted *Dandridge* as "reject[ing] the applicability of the 'least restrictive alternative' doctrine to welfare regulations and their effects on family integrity."[115] However, *Black* did not involve state removal of children from their parents. The plaintiffs in that case were a mother and her children who were separated because the inadequacy of her public assistance grant left her with no choice but to place her children in foster care. Although it was the result of a forced choice between inadequate alternatives, the placement was considered voluntary, and was not an invocation of the state's *parens patriae* power. The Second Circuit's failure to view the *Black* plaintiffs' predicament as an unconstitutional government infringement on their fundamental right to be together is consistent with many federal courts' highly limited, formalistic definition of state action, later articulated in *DeShaney*, discussed below.[116] In light of this view, the strongest claim for effective government assistance under the least restrictive alternative doctrine belongs to those whom the state seeks to protect when it intervenes to impose protective custody.[117]

The type of least restrictive alternative analysis applied in *O'Connor* for civil commitment and in *Franz* for witness relocation could help preserve poor families at the point at which the state is attempting to take children away from parents. The same analysis applied to states' attempts to remove children from parents for reasons of poverty should lead federal courts to require states to provide financial assistance as a less restrictive alternative. Because the state's

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in a particular case, compelling governmental interests. '[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose less drastic means.'") (quoting Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (citation and internal quotation omitted)).

115. Black v. Beame, 550 F.2d at 817. For a discussion of *Black*, see *supra* notes 105–107 and accompanying text.

116. *See, e.g.*, Millburn v. Anne Arundel County Dept. of Soc. Serv., 871 F.2d 474, 476 (4th Cir. 1989) (holding, based on Deshaney v. Winnebago County, 489 U.S. 189 (1989), that the state was not liable for harm to a child while he was in the custody of foster parents because the child was "voluntarily placed in the foster home by his natural parents" and the state had therefore not affirmatively "restrained the plaintiff's liberty"); Doe v. Pub. Health Trust of Dade County, 696 F.2d 901, 903 (11th Cir. 1983) ("[A voluntary patient has no right to be treated in the least restrictive setting, because] unlike the involuntary patient, the voluntary one has not been forced to suffer any massive curtailment of liberty. Curtailment of liberty in such case does not provide the *quid pro quo* requiring some corresponding duty on the part of those from whom he or she seeks treatment. The voluntary patient carries the key to the hospital's exit in her hand. She chooses to accept treatment or not accept it as a matter of the exercise of free will."). *See also* Tribe, *supra* note 98, lamenting the Court's failure, in cases such as Webster v. Reprod. Health Serv., 492 U.S. 490 (1989), and *DeShaney*, to hold the state responsible for protecting fundamental rights not only from direct government interference, but also from circumstances caused indirectly by the government's acts or omissions.

117. In *Roe v. Conn.*, 417 F. Supp. 769, 779 (N.D. Ala. 1976), the court suggested such an approach when it ruled that the state may not remove a child from her parent unless "less drastic measures [to prevent harm to the child] would be unavailing."

intervention directly implicates the fundamental right to family integrity, courts should require states to employ the method of protecting children that is least restrictive of this constitutionally protected liberty interest.

E. The State's Responsibility to Preserve the Family Ties of Children in Foster Care

The state's constitutional obligations to families do not end when a child is removed. By taking custody of a child, the state takes on a parental responsibility to act in that child's best interests.[118] The strong bonds of a loving family that are essential to a child's well-being cannot be easily or quickly replaced by foster care, or even by adoption.[119] In addition, existing bonds between parents and children in foster care can suffer irreparable harm if they are not constantly nurtured.[120] It follows that when the state removes a child from her family, it takes on a constitutional responsibility to preserve the child's liberty interest in continuing her familial relationships.

Again, an analogy to civil commitment is helpful. In *Youngberg v. Romeo*,[121] the Supreme Court considered whether and to what extent people who have been civilly committed because they are developmentally disabled have rights to state-provided rehabilitation and training. The Court concluded that such persons have a limited positive right to receive such rehabilitative training services as are required by minimum standards of professional judgment, in order to reduce the risk of endangering themselves or others, and to reduce or eliminate the institution's need to use bodily restraints.[122] Failure to provide such training—resulting in deterioration and the need for restraints—would amount to an additional and impermissible intrusion on their liberty interests, beyond that justified by the state's interest in maintaining their confinement.[123]

Youngberg identified circumstances under which the Constitution requires the state to take affirmative steps to protect its citizens. When the government takes an individual into protective custody against her will, cutting her off from other sources of assistance, it takes on a positive obligation to provide her with basic necessities, a safe environment, and treatment designed according to minimum standards of professional judgment to maximize her liberty. However, several years later, in *DeShaney v. Winnebago County*,[124] the Court defined the limits of this obligation.

In *DeShaney*, the Supreme Court held that a child was not entitled to relief from a state government for injuries sustained when his father beat him, even

118. *See, e.g.*, Nicini v. Morra, 212 F.3d 798, 806–09 (3d Cir. 2000).
119. ROBERTS, *supra* note 8, at 106; Guggenheim, *supra* note 57, at 1742–46.
120. ROBERTS, *supra* note 8, at 106.
121. 457 U.S. 307 (1982).
122. *Id.* at 321–22, 324.
123. *Id.* at 324.
124. 489 U.S. 189 (1989).

though his father had been investigated by the state child protective agency, which eventually decided to leave him in his father's care. The Court held that because the government has no original obligation to extend any kind of assistance to children who are abused or neglected, it cannot be held responsible for failing to protect all children from harm caused by private actors.[125] The majority decision distinguished *Youngberg*, because in that case the state had acted affirmatively to take the plaintiff into custody, effectively cutting him off from other sources of aid and support. Thus, the state did not owe the same obligation of reasonable care and safety to the child who was injured by his father while in his father's custody. The majority opinion rested on a view of the world in which harms can be neatly divided into two categories: those that are directly caused by some overt act of the state, for which the due process clause provides redress, and those that happen in a separate, private realm, outside of the reach of the government and therefore beyond constitutional scrutiny.[126]

Justice Brennan, joined by Justices Marshall and Blackmun, dissented, arguing that by creating a child protective system intended to prevent the type of harm suffered by the plaintiff, and by intervening to protect him, the state created a legitimate expectation of protection on the part of the plaintiff and any other private parties who might otherwise have acted to help him. Thus, the state harmed the child by failing to assist him while at the same time preventing him from obtaining other forms of assistance, in violation of the holding in *Youngberg*.[127] Justice Brennan pointed out that *Youngberg* placed an affirmative obligation on the state to remedy not merely the limitations on individual liberty imposed by the custodial arrangement, but also, to some extent, those caused by the condition that led to the state's involvement, the plaintiff's disability. Thus, Brennan viewed *Youngberg* as requiring that when the state takes affirmative steps to protect an individual from harm, it should do so in a way that not only does not cause additional harm, but also helps the individual overcome whatever problem she needed protection from, even if that problem was not directly caused by the state.

The *DeShaney* majority left open the question of whether *Youngberg* might have applied if the plaintiff had been injured while in the state's custody.[128] Lower courts have applied *Youngberg* to children in foster care, holding that such children have a right to be free from harm.[129] In addition, several courts have held that states have an obligation under *Youngberg* to provide children in foster care with services designed to preserve their relationship with their families.[130] *Youngberg* held that those in state custody are entitled to some

125. *Id.* at 195.

126. For a critique of this view, see Tribe, *supra* note 98.

127. *DeShaney*, 489 U.S. at 205 (Brennan, J., dissenting).

128. *Id.* at 201 n.9.

