

Rutgers Journal of Law & Public Policy

VOLUME 5

FALL 2007

ISSUE 1

Editor-in-Chief

KRISTYN BYRNES

Executive Editor

NEENA VERMA

Symposium Editor

CARRIE FORD

Business Editor

MICHAEL BARNES

***Managing Editor
of Articles***

TIFFANY D. JOHNSON

***Managing Technology
Editor***

LOUIS E. MOYA

***Managing Editor
of Notes***

JULIE HOROWITZ

***Senior Articles
Editor***

CHANTAL ARTUR

***Managing Research
Editor***

AMY N. KESEDAY

***Senior Notes
Editor***

BRIAN E. HILDEBRANDT

Submissions Editors

LAUREL B. BUDMAN
ADAM MARC KAPLAN

***Senior Technology
Editors***

SUPURNA BHAR
BRENDAN P. FERNALD
DARRELL MARTINELLI

Marketing Editor

RUCHIKA SACHDEVA

Articles Editors

KEVIN BIRKHEAD
ANDY HUGHES
ANTHONY VECCHIO
MARIE OLIVER
SUSAN SHAW
TARA CANNADAY
LALENA J. TURCHI
CHRISTINA J. KUBIAK
ALEXANDRIA JEAN-PIERRE

***Technology
Editors***

RENEE DELLA FAVE
JONATHAN GROPPER
BRYCE GUINGRICH
JULIE PAULL

Notes Editors

A. MASON ROHRER
JESSE MELENDREZ
ASHLEY G. D'AMATO
RACHAEL MINARDI
A. ERIC LEVINE
BRIAN PREW



MELISSA ABATEMARCO
RICHARD BATELMAN
JESSICA BISIGNANO
KRISHNA SANAT BHAVSAR
SARAH BOYER
KEVIN DAVENPORT
CHRISTOPHER EMRICH
ELIZABETH FORADORI
MICHAEL FORD
KEVIN GOLDEN

Members
BRANDON HAWKINS
CHARLES HOLMGREN
JOHN C. HYON
MATTHEW KOHUT
MARK F. KOWAL
JACLYN LEVASH
DENISE M. MAHER
DOUGLAS C. MAUTE
KATHLEEN M. MCCLURE
JESSICA MILLER
HEDWIG MURPHY

ELIZABETH MYERS
ADAM V. ORLACCHIO
ROBERT RICHARDSON
MATTHEW ROBINSON
DAVID F. ROEBER
NOAH SCHWARTZ
BORIS SHAPIRO
JOSEPH A. WACKER
RICHARD DAVID WALKER
JOHN WYAND

Faculty Advisors
PHILIP L. HARVEY
SARAH E. RICKS
DAMON Y. SMITH



About the Rutgers Journal of Law & Public Policy

The *Rutgers Journal of Law and Public Policy* (ISSN 1934-3736) is published three times per year by students of the Rutgers School of Law – Camden, located at 17 North Fifth Street, Camden, NJ 08102. The views expressed in the *Rutgers Journal of Law & Public Policy* are those of the authors and not necessarily of the *Rutgers Journal of Law & Public Policy* or the Rutgers School of Law – Camden.

Form: Citations conform to *The Bluebook: A Uniform System of Citation* (18th ed. 2005). Please cite the *Rutgers Journal of Law & Public Policy* as 5 RUTGERS J.L. & PUB. POL'Y __ (2007).

Copyright: All articles copyright © 2007 by the *Rutgers Journal of Law & Public Policy*, except where otherwise expressly indicated. For all articles to which it holds copyright, the *Rutgers Journal of Law & Public Policy* permits copies to be made for classroom use, provided that (1) the author and the *Rutgers Journal of Law & Public Policy* are identified, (2) the proper notice of copyright is affixed to each copy, (3) each copy is distributed at or below cost, and (4) the *Rutgers Journal of Law & Public Policy* is notified of the use.

For reprint permission for purposes other than classroom use, please submit request as specified at <http://www.rutgerspolicyjournal.org/>.

Manuscripts: The *Rutgers Journal of Law & Public Policy* seeks to publish articles making original contributions in the field of public policy. The *Journal* accepts both articles and compelling essays for publication that are related to the expansive topic of public policy. Manuscripts must contain an abstract describing the article or essay which will be edited and used for publication on the website and in CD-ROM format. The *Journal* welcomes submissions from legal scholars, academics, policy makers, practitioners, lawyers, judges and social scientists.

Electronic submissions are encouraged. Submissions by email and attachment should be directed to submissions@rutgerspolicyjournal.org.

Paper or disk submissions should be directed to *Rutgers Journal of Law & Public Policy*, Rutgers University School of Law – Camden, 217 North 5th Street, Camden, New Jersey 08102.

Subscriptions: Subscription requests should be mailed to to *Rutgers Journal of Law & Public Policy*, Rutgers University School of Law – Camden, 217 North 5th Street, Camden, New Jersey 08102, or emailed to info@rutgerspolicyjournal.org.

Internet Address: The *Rutgers Journal of Law & Public Policy* website is located at <http://www.rutgerspolicyjournal.org>.

OFFICERS OF THE UNIVERSITY

RICHARD L. MCCORMICK, B.A., Ph.D., *President*
MARGARET S. MARSH, B.A., M.A., Ph.D., *Interim Provost and Dean, FASC*

LAW SCHOOL ADMINISTRATION

RAYMAN L. SOLOMON, B.A., M.A., J.D., Ph.D., *Dean and Professor of Law*
JAYDEV CHOLERA, B.A., M.B.A., *Director, Finance and Administration*
JOHN S. BECKERMAN, A.B., M.A., J.D., Ph.D., *Associate Dean—Academic Affairs*
CAMILLE SPINELLO ANDREWS, B.A., J.D., *Associate Dean—Enrollment*
ANNE V. DALESANDRO, A.B., M.L.S., J.D., *Director of Law Library*
BARBARA MAYLATH, A.B., *Director of Development*
EVE BISKIND KLOTHEN, B.G.S., J.D., *Assistant Dean for Pro Bono and Public Interest Programs*
ANGELA V. BAKER, B.A., J.D., *Associate Dean of Students and Career Planning*

FACULTY

AARON ARI AFILALO, A.B., J.D., LL.M.,
Associate Professor of Law
DAVID E. BATISTA, A.B., J.D., M.S., *Librarian*
LINDA S. BOSNIAK, A.B., J.D., M.A., *Professor
of Law*
HON. DENNIS BRAITHWAITE, B.S., J.D., LL.M.,
Visiting Professor of Law
A. HAYS BUTLER, B.A., J.D., M.S. (LIS),
Librarian II
LISA CAPASSO, *Visiting Clinic Asst. Prof. - LRW*
MICHAEL A. CARRIER, B.A., J.D., *Associate
Professor of Law*
FRED C. CHANDLER, Jr., B.A., LL.B., LL.M.,
Professor of Law Emeritus
GLORIA F. CHAO, B.A., M.L.S., *Librarian II*
EDWARD E. CHASE, B.A., J.D., *Professor of
Law Emeritus*
VICTORIA L. CHASE, B.A., J.D., *Clinical
Associate Professor of Law*
ROGER S. CLARK, B.A., LL.B., LL.M., J.S.D.,
LL.D., *Board of Governors Professor*
JASON K. COHEN, B.A., J.D., *Legal Writing
Clinical Asst. Professor*
RUSSELL M. COOMBS, B.A., J.D., *Associate
Professor of Law*
LUCY COX, B.A., M.S., Ph.D., M.L.S., *Librarian
II*
PERRY DANE, B.A., J.D., *Professor of Law*
JOHN H. DAVIES, B.S., LL.B., LL.M., *Professor
of Law Emeritus*
JAY M. FEINMAN, B.A., J.D., *Distinguished
Professor of Law*
KIMBERLY D. FERZAN, B.S., J.D., *Professor of
Law*
DAVID M. FRANKFORD, B.A., J.D., *Professor of
Law*
ANN E. FREEDMAN, B.A., J.D., *Associate
Professor of Law*
STEVEN F. FRIEDEL, B.A., J.D., *Professor of
Law*
SANDRA GAVIN, B.A., J.D., *Director of
Advocacy Programs*
ERIC GILSON, B.A., J.D., M.L.I.S., *Librarian III*
GEORGE GINSBURGS, *Bacchalaureat Serie
Mathematiques, B.A., M.A., Ph.D.,*
HARRIET N. KATZ, B.A., J.D., *Clinical Professor
of Law & Director, Lawyering Program*
A. KODZO PAAKU KLUDZE, B.A., LL.B., Ph.D.,
Distinguished Professor of Law Emeritus
DONALD KOROBKIN, B.A., A.M., J.D., *Professor
of Law*
ARTHUR B. LABY, B.A., J.D., *Associate
Professor of Law*
F. GREGORY LASTOWKA, B.A., J.D., *Associate
Professor of Law*
ARNO LIIVAK, B.A., M.L.S., J.D., *Professor of
Law Emeritus*
HARRY LITMAN, A.B., J.D., *Visiting Associate
Professor of Law*
MICHAEL A. LIVINGSTON, A.B., J.D., *Professor
of Law*
JOHN C. LORE, III, *Visiting Asst. Clinical
Professor of Law*
JONATHAN MALLAMUD, A.B., J.D., *Professor of
Law Emeritus*
EARL M. MALTZ, B.A., J.D., *Distinguished
Professor of Law*
KIMBERLY MUTCHERSON, B.A., J.D., *Associate
Professor of Law*
JOHN F. K. OBERDIEK, B.A., M.A., J.D., Ph.D.,
Associate Professor of Law
CRAIG N. OREN, A.B., J.D., *Professor of Law*
TRACI OVERTON, B.A., J.D., *Clinical Staff
Attorney*
DENNIS M. PATTERSON, B.A., M.A., J.D., Ph.D.,
Distinguished Professor of Law
IMANI PERRY, B.A., J.D., LL.M., Ph.D.,
Professor of Law
STANISLAW POMORSKI, LL.B., LL.M., J.S.D.,
Distinguished Professor of Law Emeritus
SARAH RICKS, B.A., J.D., *Clinical Associate
Professor, Legal Writing*
RUTH ANNE ROBBINS, B.A., J.D., *Clinical
Professor of Law & Chair, LRW Program*
SHEILA RODRIGUEZ, *Clinical Asst. Professor-
LRW*
RAND E. ROSENBLATT, B.A., M.Sc., J.D.,
Professor of Law
PATRICK J. RYAN, B.A., M.A., J.D., LL.M.,
J.S.D., *Associate Professor of Law*