129. *See, e.g.*, Nicini v. Morra, 212 F.3d 798, 806–09 (3d Cir. 2000); Taylor *ex rel.* Walker v. Ledbetter, 818 F.2d 791, 794–97 (11th Cir. 1987) (en banc).

130. *See* Winston v. Children & Youth Serv., 948 F.2d 1380, 1390–92 (3d Cir. 1991). *See*

amount of government assistance to preserve their liberty. By placing a child in foster care, the state prevents her from pursuing her constitutionally protected relationship with her family. If the state takes no action to preserve it, the parent-child relationship will deteriorate while the child is in state care, and the state's intervention will have inflicted harm on the child, rather than protecting her.

However, circuit courts have interpreted this obligation narrowly, imposing only minimal requirements on the state to assist families seeking to reunify. For example, in *Winston v. Children & Youth Services*,[131] a group of parents with children in foster care argued that the amount of visitation provided by the state did not meet minimum standards of professional judgment, in violation of *Youngberg*.[132] The court held that the *Youngberg* analysis in general applied to the context of foster care, but found the state's visitation provisions adequate according to minimum professional standards because the plaintiffs were unable to point to examples of other jurisdictions that provided for more frequent visitation.[133] In other words, the court found that the *Youngberg* requirement was generally satisfied by the status quo.

In *Lipscomb v. Simmons*,[134] the Ninth Circuit held *en banc* that a child in foster care does not have a constitutional right to a kinship foster care placement funded at the same level as placement with an unrelated foster parent.[135] Even though this means that some foster children will be forced to live with strangers rather than relatives, the court held that the state had no affirmative obligation to provide funding in order to preserve the child's family connections.[136]

The *Lipscomb* majority relied on *Dandridge* in concluding that it had no authority to second-guess the state legislature's decisions allocating funds for social services.[137] Applying the rational basis test, the court found the state

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also Marisol A. *ex rel.* Forbes v. Giuliani, 929 F. Supp. 662, 674–77 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 372 (2d Cir. 1997) (holding that the child welfare agency has an obligation to provide services to preserve the family relationships of children in foster care); Aristotle P. v. Johnson, 721 F. Supp. 1002, 1007–10 (N.D. Ill. 1989) (finding substantive due process claim where the child welfare agency failed to take steps to preserve children's relationships with their siblings). A *Youngberg*-type analysis might also present opportunities to attack certain provisions of the Welfare Reform Act. For example, the Welfare Reform Act denies federal funding for cash assistance to families whose children have been out of the home for a period of time determined by the state. 42 U.S.C. § 608(a)(10) (2000). This certainly harms children who are relying exclusively on the state to preserve their constitutionally protected liberty interest in returning to their families, because their families may not be able to preserve a home, or work towards addressing the problems that brought their children into care without financial assistance. Thus, the denial of benefits to children's families, a by-product of their placement in state custody, leads to the erosion of their family relationships, in probable violation of *Youngberg*.

131. 948 F.2d 1380 (1991).

132. *Id.* at 1389 (discussing expert testimony presented by plaintiffs).

133. *Id.* at 1390–91.

134. 962 F.2d. 1374 (9th Cir. 1992) (en banc).

135. *Id.* at 1377, 1384.

136. *Id.*

137. *Id.* at 1377–78.

legislature's decision to fund only nonrelative foster parents to be rationally related to the state's legitimate goal of maximizing foster care funds.[138] Although the court recognized that individual foster children have an interest in living with their relatives, it did not grant this interest constitutional protection.[139]

The *Lipscomb* majority acknowledged that the state, as custodian, owes children in foster care a duty of reasonable care and safety.[140] However, it held that the state was not required to fund the exercise of the fundamental right to enjoy family relationships.[141] The majority reasoned that *Youngberg* imposes such a duty on the state "only when the circumstances of the custodial relationship directly prevent individual exercise of those rights."[142] Since relatives under the challenged funding scheme were free to care for foster children without payment, the court concluded that the state had not acted to prevent the exercise of this fundamental right.[143] Thus, the *Lipscomb* decision adopted the strictly formalistic distinction drawn in *DeShaney* between state action and inaction.

The dissenting judges in *Lipscomb* reasoned that by taking custody of a child, the state takes on an affirmative obligation to protect that child's liberty interests—including her interest in maintaining family contacts.[144] Specifically, they maintained that as custodian of a child, the state may only refuse to fund placements with relatives based on an individualized, case-by-case determination of the child's best interests.[145] The dissenters rejected the majority's argument that the child's best interests could be sacrificed solely to further the state's interest in preserving funds.[146]

The dissent implicitly rejected the majority's comparison to *Dandridge* and distinguished the plaintiffs' claim from one merely involving public assistance, because of the coercive nature of the state's intervention: "Unlike ordinary social welfare programs where eligible individuals are free to take advantage of available benefits or not as they see fit, the relationship between the child and the state is nonconsensual."[147] By distinguishing child protective services from financial assistance programs, and by focusing on the rights of the child, the dissenters were thus able to argue that federal courts can and should require the

138. *Id.* at 1380.

139. *Id.* at 1378–79.

140. *Id.*

141. *Id.*

142. *Id.* at 1379.

143. *Id. See also id.* at 1377 (distinguishing among groups of kin who are "financially able and willing," "willing but financially unable," and "financially able but unwilling" to care for their relatives' children).

144. *See id.* at 1386, 1390 (Kozinski, J., dissenting) (stressing importance to a child of living with relatives rather than strangers).

145. *Id.* at 1389.

146. *Id.* at 1389–90.

147. *Id.* at 1389.

state to act in the best interests of each individual child in its custody. The child plaintiffs, they wrote,

> are not pawns; they may not be subjected to senseless suffering, their childhoods may not be wasted, their potential as adults may not be impaired just to goad the relatives of other foster children to make financial sacrifices. A mother and father who so treated their children would earn the opprobrium of the community; we should not give our imprimatur to this practice when it is adopted by the state acting *in loco parentis*.[148]

Lipscomb is distinguishable from *Winston*, and from the claim of a parent seeking financial assistance in order to reunify with a child in foster care, in that it does not involve parents hoping to mitigate the harm caused by the state's removal of their children. The relatives seeking funding to serve as foster parents were not the original caretakers of the children in foster care, and thus their separation from the children was not directly caused by state action. On the contrary, as the *Lipscomb* majority pointed out, the state had not taken any affirmative action to prevent the foster children from being cared for by their relatives—it had merely declined to provide financial support for such an arrangement. The children's claim would have been stronger if they had been seeking state assistance to facilitate reunification with their parents, or with any other family member from whose custody the state had removed them. Although the courts in *Winston* and *Lipscomb* viewed the state's obligation narrowly, their willingness to find such an obligation by applying *Youngberg* to the foster care context suggests that such a claim could succeed.

Youngberg and the cases that follow it thus suggest that when the government intervenes in a family by placing a child in foster care, it takes on a positive duty toward the child to preserve her liberty interests. By taking the child away from her parents, the state takes on all the responsibilities of a parent to act in her best interests. The state should therefore be held responsible for taking affirmative steps to fulfill not only her physical needs for safety, food, clothing and shelter, but also her emotional need to preserve family bonds. The state should be required to mitigate the harm of removing a child from her parents, by providing concrete assistance that will help the family overcome the barriers to reunification.

F. Requiring the Child Welfare System to Help Families: The Statutory Reasonable Efforts Requirement

Federal child welfare statutes require state child protective agencies to make "reasonable efforts" to prevent foster care placement, and to reunite families once children have been placed in foster care.[149] This requirement originated

148. *Id.* at 1390–91.