Distinguished Professor of Law Emeritus
SALLY F. GOLDFARB, B.A., J.D., *Associate
Professor of Law*
ELLEN P. GOODMAN, A.B., J.D., *Professor of
Law*
JOANNE GOTTESMAN, B.A., J.D., *Clinical
Associate Professor of Law*
PHILLIP L. HARVEY, B.A., J.D., Ph.D., *Professor
of Law*
ELIZABETH L. HILLMAN, B.S.E.E., J.D., Ph.D.,
Professor of Law
N.E.H. HULL, B.A., Ph.D., J.D., *Distinguished
Professor of Law*
RICHARD HYLAND, A.B., M.F.A., J.D., D.E.A.,
Distinguished Professor of Law
JOHN P. JOERGENSEN, B.A., M.A., M.S. (LIS),
J.D., *Librarian II*
DONALD K. JOSEPH, B.S., LL.B., *Visiting
Associate Professor of Law*

MEREDITH L. SHALICK, B.A., M.S., J.D.,
Visiting Clinical Asst. Professor of Law
SANDRA SIMKINS, *Clinical Associate Professor
of Law*
RICHARD G. SINGER, B.A., J.D., LL.M., J.S.D.,
Distinguished Professor of Law
DAMON Y. SMITH, B.A., M.U.P., J.D., *Assistant
Professor of Law*
WILLIAM M. SPEILLER, B.S., LL.B., LL.M.,
Professor of Law Emeritus
ALLAN R. STEIN, B.A., J.D., *Professor of Law*
BETH STEPHENS, B.A., J.D., *Professor of Law*
GERARDO VILDOSTEGUI, B.A., J.D., *Visiting
Professor of Law*
CAROL WALLINGER, B.S., J.D., *Legal Writing,
Clinical Associate Professor of Law*
ROBERT M. WASHBURN, A.B., J.D., LL.M.,
Professor of Law
ROBERT F. WILLIAMS, B.A., J.D., LL.M., LL.M.,
Distinguished Professor of Law

Rutgers
Journal of Law & Public Policy

VOLUME 5

FALL 2007

ISSUE 1

Current Issues in
Public Policy



Rutgers Journal of Law & Public Policy

VOLUME 5

FALL 2007

ISSUE 1

CONTENTS

BUT DID THEY LISTEN? THE NEW JERSEY DEATH PENALTY
COMMISSION'S EXERCISE IN ABOLITIONISM: A REPLY..... 9

Robert Blecker

THE DWINDLING MARGIN FOR ERROR: THE REALIST
PERSPECTIVE ON GLOBAL GOVERNANCE AND GLOBAL
WARMING.....89

Paul L. Joffe

THE IMPACT OF MANDATORY REPORTING REQUIREMENTS
ON THE CHILD WELFARE SYSTEM.....177

Robert J. Lukens

THE RIGHT TO HEALTH – A HOLISTIC HEALTH PLAN FOR
THE NEXT ADMINISTRATION..... 234

Barbara P. Billauer



THE IMPACT OF MANDATORY REPORTING REQUIREMENTS ON THE CHILD WELFARE SYSTEM

Robert J. Lukens¹

ABSTRACT

This article explores the impact of the mandatory reporting of child abuse and neglect by analyzing the repercussions of erroneous reports. The consequences of investigating reports that do not result in an intervention by the child welfare agencies can be very serious because these diminish the already over-extended resources of these agencies. The consequences of over-burdening the child welfare system through this misallocation of investigative resources can be devastating for a high volume of children who remain at risk but whose needs are not properly addressed. Mandatory reporting exacerbates the tensions inherent in the child welfare system between the social responsibility of protecting children at risk of harm, and a similar obligation to shore up families who are distressed. As one way to reduce the over-reporting of spurious incidents of child abuse or neglect, this article argues for some professional discretion in deciding when to report suspected circumstances.

Each and every day, American children are suffering at the hands of perpetrators. In our

¹ Co-Director of the Advocating on Behalf of Children Project at Community Legal Services, Inc. in Philadelphia, Pennsylvania. J.D., Temple University; LL.M., Columbia University; Ph.D. (Psychology), United States International University. Visiting Assistant Professor of Legal Research and Writing at the Beasley School of Law of Temple University, 2007-2008. Special thanks to Dean Robert Reinstein and to my colleagues in the legal research and writing program at Temple for supporting this effort.

urban “ghettos,” in our middle-class subdivisions, and our high-end gated communities, the most vulnerable members of our society are being beaten, burned, starved, and sexually abused. In most cases these children are not being victimized by strangers, serial rapists, thugs, or cults, but by the very people entrusted with the task of protecting them, the group of individuals we expect to come to these children's aid, to nurture and to provide them with safety: their nuclear and extended families.²

Reports about how parents are unable to care adequately for their children generally come to the public's attention only when the worst scenario has already happened.³ Understandably, for any community highly invested in the safety of its children, mistreatment of those least able to protect themselves generates the greatest outrage. Too often, however, the accusations of mistreatment turn out to be incorrect after further investigation.

Currently, over three million reports of child mistreatment are recorded annually. While this figure has slowly, but steadily risen over the past ten years, the proportion of reports made to incidents actually investigated has hovered at approximately two out of every three reports.⁴ Of the proportion of all reports that

² Richard R. Fields, *The Future of Child Protection: How to Break the Cycles of Abuse and Neglect*, 3 J. L. & FAM. STUD. 243, 243 (2001) (reviewing JANE WALDFOGEL, *THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLES OF ABUSE AND NEGLECT* (1998)).

³ See Rob Geen & Karen C. Tumlin, *State Efforts to Remake Child Welfare: Responses to New Challenges and Increased Scrutiny* 9 (Urban Inst., Occasional Paper No. 29, 1999), available at <http://www.urban.org/UploadedPDF/occa29.pdf> (noting that report of child's death is a “story that is increasingly salient to the media. If the child has been part of an active child welfare case or was reported to the agency for alleged abuse and neglect, the story is likely to run on the front page of the paper or lead the television news.”); J. Robert Shull, *Emotional and Psychological Child Abuse: Notes on Discourse, History, and Change*, 51 STAN. L. REV. 1065, 1066 (1999) (relaying report of mother “charged criminally for having locked her thirteen-year-old daughter in a closet for seventeen hours, naked, without food or water, and with only a bucket for a bathroom. [The mother] was acquitted.”).

⁴ Compare U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. OF CHILD. AND FAMS., *CHILD MALTREATMENT 2005*, at xiv (2007), available at

are ultimately investigated, around one third of them lead to a finding that a child was abused or neglected. This means that of the volume of reports that are made each year, slightly less than one million ultimately reveal a substantiated incident of child abuse or neglect.

The proportion of actual findings of neglect or abuse to reported incidents is the principal statistic and has remained stable for several years.⁵ In other words, as the volume of

<http://www.acf.hhs.gov/programs/cb/pubs/cm05/cm05.pdf> (enumerating that approximately 3.3 million allegations of child abuse and neglect including 6.0 million children were made to CPS agencies. About 62 percent of those allegations reached the report stage and either were investigated or received an alternative response. Nearly 30 percent [28.5%] of the investigations that reached the report stage determined that at least one child was a victim of child abuse or neglect) [hereinafter CHILD MALTREATMENT 2005], with U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. OF CHILD. AND FAMS., CHILD MALTREATMENT 2004, at 7 (2006), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm04/cm04.pdf> (enumerating that during 2004, an estimated total of 3 million referrals, including approximately 5.5 million children, were made to CPS agencies. The national rate was 42.6 referrals per 1,000 children for 2004 compared with 39.1 referrals per 1,000 children for 2003. CPS agencies screened in 62.7 percent of referrals and screened out 37.3 percent. These results were similar to 2003 data, which indicated 67.9 percent were screened in and 32.1 percent were screened out.), with U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. OF CHILD. AND FAMS., CHILD MALTREATMENT 2002, at iii, available at <http://www.acf.hhs.gov/programs/cb/pubs/cm02/cm02.pdf> (enumerating that during 2002, an estimated total of 2.6 million referrals, including 4.5 million children, were made to CPS agencies. The national rate was 35.9 referrals per 1,000 children for 2002 compared to 36.6 referrals per 1,000 children for 2001. CPS agencies screened in 67.1 percent of referrals and screened out 32.9 percent. These results were almost identical to last year's report, which indicated 67.3 percent were screened in and 32.7 percent were screened out.) (last visited Nov. 14, 2007), with U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. OF CHILD. AND FAMS., CHILD MALTREATMENT 2000, at 3 (2002), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm00/cm2000.pdf> (enumerating that in 2000, CPS agencies screened out 38.3 percent [an estimated 1,070,000] of referrals, [compared to 39.6% or 1,178,000 in 1999], many of which concerned more than one child. The agencies screened in 61.7 percent [an estimated 1,726,000] of referrals [compared to 60.4% or 1,796,000 in 1999]. The total 2.8 million referrals concerned approximately five million children. The rate of screened-out referrals per 1,000 children in the population was 14.8 [compared to 16.8 in 1999], while the rate of screened-in referrals was 23.9 [compared to 25.6 in 1999]).