149. 42 U.S.C. § 671(a)(15)(B) (2000).

with the Child Welfare Act[150] and survived the Adoption and Safe Families Act,[151] albeit in a less powerful form.[152] However, neither statute has been interpreted to allow for a private right of action to enforce this requirement.[153] Thus, as I discuss further in part III, families seeking to compel the state to make reasonable efforts to assist them in reunifying with children in foster care are more successful when they litigate in state courts, using state statutes enacted to implement the federal reasonable efforts requirement.

As long as children are removed from poor families at vastly higher rates than from non-poor families, it seems clear that the state assistance available to these families is not enough. Providing these families with the resources enjoyed by those who face a lesser risk of forced separation could avert the need for foster care placement. Any meaningful interpretation of reasonable efforts should therefore include the provision of financial assistance.

III.
STATE LAW

A. Defending the Safety Net: A Brief Survey of State Cases

In some states, state law may hold more promise than federal law for enforcing poor families' rights to financial support as an alternative to foster care placement. Below, I describe several examples of cases in which state courts have imposed affirmative obligations on child protective agencies to provide cash or in-kind benefits to families in order to prevent or shorten foster care placement. These decisions rely on state statutes codifying the federal Child Welfare Act's reasonable efforts requirement. While these cases do not deal directly with the results of welfare reform, they provide an example of the use of state litigation as a tool for enforcing families' rights to state assistance to preserve family integrity—a tool which advocates can use as a defense against the aspects of welfare reform which threaten to tear families apart.

In *In re Nicole G.*, the Rhode Island Supreme Court held that the state's family court has the authority to order the local child protective agency to provide housing assistance to families when such assistance is necessary to facilitate reunification.[154] The court based its holding on a state statute requiring the agency "to help parents meet their obligations to their children and to provide

150. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 101(a)(1), 94 Stat. 500, 503 (1980) (codified as amended at 42 U.S.C. § 671(a)(15) (2000)).

151. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101(a), 111 Stat. 2115, 2116 (amending 42 U.S.C. § 671(a)(15) (2000)).

152. *See supra* notes 64–68 and accompanying text.

153. *See* Suter v. Artist M., 503 U.S. 347, 350 (1992) (holding that the pre-ASFA provision did not allow private suit for enforcement under 42 U.S.C. § 1983).

154. 577 A.2d 248, 249 (R.I. 1990).

services designed to prevent the unnecessary removal of children from their homes."[155]

Similarly, in *Washington State Coalition for the Homeless v. Department of Social & Health Services*, the Washington Supreme Court held that a juvenile court judge may order the local child protective agency to provide housing assistance in cases in which the lack of adequate housing is either the primary reason for foster care placement or the primary obstacle to reunification.[156] The form of the housing assistance is left to the discretion of the agency, but the juvenile court retains the authority to determine whether the services offered are adequate under the state's reasonable efforts standard.[157]

In *Hansen v. Department of Social Services*, a California appellate court rejected the state's policy of providing emergency shelter only to children who were separated from their parents and placed in the foster care system, holding that the policy "subvert[ed]" the purpose of the child welfare statute.[158] The court required the state to provide family shelter arrangements for all homeless children, so that families would be kept intact.[159]

A drawback to relying on statutes implementing the reasonable efforts requirement is that some of these statutes, and some of the courts enforcing them, require only that states use available resources to help families.[160] These statutes are therefore of little use to families who need assistance beyond what is already available in their communities to prevent or shorten foster care placement. Like the professional judgment standard articulated in *Winston*,[161] the reasonable efforts requirement is sometimes interpreted to require no more than what is already routinely provided by child protective agencies.

Other state courts have claimed impotence in the field of public benefits, often echoing the reasoning of the federal courts. This response is particularly common in cases in which families' claims are based on public assistance statutes rather than child welfare statutes. In these cases, courts tend to focus on the parents' responsibility for the family's situation rather than the state's responsibilities to children.

For example, in *Savage v. Aronson*,[162] homeless families in Connecticut challenged the state's hundred-day annual limit on emergency housing. The

155. *Id.* at 250.

156. 949 P.2d 1291, 1307 (Wash. 1997).

157. *Id.*

158. 238 Cal. Rptr. 232, 239 (Ct. App. 1987).

159. *Id.* at 242.

160. Braveman & Ramsey, *supra* note 9, at 466–69. Some state statutes implementing the reasonable efforts requirement explicitly permit this standard to be met by the appropriate agency's exercise of "due diligence" in using "appropriate and available services." *See, e.g.*, MINN. STAT. ANN. § 260.012(f) (West 2006).

161. Winston v. Children & Youth Serv., 948 F.2d 1380, 1390–92 (3d Cir. 1991). *See supra* notes 131–33 and accompanying text for a discussion of *Winston*.

162. 571 A.2d 696 (Conn. 1990).

plaintiffs claimed that the policy violated the state's public assistance statute, which provided that recipients' children "shall be supported in a home in this state, suitable for their upbringing," and shall be provided with the means to live "in health and decency."[163] The Connecticut Supreme Court rejected this argument, holding that these provisions were part of the eligibility section of the statute and therefore referred to responsibilities of the parent, not the state.[164] The court further held that the state's social services commissioner and, ultimately, the legislature had sole authority to determine what level of public assistance the state should provide in order to meet its responsibilities under the statute.[165]

B. Homeless Families in New York Seeking Assistance from the Child Welfare System

In *Cosentino v. Perales*, homeless parents challenged the New York City child protective agency's policy of encouraging them to place their children in foster care instead of providing the entire family with housing assistance.[166] The state court granted the parents' request for an injunction directing the City to provide preventive services, including housing assistance, in order to avert foster care placement.[167]

The *Cosentino* trial court based its ruling on sections of the New York Social Services Law and their implementing regulations that require the provision of preventive services to families at risk of foster care placement.[168] The Social Services Law mandates that "[a]s far as possible families shall be kept together, they shall not be separated for reasons of poverty alone, and they

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163. *Id.* at 704.

164. *Id.* at 706.

165. *Id.* at 707–08. In *Rights and Freedoms Under the State Constitution: A New Deal for Welfare Rights*, Helen Hershkoff observes that state courts have often declined to intrude on the legislature's authority to make policy decisions about how the government allocates public assistance benefits using language similar to that employed by federal courts exercising judicial restraint. 13 TOURO L. REV. 631 (1997). Hershkoff argues that state courts should take a greater role in overseeing legislative decisions regarding government spending, because the doctrine of federalism, which leads federal courts to practice restraint, does not constrain state court judges. *Id.* at 647–48. Furthermore, state court judges are subject to greater political accountability than federal judges, and state courts have the common law available to them as an analytical tool unavailable to legislatures. *Id.*

166. Martin A. v. Gross, 524 N.Y.S.2d 121, 123 (Sup. Ct. 1987), *aff'd*, 546 N.Y.S.2d 75 (App. Div. 1989). This was a consolidation for decision of two cases: *Martin A. v. Gross* and *Cosentino v. Perales*. The *Martin A.* plaintiffs, families who were separated or at risk of separation due to foster care placement, sought to enforce their right to various preventive and protective child welfare services under New York law. The *Cosentino* plaintiffs, homeless families seeking housing assistance to prevent them from having to place their children in foster care, have continued to litigate the case under the title *Cosentino v. Perales.* Because this article deals with the latter, it will refer to the case as *Cosentino,* but will cite to the consolidated 1987 and 1989 decisions captioned as *Martin A.*

167. *Id.* at 129.