⁵ See data discussed *supra* note 4.

reports has risen, there has been an equivalent rise in the number of investigations, but despite this increase in investigations, the proportion of children who are identified as having been abused or neglected has plateaued.⁶ However, there also is some credible evidence to suggest that a substantial number of legitimate incidents of child mistreatment are unreported, and hence, go undetected each year.⁷ Can a reporting system designed to protect children be adequate when it is not only incorrect 66% of the time, but fails to identify a significant number of incidents where children are mistreated?

It is unlikely that anyone would claim that the child welfare system in this country is a model of efficiency.⁸ One area of

⁶ See CHILD MALTREATMENT 2005, *supra* note 4, at xiv.

⁷ See, e.g., U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. OF CHILD. AND FAMS., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT, Project Summary, at 2, *available at* <https://www.nis4.org/DOCS/ProjectSummary.pdf> (reporting in 2007 that “[e]arlier research has shown that many more children are abused and neglected in a community than are observed at any single agency”) (last visited Nov. 14, 2007); Andrea J. Sedlak & Diane D. Broadhurst, U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. OF CHILD. AND FAMS., THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT, Executive Summary, *available at* <http://www.childwelfare.gov/pubs/statsinfo/nis3.cfm#national> (reporting in 1996 that number of children at risk “who are investigated by CPS has remained fairly stable, or risen slightly, since the last national incidence study in 1986. As a result, CPS investigation has not kept up with the dramatic rise in the incidence of these children, so the percentages who receive CPS investigation of their maltreatment have fallen significantly.”) (last visited Nov. 14, 2007).

⁸ The almost universal opinion of critics and supporters alike is that the child welfare system is tragically broken and something must be done to fix it. See, e.g., INSOO KIM BERG & SUSAN KELLY, BUILDING SOLUTIONS IN CHILD PROTECTIVE SERVICES 3 (2000) (“[i]t is no secret that everyone has opinions about child welfare services . . . and that the universal opinion is that the system is broken and that something needs to be done to fix it”); see also Jane Waldfogel, *New Perspectives on Child Protection: Protecting Children in the 21st Century*, 34 FAM. L.Q. 311, 311 (2000) (“There is little disagreement among child welfare scholars that our child protection system is badly flawed and in need of reform.”). The “fix” for what most ails the CPS cannot be accomplished when the resources of the system are focused on the child to the exclusion of the family and home environment because this would be tantamount to a child removal process in search of a legitimate mandate. See Karin Malm et al., *Running to Keep in Place: The Continuing Evolution of Our Nation's Child Welfare System* 3 (Urban Inst., Occasional Paper No. 54, 2001) (characterizing

ongoing controversy is the level of over-reporting and under-reporting of incidents of child mistreatment and how these phenomena impact both the outcome of investigations by the child welfare system and the quality of services provided to families in need. The chief culprits of over-reporting are vague and overly broad statutory definitions of child abuse and neglect in conjunction with the blanket requirement for professionals to report all suspected incidents without discretion. Since the mid-1960s the state and federal definitions of child mistreatment have become more encompassing, as have the ranks of professionals required to report suspected incidents of child abuse and neglect. In tandem, these factors have exponentially increased the number of reported incidents of child mistreatment over the last three decades. This has correspondingly required the child welfare system to adapt to circumstances by increasing its investigatory arm at the expense of its protective branch. Tragically, however, too many children remain in harm's way because the child welfare system is too overburdened to adequately care for them.

In a somewhat similar fashion, this Article contends that the chief explanations for under-reporting suspected incidents are the perception by professionals that 1) the child welfare system is overtaxed; 2) intervention by the child welfare system will not resolve the matter satisfactorily; and 3) engagement with the system may be detrimental to the child. Moreover, it is possible that some children simply may not come to the attention of mandated reporters (e.g., very young children not enrolled in school and medical neglect situations where the child is not seen routinely by care specialists), and some may not exhibit any signs of trouble or may be reticent about revealing it (e.g., many of the instances of sexual abuse or emotional neglect). In sum, despite the broad reach of the mandatory reporting system, too many children remain in harm's way because they have not been identified by the child welfare system.

To facilitate more accurate reporting of child mistreatment, and to induce better compliance with the reporting

a "child welfare system that continues to be largely reactive to, and driven by, crises and criticisms as well as changes in leadership and mission"), *available at* http://www.urban.org/UploadedPDF/310358_occa54.pdf.

requirements, this Article advocates a consolidation of the definitions of what qualifies as reportable child abuse or neglect. This Article further describes how permitting professional discretion, specifically in situations where neglect is the primary consideration, can alleviate some over-reporting and indirectly alter some of the professional habits or concerns that have caused under-reporting in the past.⁹ Although others have proposed similar recommendations to clarify the definitions of abuse and neglect and to allow some latitude for clinical judgment in mandatory reporting obligations,¹⁰ existing resources have yet to specifically address the benefits or consequences of introducing more discretion in mandatory reporting requirements explicitly for poverty-related circumstances.

On the one hand, because the definitions for what constitutes abuse and neglect are imprecise, clarifying the definitions and specifying what circumstances are most likely to be substantiated may aid to screen in some additional cases that come to the attention of professionals who do not now report under the assumption that the particular circumstances do not warrant it because of the ambiguous thresholds in place at the present time. Less ambiguity in the threshold for whether to report will increase the confidence experienced by the professional who therefore will be more likely to make a report that has a higher probability of being substantiated. On the other hand, simply permitting more discretion without elucidating the conditions that require reporting will screen out too many children based on clinical judgment rather than a

⁹ See Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1724-25 (2000) (arguing for three types of cases on a continuum from egregious abuse to poverty-related neglect) (reviewing ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999)).

¹⁰ See, e.g., JANE WALDFOGEL, *THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE AND NEGLECT* 210-11 (1998); RICHARD WEXLER, *WOUNDED INNOCENTS: THE REAL VICTIMS OF THE WAR AGAINST CHILD ABUSE* 274-75 (1995); Douglas J. Besharov, *Child Abuse Realities: Over-Reporting and Poverty*, 8 VA. J. SOC. POL'Y & L. 165, 196-97 (2000); N. Dickon Repucci & Carrie S. Fried, *Child Abuse and the Law*, 69 U.M.K.C. L. REV. 107, 109-11 (2000).

standard endorsed by the community. Therefore, to most positively reduce the burden on the child welfare system of over-reporting without increasing the possibility that circumstances where children remain in danger will go unreported, the clarification of the definitions of abuse and neglect must be done in conjunction with authorizing some professional discretion about when to make a report.

Despite widespread agreement that the present reporting system is seriously flawed, policymakers seem to remain resistant to modifications. Permitting any type of discretion in reporting child abuse and neglect flies in the face of the public's perceived willingness to tolerate incredible intrusions into other people's lives in the name of protecting children. However, the justifications proffered for these intrusions have not always taken into account that protecting children from harm is the primary objective in all situations regardless of whether the harm is imposed on them by their family or the result of their being unnecessarily removed from their family. When the focus is on ensuring the autonomy and due process rights of adults, the attention that should be directed toward protecting children may be missing – this results in children being left in homes that are unsafe. By contrast, when the zeal to protect every child leads to removing children from a caring family merely to ensure that they do not grow up in conditions of poverty, then the attention that ought to be directed toward assisting the family's survival is withheld from the family and this can result in unnecessary foster care placements, needless trauma for the child and his or her family, and somewhat understandable accusations of the racial or class-biased removal of children.¹¹ Children can be equally harmed by either extreme.

¹¹ See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 763 (1982) (noting that because “parents subject to termination proceedings are often poor, uneducated, or members of minority groups . . . such proceedings are often vulnerable to judgments based on cultural or class bias”) (citations omitted); ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 5 (1999) (acknowledging concerns that “lead some to equate state intervention to protect and remove children with race and class warfare”) [hereinafter BARTHOLET, *NOBODY'S CHILDREN*]; DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 99 (2002) (concluding that “America's child welfare system is a racist institution”).

Part I of this Article provides a brief description of the history of child protective service agencies, which are usually separate departments within a state's child welfare system, and how they currently function. Part II explores the evolving definitions of child abuse and neglect. The definitions of what constitutes abuse or neglect are the trigger for any analysis of when a report should be made. In conjunction with mandatory reporting laws that have now expanded to include nearly all professionals who come in contact with children, the vague standards for what constitutes a reportable incident have resulted in an exponential increase in reported incidents, the greater proportion of which are later determined to be unsubstantiated. A high volume of reporting based on ambiguity about whether a report is called for can lead to over-reporting. Dedicating scarce Child Protective Services ("CPS") resources to investigate reports that ultimately are unsubstantiated may in turn have a detrimental impact on the efficiency of the entire child welfare system. Moreover, reports later determined to be unsubstantiated unnecessarily impose trauma on some children whose family environments are hampered principally by the deprivations of poverty and not by any willing neglect by parents. Similarly, but with the opposite effect, deciding not to report when it is called for, or under-reporting, may adversely affect children who remain at risk of mistreatment because the appropriate interventions by the child welfare system have not occurred.