168. *Id.* at 125.

shall be provided services to maintain and strengthen family life."[169] The court held that this "preference for keeping families together creates a presumption that unnecessary foster care placement is irreparably harmful to children and their families."[170]

The Social Services Law and regulations at issue in *Cosentino* require local social services districts, including the City of New York, to provide families with children in foster care or at risk of foster care placement with certain preventive services if those services can avert or shorten foster care placement.[171] The *Cosentino* court found that the City's alleged practice of placing and retaining children in foster care instead of providing these services was "inconsistent with defendants' duty to protect the interests of its children."[172] The court also struck down the state's ninety-day limit on emergency housing, one such preventive service. The court held that such a limitation was arbitrary and "at odds with governing law," which requires provision of preventive services "according to a family's assessed need" in order to prevent or shorten foster care placement.[173]

The court was particularly disturbed by the City defendants' strategy of presenting evidence intended "to discredit some of the plaintiffs as parents."[174] Although the defendants neither accused these parents of neglect as defined by statute, nor disputed the families' eligibility for preventive services, they nevertheless argued that the parents' insufficiencies should excuse the City's failure to provide these services.[175] The court found that the record did not support the City's allegations against these parents, and that

> the very making of these allegations is indicative of a philosophy fundamentally at odds with the letter and spirit of the preventive services law. Poverty and homelessness create enormous problems for families. The preventive services law was enacted to address these problems. Accordingly, it is incongruous for the City to point to these

169. N.Y. SOC. SERV. LAW § 131(3) (McKinney 2005). Section 131(3) has not changed since *Cosentino* was decided in 1987. The court also relied on section 384-b(1)(a)(iii) of the Social Services Law, which provides that "the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home." *Martin A.*, 524 N.Y.S.2d at 125 (quoting N.Y. SOC. SERV. LAW § 384-b(1)(a)(iii)). This section has also not changed since 1987.

170. *Martin A.*, 524 N.Y.S.2d at 128.

171. *See id.* at 125 (citing N.Y. SOC. SERV. LAW §§ 409-a (1)(a), 424(9), 424(12); N.Y. COMP. CODES R. & REGS. tit. 18, §§ 430.9, 430.10, 432.1(i)). The statutes and regulations cited still require provision of preventive services, although they have been amended since the late 1980s.

172. *Id.*

173. *Id.* at 128. The court also noted that twenty-four-hour access to emergency shelter was specifically included in the state regulation's list of services that must be made available to families in need of preventive services. *Id.* at 125 (citing N.Y. COMP. CODES R. & REGS. tit. 18, § 423.4(d)). The regulation cited in the case is still in effect.

174. *Id.* at 127.

175. *Id.*

problems as a basis for denying services.[176]

The *Cosentino* decision was upheld by the state's appellate division,[177] and was followed by the implementation of a housing subsidy program for families whose children are in foster care and whose primary service need is housing, or whose children are at risk of foster care placement, and have at least one service need in addition to a lack of adequate housing.[178] This subsidy program grew out of the *Cosentino* court's explicit recognition that the separation of families based on poverty is inconsistent with the state's duty to further the best interests of the children it purports to help.

C. Homeless Families' Right to Shelter in New York State

Article XVII of the New York State Constitution requires the state to provide for "[t]he aid, care and support of the needy."[179] The court of appeals, New York's highest court, has ruled that Article XVII prohibits the legislature from denying public assistance to the poor based on criteria unrelated to need.[180] Thus, New York State provides public assistance to needy families and individuals who do not qualify for federally funded assistance under TANF. Once a family reaches the five-year time limit mandated by the Welfare Reform Act, the family may continue to receive assistance through the state-funded program.

However, Article XVII has not proven as useful as one might have hoped in protecting poor families from punitive welfare policies. For example, the court of appeals has left it to the legislature to determine the adequacy of public assistance grant levels,[181] and to define the term "needy," thereby limiting the scope of Article XVII's guarantee. In *Barie v. Lavine*,[182] the court upheld a New

176. *Id.*

177. Martin A. v. Gross, 546 N.Y.S.2d 75 (App. Div. 1989).

178. N.Y. SOC. SERV. LAW §§ 409-a(5)(c), (7) (McKinney 2005); N.Y. COMP. CODES R. & REGS. tit. 18, § 423.2(b)(16) (1997).

179. N.Y. CONST. art. XVII, § 1. Hershkoff demonstrates that the express purpose of the article was to mandate the constant provision of relief to the poor, both in times of economic downturn and also in times of prosperity, "'when the need may be reduced in measure but certainly not in nature.'" Hershkoff, *supra* note 165, at 645 (quoting III REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 2126 (1938) (statement of Edward Corsi, Chair of Convention's Comm. on Social Welfare)). In other words, the constitutional provision was intended to make public assistance a government priority that would not depend on the availability of funds. In addition, the provision was intended to ensure that the state legislature would have the authority to require localities to provide relief to the poor, because such legislation had previously been subject to challenge as being beyond the scope of the police power. *Id.* at 646.

180. In Tucker v. Toia, the New York Court of Appeals struck down a provision of the New York Social Services Law requiring minors to seek an order of support against a parent or guardian before applying for public assistance. 371 N.E.2d 449 (N.Y. 1977), at 452–53.

181. *See* Bernstein v. Toia, 373 N.E.2d 238, 244 (N.Y. 1977) (relying on *Tucker*, 371 N.E.2d 449, to observe that "the Legislature is vested with discretion to determine the amount of aid").

182. 357 N.Y.S.2d 587 (App. Div. 1975), *aff'd*, 357 N.E.2d 349 (N.Y. 1976).

York Social Services Department regulation imposing a thirty-day suspension of benefits to indigent adults as a sanction for missing an employment appointment. The court reasoned that the legislature has the discretion to define need, and that by labeling the recipients' actions as evidence that they were no longer needy, the agency's regulation met the requirements of Article XVII.[183] This decision laid the groundwork for further regulations allowing welfare grants to be discontinued as a sanction for recipients' failure to comply with workfare requirements.[184]

A right to shelter for the homeless under Article XVII was first recognized in *Callahan v. Carey*,[185] a class-action lawsuit brought in the late 1970s on behalf of homeless adult men who were denied adequate shelter in New York City. Later courts extended the right to adult women in *Eldridge v. Koch*,[186] and to families with children in *McCain v. Koch*.[187] The *McCain* litigation began in 1983, and although several interim decisions have been issued and certain issues were resolved in a 2003 settlement, the litigation continues today and interim orders remain in place.[188] Over the years, the litigation has addressed such issues as the conditions in family shelters, the availability of shelter space, and the City's practice of forcing families to wait overnight in a welfare office before being provided with adequate shelter as defined by New York law.[189]

In 1995, the State announced new regulations that for the first time would allow shelters to evict residents who violated shelter or public assistance rules and to prevent them from reapplying for shelter for a period of thirty days.[190] Shelters had always retained the right to enforce rules, and to discharge residents

183. *Id.* at 351–52. Hershkoff argues that by following the lead of federal courts, New York courts have allowed the state to renege on its constitutional commitment to provide for the poor. In spite of their state constitution's express guarantee of assistance to the needy, New York courts have treated public assistance in much the same way federal courts approach the issue—deferring to the legislature's discretion. Hershkoff, *supra* note 165, at 647–48.

184. *See, e.g.*, McCain v. Giuliani, 676 N.Y.S.2d 151, 152 (App. Div. 1998).

185. N.Y.L.J., Dec. 11, 1979, at 10 (N.Y. Sup. Ct. Dec. 5, 1979) (reporting preliminary injunction). The consent decree in *Callahan* (1981) is available at http://www.coalitionforthehomeless.org/downloads/callahanconsentdecree.pdf.

186. 459 N.Y.S.2d 960 (Sup. Ct. 1983), *rev'd*, 469 N.Y.S.2d 744, 745 (App. Div. 1983) (reversing trial court's ruling permitting New York City to exclude homeless adult women from the protections of *Callahan*).

187. 502 N.Y.S.2d 720, 729 (App. Div. 1986) (extending rights established under *Callahan* to homeless families as well as individuals but vacating lower court's injunction compelling state agency to provide services), *rev'd in part*, 511 N.E.2d 62, 67 (N.Y. 1987) (upholding lower court's power to issue injunction compelling state agency to provide services).

188. This case has been litigated over the course of several decades against four different mayors under the titles *McCain v. Koch, McCain v. Dinkins, McCain v. Giuliani*, and *McCain v. Bloomberg*. Through the case has never gone to trial, it has been extensively litigated, resulting in numerous interim orders and several appellate decisions. *See* Leslie Kaufman, *New York Reaches Deal to End 20-Year Legal Fight on Homeless*, N.Y. TIMES, Jan. 18, 2003, at A1.

189. *See* McCain v. Koch, 511 N.E.2d at 62–64 (App. Div. 1987) (describing early history of the litigation), McCain v. Giuliani, 653 N.Y.S.2d 556, 557–58 (App. Div. 1997) (describing more recent developments, including prohibitions on holding families overnight in welfare offices).

190. N.Y. COMP. CODES R. & REGS. tit. 18, § 352.35 (1997).

who broke those rules by sending them to a different shelter or back to an intake office to reapply. But since the inception of litigation on behalf of homeless families, the City had never been permitted to reject families who had nowhere else to go, and exclude them from the shelter system for a period of time. The new regulations further required social services departments to refer children for possible foster care placement when ejecting their families from shelter, so as to prevent those children from sleeping on the street.[191]

Homeless families, represented by the Legal Aid Society, challenged the new regulations as a violation of prior orders in *McCain* and other cases that recognized a constitutional right to shelter in New York. They argued that the city shelter system should not be permitted to expel families who had nowhere else to go.[192] Furthermore, under the regulations, children would be taken away from their parents and placed in foster care solely because their parents were homeless, in violation of *Cosentino*.[193] The shelter providers, a group of city-contracted nonprofit organizations, joined homeless families in opposing the regulations. As the parties responsible for enforcing shelter rules, the providers did not want the responsibility of throwing families out in the street.[194]

The City and State responded by arguing that families should be required to cooperate with the government's efforts to help them as a condition of living in the shelter system. They asserted that for some particularly difficult families, only the threat of a penalty as severe as eviction and the prospect of sleeping on the streets would motivate them to comply with plans intended to move them toward self-sufficiency.[195] The defendants pointed to the Court of Appeals' reasoning in *Barie*,[196] arguing that a homeless parent who failed to comply with shelter rules and plans designed to assist her in moving into permanent housing was not truly needy. They argued, in essence, that when it had enacted the new regulation the state had redefined "need" so as to exclude those who

191. *Id.* § 352.35(d).

192. Affirmation of Steven Banks in Support of Plaintiffs' Motion for Injunctive Relief at 3, McCain v. Giuliani, No. 41023/83 (N.Y. Sup. Ct. 1995).

193. *Id.* at 10–11.

194. *Id.* at 5–6. The group of nonprofit shelter providers wrote, "Denying emergency temporary housing to families would undermine their stability and could force children into the costly foster care system . . . . Therefore, we refuse—each and everyone [*sic*] of us—to discharge vulnerable children and parents to the streets. We will not act as agents for their harm." *Id.* at exh. C (Tier II Response to the Proposed State Department of Social Services Emergency Housing Assistance Regulations, June 1, 1995).

195. *See, e.g.*, Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Injunctive Relief at 4–5, McCain v. Giuliani, No. 41023/83 (N.Y. Sup. Ct. 1996); Affidavit of Joan Malin, Commissioner, New York City Department of Homeless Services in Support of Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Injunctive Relief at 5–6, McCain v. Giuliani, No. 41023/83 (N.Y. Sup. Ct. 1996).

196. Defendants' Memorandum of Law, *supra* note 195, at 6–7 (citing Barie v. Levine, 367 N.Y.S.2d 587 (App. Div. 1975), *aff'd*, 357 N.E.2d 349 (N.Y. 1976)). *See also* discussion *supra* notes 182–84 and accompanying text.

failed to comply with shelter regulations and thus "created their own need."[197]

The defendants further argued that the trend in federal legislation toward placing greater restrictions on receipt of public benefits required them to allocate scarce social services resources more conservatively. They claimed they were responsible for "balancing the needs of homeless individuals and families with those of the State and its local social services districts, which must allocate increasingly limited public assistance resources among those in need of aid."[198] In addition, they argued that the regulations complemented the state's obligation to provide aid to the needy by imposing reciprocal obligations on the recipients of such aid.[199]

While the legal battle over the regulations continued in state court, the federal Welfare Reform Act was signed into law. The new law explicitly allowed localities to sanction an entire family for noncompliance with public assistance requirements by cutting off the family's entire grant.[200] This type of sanction had been prohibited under AFDC, which only allowed sanctions reducing the portion of the grant attributable to the family member responsible for the noncompliance.[201]

However, the New York State legislature chose not to implement full-family sanctions for cash benefits.[202] The plaintiffs argued that this decision should invalidate the shelter expulsion regulation promulgated two years earlier. They argued that in spite of the change in federal law allowing full-family sanctions, the New York State legislature had decided not to implement sanctions that would punish children for their parents' noncompliance, thereby invalidating the regulations in question.[203]

The City defendants responded by arguing that the legislature's rejection of full-family sanctions applied only to cash benefits, leaving to the executive branch the discretion to apply such sanctions to other benefits, such as emergency housing.[204] Furthermore, they argued that because it would be impractical to expel parents from a shelter and allow their children to remain, expulsion of the entire family was the only logical way to impose the sanction.[205] If the family had nowhere else to go, the children might have to be placed in foster care to protect them from sleeping on the street.[206] The City

197. Defendants' Memorandum of Law, *supra* note 195, at 6–8.

198. Affidavit of Joan Malin, *supra* note 195, at 8.

199. Defendants' Memorandum of Law, *supra* note 195, at 4–5.

200. 42 U.S.C. § 607(e)(1)(B) (2000).

201. 45 CFR § 250.34(c)(1) (1995).

202. Plaintiff-Appellants' Brief at 42–44, McCain v. Giuliani, 676 N.Y.S.2d 151 (App. Div. 1998) (No. 41023/83).

203. *Id.* at 19–20, 44–47.

204. Municipal Respondents' Brief at 27–28, McCain v. Giuliani, 676 N.Y.S.2d 151 (App. Div. 1998) (No. 41023/83).

205. *Id.* at 25–26, 29.

206. *Id.* at 3–4.

would use foster care to shelter homeless children while refusing shelter to their homeless parents as a sanction for the parents' noncompliance with shelter rules.

The trial court upheld the regulations, but also reiterated the holding in *Cosentino* that children may not be placed in foster care solely due to their parents' homelessness.[207] The decision was upheld on appeal, in a significant setback to advocates hoping to protect the New York State constitutional right to shelter from the wave of attacks on the safety net brought on by welfare reform. The appellate division held that *Barie v. Lavine* had accorded the State wide discretion to impose sanctions on recipients of public assistance, and that sanctioning homeless parents by evicting entire families from shelter was a permissible exercise of this discretion.[208]

D. The Threat of Foster Care after Welfare Reform

The litigation surrounding the implementation of New York's shelter expulsion regulation provides a clear example of the inconsistency between one of the central tenets of welfare reform—that the government should not fund public assistance for poor adults who fail to meet its work-related goals—and child welfare policies favoring government assistance to poor children so that they can continue to live with their families. Even before the implementation of national welfare reform, Mayor Giuliani had begun imposing burdensome requirements on applicants for and recipients of public assistance. Applicants had to undergo more rigorous investigations, provide extensive documentation, and attend numerous appointments in different parts of the city.[209] The City had also begun to implement work programs and to sanction recipients for noncompliance even before the federal Welfare Reform Act had passed.