To alleviate some of the surplus burden on the child welfare system caused by over-reporting, the statutory definitions of abuse and neglect should be clarified so that bona fide abuse cases are reported more consistently and the less egregious neglect cases do not continue to absorb most of the resources of the child protective services. The typical neglect case (e.g., inadequate shelter, clothing, or food for a child) likely can be remedied with supportive services. Only when the parents have been provided these supports and failed to improve the conditions of neglect should further intervention be undertaken.

Together with making the definitions of what constitutes abuse and neglect more specific, the mandatory reporting rules should be amended to allow for some discretion by those

professionals obliged to report potential neglect cases.¹² The report of abuse should remain mandatory for all professionals who have regular contact with children, but clinically trained professionals (such as physicians, psychologists, nurses, and social workers) should be allowed to make a decision whether to report instances of suspected neglect.¹³ This simple statutory modification could reduce the child welfare caseload annually, predominately from the 66% that subsequently are found to be unsubstantiated. This modification in the threshold for reporting would facilitate re-allocation of child welfare resources to families most in need.¹⁴ Definitions for abuse and neglect

¹² Currently, among those professionals most likely to have regular contact with children only attorneys have no obligation to report suspected abuse or neglect. *See, e.g.*, N.Y. SOC. SERV. LAW § 413 (McKinney 2003) (enumerating professionals required to report if they have reason to suspect that “child coming before them in their professional or official capacity is an abused or maltreated child, or when they have reasonable cause to suspect that a child is an abused or maltreated child where the parent, guardian, custodian or other person legally responsible for such child comes before them in their professional or official capacity and states from personal knowledge facts, conditions or circumstances which, if correct, would render the child an abused or maltreated child”); 23 PA. CONS. STAT. ANN. § 6311 (West 2001) (enumerating “persons required to report suspected child abuse” as persons “who, in the course of their employment, occupation or practice of their profession, come into contact with children” and excluding attorneys). Mandatory reporters are immune from criminal or civil liability for any good faith report or testimony about suspected incidents of child abuse or neglect. 23 PA. CONS. STAT. ANN. §§ 6311(d), 6318(a) (West 2001). Mandatory reporters are presumed to make all reports in good faith; *Id.* § 6318(b) (West 2001). Given that attorneys generally are not trained to make informed clinical decisions, and given the need to maintain attorney-client privilege, it may be inadvisable to include attorneys among mandatory reporters. It also would not be advisable to exempt those without clinical training, such as teachers. *See also* Karen L. Ross, *Revealing Confidential Secrets: Will It Save Our Children?*, 28 SETON HALL L. REV. 963 (1998) (arguing for Establishment Clause exemption from reporting requirements for clergy).

¹³ *See* WALDFOGEL, *supra* note 10, at 126-27 (arguing for narrowing the mission of CPS to provide a range of services from “authoritative protective” – addressing the most serious cases of abuse and neglect – to screening and assessment for preventive services in cases that are poverty-related only).

¹⁴ Moreover, this Article implicitly suggests that increased interdisciplinary efforts by advocates for both children and adults can contribute immensely to decrease the burden on the child welfare system to fulfill its family preservation role, and the mandatory reporting requirement is one of the major obstacles to

should emphasize that neglect must be differentiated from conditions of poverty by including an element of volitional adult conduct or omission of a recognized parental duty to ensure for a child's health.¹⁵ The Appendix includes a proposed model rule for reporting child abuse or neglect that provides limited discretion for professionals who encounter situations that could be construed as neglect.¹⁶

I. THE EVOLVING MANDATE TO PROTECT CHILDREN

It is axiomatic that families are more than the sum of their individual members; emotional bonds, shared values and experiences, and mutual expectations for the future are the hallmarks of the family when viewed as a system.¹⁷ Yet, under

successful and harmonious interdisciplinary advocacy for families. *See infra* notes 158-176 and accompanying text.

¹⁵ The differences that exist in the effectiveness of various parenting strategies make adequate parenting a highly subjective, as opposed to measurable, phenomenon and these differences in what comprise "good enough parenting" translate into differing standards as to when neglect or abuse are identified. *See, e.g.*, MARTHA A. FIELD & VALERIE A. SANCHEZ, EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION: HAVING AND RAISING CHILDREN 242-247 (1999). No matter how "objective" the standards ostensibly are set for child protection workers to use in decisions about the resolution of any investigation into alleged abuse or neglect, the highly subjective nature of the relationship under investigation confounds the uncertainty inherent in the decision-making process. Attempts to eliminate this uncertainty likely will result in an increase in erroneous decisions. *See infra* notes 110-120 and accompanying text for further discussion of Type I and Type II errors in child protective decisions.