The new federal mandate created by the Welfare Reform Act requiring states to move large numbers of recipients into work programs or off welfare gave new momentum to the City's existing efforts. The burdensome requirements of the workfare programs meant that a majority of public assistance recipients endured some type of sanction during the course of a year.[210] Meanwhile, an enormous number were driven off welfare altogether,[211] with no reliable evidence that they had found jobs or had any other way to support themselves and their families.

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207. McCain v. Giuliani, No. 41023/83 (N.Y. Sup. Ct. May 7, 1997) (vacating temporary restraining order), *aff'd*, 676 N.Y.S.2d 151 (App. Div. 1998).

208. McCain v. Giuliani, 676 N.Y.S.2d 151, 152 (App. Div. 1998).

209. *See, e.g.*, Reynolds v. Giuliani, 35 F. Supp. 2d 331, 343–47 (S.D.N.Y. 1999) (describing the transformation of New York City's public assistance system), *modified in part*, 43 F.Supp. 2d 492 (S.D.N.Y. 1999).

210. *See, e.g.*, Nina Bernstein, *Giuliani to Order Homeless to Work for their Shelter,* N.Y. TIMES, Oct. 26, 1999, at A1 (noting that in the previous year, sixty-nine percent of work program participants were sanctioned).

211. *Id. See also supra* note 4 (statistics pertaining to New York's implementation of welfare reform).

Although the appellate holding in *McCain* focused on the regulation's sanctions for noncompliance with *shelter* rules, the regulation also explicitly allowed social services districts to expel families from shelter as a sanction for violating *public assistance* rules.[212] Shortly after the appellate court upheld the regulation, in 1999, the City announced its plan to implement the shelter expulsion sanction.[213] Under the new procedure, homeless families who were subject to sanctions for noncompliance with public assistance rules would be evicted from shelter, along with those who violated shelter rules.[214]

The new procedure directed social services officials to seek foster care placement for children in families who were thrown out of shelter and lacked alternative housing arrangements. Shelter personnel would refer the parents to the New York City Administration for Children's Services (ACS) to be investigated for child neglect. Based on the outcome of this investigation, the City might ask the family court for permission to place the children in foster care, apparently under the theory that the parents had caused the family's homelessness by failing to comply with public assistance regulations.[215]

Opponents of the new sanction procedures argued that their implementation would cause harm to children by unnecessarily separating them from their parents.[216] They pointed out that recipients of public assistance receive a high number of sanctions for trivial infractions or because of bureaucratic error. Families subject to these sanctions had never before been threatened with placement of their children in foster care simply because of an alleged violation of welfare rules. Moreover, under the proposed policy, only homeless families would be subject to this severe penalty—families with housing would be sanctioned for the same infractions only by having their welfare grants reduced by the portion attributable to the responsible adult. The same infraction, committed by a homeless and a housed parent, would now result in different consequences for each parent, solely because of the City's new policy. Thus, children would be removed from parents who—but for the new shelter expulsion policy—could have adequately cared for their children.

In public debate, the City argued that its workfare regulations and its expectation that families on welfare work for their benefits were reasonable.[217] According to this argument, the new sanction policy was simply a way to enforce the requirement that families receiving costly shelter assistance at

212. *See* N.Y. COMP. CODES R. & REG. tit. 18, § 352.35(e) (1997) (requiring homeless families and individuals to comply with public assistance regulations as a condition of receiving temporary housing).

213. *See* Bernstein, *Giuliani to Order Homeless to Work*, *supra* note 210.

214. *Id.*

215. *New York City Council General Welfare Committee Hearings* (Dec. 3, 1999) (prepared testimony of Nicholas Scoppetta, Comm'r, Administration for Children's Services) [hereinafter Scoppetta Testimony].

216. *See* Bernstein, *Giuliani to Order Homeless to Work*, *supra* note 210.

217. *Id.*

public expense make efforts to achieve self-sufficiency.

The *McCain* plaintiffs challenged the new policy in court, arguing that it would result in placement of children in foster care due to their parents' homelessness, in violation of *Cosentino*.[218] The City responded by asserting that the cause of foster care placement would be not the City's actions, but rather the parents' noncompliance with City rules, which they argued could properly be characterized as neglect.[219] In the City's view, any parent who failed to comply would be responsible for the resulting eviction of her family from the shelter system. Children would be placed in foster care in order to protect them from sleeping on the streets as a result of their parents' irresponsibility. Nicholas Scoppetta, then Commissioner of ACS, reasoned that "any foster care engendered by the implementation of [the sanction] will be the result of parental conduct which has led to the parents' loss of eligibility for temporary housing assistance and the neglect on the part of the parents to plan alternative living arrangements for their children."[220] He told the *New York Times* that his only concern was that children not end up living on the street.[221]

The plaintiffs responded with an affidavit from Michael Gage, a former family court judge, stating that the City's new policy "would effectively require a new ground for neglect without statutory authority."[222] Judge Gage argued that "a homeless parent's minor or unintended violation of shelter or welfare rules does not reach the level of parental action or omission dictated by the Family Court Act for a finding of neglect."[223] She reasoned that a family court judge weighing the possible foster placement of a child whose family had been expelled from a City shelter would not be inclined to find parental neglect, but would instead ask whether the City's "governmental action could pose an imminent risk to the child."[224]

Judge Gage's argument reflects the conflict between welfare reform's goal of moving public assistance recipients off the rolls or into workfare and the child welfare system's goal of protecting children from harm while keeping families together if possible. The express purpose of the New York statutory scheme governing removal of children from their families is rehabilitative, not

218. *See* McCain v. Giuliani, No. 41023/83 (N.Y. Sup. Ct. 1999) (granting temporary restraining order); Affirmation of Steven Banks in Support of Plaintiffs' Motion for Injunctive Relief at 5, McCain v. Giuliani, No. 41023/83 (N.Y. Sup. Ct. 1999); Affirmation of Steven Banks in Support of Plaintiffs' Motion for Injunctive Relief at 10, Cosentino v. Dowling, No. 43236/85 (N.Y. Sup. Ct. 2000).

219. Affirmation of Leonard Koerner in Opposition to Plaintiffs' Motion for Injunctive Relief at 5, Cosentino v. Dowling, No. 43236/85 (N.Y. Sup. Ct. 2000).

220. Affidavit of Nicholas Scoppetta in Opposition to Plaintiffs' Motion for Injunctive Relief at 2, McCain v. Giuliani, No. 41023/83 (N.Y. Sup. Ct. 1999).

221. *See* Bernstein, *Giuliani to Order Homeless to Work*, *supra* note 210.

222. Affirmation of Michael Gage at 3, McCain v. Giuliani, No. 41023/83 (N.Y. Sup. Ct. 1999).

223. *Id.*

224. *Id.*

punitive.[225] The Family Court Act, which governs the court's involvement in child protective cases, defines neglect and abuse,[226] but it also provides a separate standard for determining when the court may authorize the involuntary removal of children from their parents. Regardless of the neglect allegations, the court may not allow the removal of a child except where it finds that the removal is necessary to prevent an imminent risk of harm to the child, and that the child protective agency has made reasonable efforts to assist the family where such assistance could eliminate the risk and obviate the need for removal.[227] In other words, a parent may be held liable for neglect, but still retain custody of her children, and still be entitled to government assistance to prevent their removal. As Justice Wilk recognized in *Cosentino*, New York law expressly prefers providing public assistance to families to allow them to stay together safely over foster care placement, irrespective of any assessment of the parent's blameworthiness, because family preservation is considered best for children.[228]

Because of this conflict, the new policy would have placed family court judges in a difficult position. They would have been presented with cases in

225. It is important to note that in spite of the legal mandates under which it operates, the child welfare system in New York City has historically treated parents in a manner that seems more in line with welfare reform's punitive model than child welfare's rehabilitative model. *See* SPECIAL CHILD WELFARE ADVISORY PANEL, ADVISORY REPORT ON FRONT LINE AND SUPERVISORY PRACTICE (2000). The panel, which was created as part of the settlement of *Marisol A. ex rel. Forbes v. Giuliani*, 929 F. Supp. 662, 669–70 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 372 (2d Cir. 1997), found that

> the Family Court's emphasis is markedly skewed toward determining the guilt or innocence of the parents, and the imposition of punishment for their acts, with far less consideration given to the broader well-being of their children . . . . [T]he rehabilitation of the parents, along with issues of visitation of children in care . . . were typically considered in terms of whether a parent deserved such a reward or punishment, rather than whether removal, visits, or reunification were in children's best interests, based on their safety and emotional health.

Id. at 46–47. Commissioner Scoppetta's City Council testimony, which emphasized the blameworthiness of parents rather than what the City could do to help them keep their families together, reveals this systemic bias. *See* Scoppetta Testimony, *supra* note 215. Another example of the system's lack of commitment to materially assisting families is its underutilization of the housing subsidy that came about as a result of the *Cosentino* lawsuit. Despite the legal requirement that this subsidy be provided to every family for whom lack of housing prevents reunification or causes a risk of foster care placement, this subsidy is only provided to a small number of the families who find themselves in this situation. *See* N.Y. SOC. SERV. LAW §§ 409-a(5)(c), 409-a(7) (2002); N.Y. COMP. CODES R. & REGS. tit. 18, §§ 423.2(b)(16) (1997), 423.4(d)(1), 423.4(d)(2) (1997), 430.9(e)(2) (1998); CITIZENS' COMMITTEE FOR CHILDREN, IMPLEMENTING RENT ASSISTANCE PROGRAMS THAT WORK: A REVIEW OF NEW YORK CITY FUNDED RENT ASSISTANCE FOR FAMILIES 14, 18–20, 23–24 (2003) (finding that significant problems prevent optimal implementation of the subsidy and recommending changes to the existing laws and procedures). *See also* Leslie Kaufman, *Want Children Back? Get a Bigger Apartment*, N.Y. TIMES, Jan. 20, 2004, at B1.

226. N.Y. FAM. CT. ACT §§ 1012(e)–(f) (McKinney 2005).

227. *Id.* §§ 1027, 1028.

228. Martin A. v. Gross, 524 N.Y.S.2d 121, 125 (Sup. Ct. 1987) (quoting N.Y. SOC. SERV. LAW § 384-b(1)(a)(iii), which states that "the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home"), *aff'd*, 546 N.Y.S.2d 75 (App. Div. 1989).

which the child protective agency alleged that a child's health or safety was placed at risk by her family's imminent expulsion from shelter due to noncompliance with welfare rules. They would have been required to consider not only whether this situation constituted an imminent risk to the child, but also whether the agency had made adequate attempts to provide services to eliminate this risk. As Judge Gage pointed out, child protective agencies are bound by state regulations describing the services they must provide to families who need these services in order to prevent foster care placement.[229] One of the services that must be provided is emergency shelter.[230] Therefore, the City, after threatening to expel the family from shelter and place the child in foster care pursuant to public assistance regulations, would be required, pursuant to child welfare regulations, to continue providing shelter to the family in order to prevent that very result.

The New York State shelter expulsion regulation and its proposed implementation in New York City echoed the policy choice made by legislators who supported welfare reform even though they knew it would lead to an increase in the number of children placed in foster care. By explicitly incorporating foster care placement into a sanction for noncompliance with workfare rules, the City's proposed policy placed a higher value on punishing parents for their failures than on providing for children in their own homes. City officials were willing to place more children in foster care if doing so would increase compliance with welfare rules and push more parents into workfare.

The new policy would have held homeless parents to a new standard in measuring their ability to care for their children. While poor families receiving public assistance are generally subject to a higher level of state scrutiny and must therefore comply with more requirements than other families, New York's proposed shelter expulsion policy carved out a subclass of especially needy families—homeless families—and imposed still more stringent standards on their conduct as parents. Of all New York's needy, only homeless parents would face the possibility that their children would be removed and placed in foster care as a sanction for failure to comply with all of the burdensome rules of the public assistance and workfare programs.

By altering shelter policy to allow families to be evicted for violating workfare rules, the City of New York created a predicament for homeless families that was more precarious than any situation previously faced by them, and also placed them in a worse position than other families on welfare. The policy change would have made it more difficult for homeless families to maintain their housing, one of the basic necessities they needed to care for their children. As a result, children who could have otherwise remained safely with

229. Affirmation of Michael Gage, *supra* note 222, at 3 (citing N.Y. SOC. SERV. LAW § 409-a(7), N.Y. COMP. CODES R. & REGS. tit. 18, § 423.2(b)(16)).

230. *See* N.Y. SOC. SERV. LAW § 409-a(7) (2002); N.Y. COMP. CODES R. & REGS. tit. 18, §§ 423.2(b)(16) (1997), 423.4(l) (1997), 430.9(e)(2) (1998).

their parents in shelter would have suffered the trauma of removal and placement in foster care. The real victims of the City's plan to punish homeless parents for violating welfare rules would have been their children.

The trial court enjoined the City's plan to force families out of shelter and place their children in foster care.[231] The City appealed, but the appeal was never perfected. The Bloomberg administration abandoned the policy of tying welfare sanctions to shelter eligibility, attempting instead to implement a policy which would expel families from shelter if they turned down available apartments. The issue was finally resolved on January 17, 2003, as part of a historic settlement in the *McCain* litigation.[232] The City agreed not to expel any family from shelter without making a safe, habitable apartment permanently available to it.[233] The pending litigation regarding expulsion from shelter was therefore resolved in favor of a policy that maintained the City's legal obligation to provide shelter for homeless families, enabling families to stay together.

IV.
CONCLUSION

A. Looking to State Child Welfare Law to Protect Family Integrity

Both state and federal law include provisions designed to protect the integrity of the family. I have argued in part II that the Due Process Clause of the Fourteenth Amendment should be interpreted to require states to provide needy families with cash or in-kind assistance when such assistance would prevent child neglect without intruding upon the fundamental right of family integrity. Cases such as *Franz*,[234] which required that states choose the least restrictive alternative when interfering with the integrity of the family, and *Winston*,[235] which extended to the foster care realm the *Youngberg*[236] requirement that states take positive steps to preserve the liberty of individuals in protective custody, suggest that there is some hope of establishing such a principle. On the other hand, the decisions in *Black*[237] and *Lipscomb*[238] suggest

231. McCain v. Giuliani, No. 41023/83 (N.Y. Sup. Ct. 1999) (issuing temporary restraining order); *McCain*, No. 41023/83 (N.Y. Sup. Ct. 2000) (extending temporary restraining order); Cosentino v. Dowling, No. 43236/85 (N.Y. Sup. Ct. 2000) (same).

232. *See* Stipulation ("Stipulation I"), McCain v. Giuliani, No. 41023/83 (N.Y. Sup. Ct. Jan. 17, 2003) (modifying 2000 Orders); Stipulation ("Stipulation II"), McCain v. Giuliani, No. 41023/83 (N.Y. Sup. Ct. Jan. 17, 2003) (approving settlement in both *McCain* and *Cosentino*).

233. *Id.*, Stipulation I, *supra* note 232, at 3.

234. Franz v. United States, 707 F.2d 582 (D.C. Cir. 1983), *supplemented by* 712 F.2d 1428 (D.C. Cir. 1983). *See supra* notes 113–14 and accompanying text.

235. Winston v. Children & Youth Serv., 948 F.2d 1380 (3d Cir. 1991). *See supra* notes 131–33 and accompanying text.

236. Youngberg v. Romeo, 457 U.S. 307 (1982). *See supra* notes 121–23 and accompanying text.

237. Black v. Beame, 550 F.2d 815 (2d Cir. 1977). *See supra* notes 105–07 and accompanying text.

that federal courts are reluctant to impose on states a positive constitutional obligation to assist families, even when failure to assist threatens the fundamental right to family integrity.

State legislation implementing the federal statutory requirement that states make reasonable efforts to keep families together, and to reunite them when they have been separated by foster care, appears to hold more promise as a tool for establishing the right of needy families to public assistance. As illustrated in part III, litigation to enforce the relevant provisions of these state child welfare laws, which recognize the importance of family integrity to children's well-being, has generally been more successful than litigation seeking to establish rights to adequate financial assistance for needy families under state public assistance statutes. Even in New York State, where the state constitution promises assistance for the needy, courts were ready to allow homeless families to be expelled from shelter until those families pointed out that such an action would violate case law interpreting the state's child welfare statutes. Many state child welfare statutes recognize that where assistance to families as a whole can prevent or shorten foster care placement, providing such assistance is the best way to help children. Through litigation based on these statutes, advocates may be able to obtain cash or in-kind assistance for needy families, in circumstances when such assistance would prevent removal and foster care placement.

B. Beyond the Courts: Making Public Assistance a Child Welfare Policy Issue

Ultimately, any solution to the problem of families separated by poverty must include a strategy for convincing not just judges, but also policymakers and the citizens who elect them, that public assistance is a child welfare issue. It should shock the conscience that a society as wealthy as ours would willingly withhold housing or cash assistance from a family when this action will cause its break-up. Why, then, has welfare reform remained so politically popular, while thousands of children are separated from their families because of poverty?

Welfare reform owes its popularity at least in part to politicians' appeals to the value of work and individual financial independence that seem to give moral authority to the impulse not to help the poor. However, a belief that poor adults are responsible for their poverty cannot justify harm to children. There must be another explanation for Americans' willingness to accept the separation of children from their poor parents as a collateral consequence of welfare reform.

Welfare reform could not have succeeded politically if its proponents had wholly ignored the material needs of children. Even Newt Gingrich agreed that children should be saved from the destitute poverty he knew would be caused by welfare reform, though his suggestion that children be placed in orphanages offended the sensibilities of many Americans, who knew instinctively that

238. Lipscomb v. Simmons, 962 F.2d 1374 (9th Cir. 1992) (en banc). *See supra* notes 134–48 and accompanying text.

children's needs are better met in a home than in an institution. Unlike the orphanage proposal, foster care placement may seem to many Americans like an acceptable way to meet the emotional and material needs of poor children. What is missing from this view, however, is any recognition of the critical importance to children's well-being of the bonds they share with their own families, which cannot be replaced by the affection of even the most caring stranger.

It is difficult to escape the conclusion that the families served by both the welfare system and the child welfare system, who are disproportionately families of color, are simply undervalued by policymakers. Economists Alberto Alesina and Edward Glaeser have demonstrated that societies with greater racial diversity are less likely to provide strong safety net protections for indigent citizens than societies that are largely homogeneous.[239] The empathy of the political majority appears to depend at least in part on whether they racially identify with the poor. This holds true in the child welfare context as well; Dorothy Roberts provides convincing evidence that in this country, the bonds between African-American children and their parents are undervalued by policymakers and by the government officials who run the child welfare system.[240] It may be that many white Americans view the removal of children from their parents as an acceptable solution to the problem of child poverty, as long as those children are primarily children of color.

When Justice Blackmun concluded his separate dissent in *DeShaney* with the words "Poor Joshua!",[241] he may have feared that the failure to hold the state liable in *DeShaney* would leave states without any incentive to intervene in families to protect children from harm. Yet the decision had no such effect. On the contrary, since 1989, when *DeShaney* was decided, the number of children removed from their families and placed in foster care has soared.[242] Significant pressures apart from the fear of liability have led states to intervene in families and remove children at increasing rates. In particular, widespread and at times sensational media attention to individual cases of severe child abuse, particularly those which could have been prevented by state child protective agencies, has created strong incentives for agencies to remove children first and ask questions later.[243] When combined with the tendency to undervalue the bonds between poor parents of color and their children, these incentives lead child welfare

239. ALBERTO ALESINA & EDWARD GLAESER, FIGHTING POVERTY IN THE U.S. AND EUROPE: A WORLD OF DIFFERENCE 133–81 (2004).

240. *See generally* ROBERTS, *supra* note 8.

241. Deshaney v. Winnebago County, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

242. ROBERTS, *supra* note 8, at 143, 150–51.

243. *Id.* at 54, 77 (describing the effect that the death of six-year-old Elisa Izquierdo had on New York's child welfare practices); Guggenheim, *supra* note 57, at 1725–26 (same); Katz, *supra* note 20, at 20 (same). Most recently, the highly publicized death of Nixzmary Brown has provoked a maelstrom of media attention. *See* Leslie Kaufman, *Welfare Unit Moves Children From Parents*, N.Y. TIMES, Jan. 17, 2006, at B1; Maia Ridberg, *A Push to Focus on Worst Cases in Child Abuse*, CHRISTIAN SCI. MONITOR, Jan 26, 2006, at 2. *See generally* NELSON, *supra* note 7, at 51–75 (discussing this phenomenon in a chapter entitled "The Agenda-Setting Function of the Media").

officials to expend more energy and resources on removing children from their homes than on helping families to stay together or to reunify.[244] In short, in today's media, "Poor Joshua" is considered newsworthy, but the far more common tragedy of a child separated for months or years from her family because the state has failed to provide her family with the support it needs to care for her at home goes unreported.

The erosion of the public assistance safety net would encounter far greater opposition if those with political power appreciated the ties that bind poor children of color to their families. To limit the harshest effects of welfare reform, we must convince policymakers that the separation of children from their families causes profound harm to children, and that a benevolent *parens patriae* must do all it can to prevent this harm.

If we accept that the best way to help children—from the point of view of children—is to maximize their chances of remaining safely with their families, then there can be no justification for denying families the financial support they need to stay together based on their parents' alleged failure to work. To deny them this support would mean placing greater importance on punishing a parent for failing to live up to social norms than on protecting a child from harm.

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244. *See generally* ROBERTS, *supra* note 8; Katz, *supra* note 20. Katz explains that following the highly publicized death of Elisa Izquierdo in 1996, foster care placements in New York rose by almost fifty percent, and observes that many of the affected families "should never have been split up in the first place [and now] must wait far too long to be reunited." *Id.* at 20. Akka Gordon, a former New York City child protective caseworker, explains:

> There is no penalty for the wrongful taking of a child. And the pressures to remove are intense. I was trained to do removals in cases that did not necessarily qualify as abuse or neglect because, as one of my supervisors reminded me, "prevention is better than a cure." . . [A]t moments of uncertainty, the mantra was "Cover your ass"—a phrase heard often around the office. It was backed up by a pervasive fear—among caseworkers, supervisors, managers and attorneys—of seeing our photograph in the *Daily News* as the person who made an error that was literally fatal.

Akka Gordon, *Taking Liberties*, CITY LIMITS, Dec. 2000, at 18, 20.