¹⁶ Susan E. Foster & Margaret L. Macchetto, *Providing Safe Havens: The Challenge to Family Courts in Cases of Child Abuse and Neglect by Substance-Abusing Parents*, 3 J. HEALTH CARE L. & POL'Y 44, 51 (1999) (noting that "goal of the child welfare system is to form and support safe, nurturing families for children – where possible within the biological family or, where not possible, with an adoptive family").

¹⁷ *See, e.g.*, *Smith v. Org. of Foster Fams. for Equal. and Reform*, 431 U.S. 816, 844 (1977) ("the importance of the familial relationship . . . stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of

some circumstances the responsibility to protect children does not rest entirely within the family, and the child welfare system has evolved as the mechanism entrusted to ensure the health and safety of the children in our communities.¹⁸ Public consideration about child welfare, in all of its various permutations, has been an evolving part of American society almost since the founding of our nation.¹⁹ In the Colonies, abandoned or orphaned children could be indentured to more wealthy families in a manner emulating the seventeenth century “poor laws” of England.²⁰ In the mid-1800s, the “child saver” movement initiated rescue efforts by charitable groups to provide care for the orphaned.²¹ The first official child protection agency was founded in the 1870s.²² When the

children, as well as from the fact of blood relationship”) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972)).

¹⁸ See Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified in scattered sections of 42 U.S.C.). But see *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989) (the Fourteenth Amendment’s “Due Process Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security” for children).

¹⁹ See generally STEPHEN O’CONNOR, *ORPHAN TRAINS: THE STORY OF CHARLES LORING BRACE AND THE CHILDREN HE SAVED AND FAILED* (2001) (describing efforts of early pioneer to forestall kidnapping and indentured servitude of vast numbers of American youth in 19th century through founding of Children’s Aid Society in New York); Neil A. Cohen, *Child Welfare History in the United States*, in *CHILD WELFARE: A MULTICULTURAL FOCUS* 15-27 (2d ed. 2000) (describing the evolution of public attention on child welfare beginning with the “child saving movement,” which mutated into the “child rescue movement,” and later culminated in the Child Welfare League of America). In many states, the present incarnation of the child welfare system can include such diverse programs as juvenile delinquency, child support enforcement, foster care and adoptions, and childcare, and head start programs. See, e.g., New York State Office of Children and Family Services, <http://ocfs.state.ny.us/main/> (last visited Nov. 14, 2007).

²⁰ See BRENDA SCOTT, *OUT OF CONTROL: WHO’S WATCHING OUR CHILD PROTECTIVE AGENCIES?* 21-22 (1994).

²¹ Cohen, *supra* note 19, at 20.

²² Anecdotally, the first official case of child abuse and neglect investigated by a protective group occurred in 1874. See WEXLER, *supra* note 10, at 38 (describing creation of first Society for Prevention of Cruelty to Children in New

Federal Children's Bureau was established in 1912, its purpose was to facilitate more coordinated efforts by the states to protect children and prevent their abandonment.²³ The Social Security Act of 1935 made provisions for the first federal funds directed toward encouraging the states to form specific agencies to help prevent children from being abandoned by their families.²⁴

The long evolution of the child welfare system helps to explain its broad agenda. Because of the mandate to protect the most vulnerable of their residents, the states have primary responsibility for ensuring the health and safety of all children.²⁵ To that end, the states define what constitutes child mistreatment within their jurisdiction.²⁶ Furthermore, every state has established procedures for investigating reports made about mistreatment and provides programs and supportive services that are expected to address the needs of the identified children and their families.²⁷ The states also establish the parameters for investigating reports, what services to provide to the family to assist in keeping it intact, when and under what circumstances to remove a child from her home and place her in

York City as result of intense media attention to child abused while in foster care); Richard J. Gelles & Ira Schwartz, *The Child Welfare System*, 2 U. PA. J. CONST. L. 95, 98 n.16 (1999) (noting influence of same celebrated case of child abused and neglected who was rescued from execrable foster care conditions in New York City).

²³ SCOTT, *supra* note 20, at 25.

²⁴ *Id.*

²⁵ See, e.g., N.Y. SOC. SERV. LAW § 384-b(1)(a) (McKinney 2002) ("health and safety of children is of paramount importance"); 23 PA. CONS. STAT. ANN. § 6302(b) (West 2007) (purpose of CPS is to "protect children from further abuse and to ensure the child's well-being and to preserve, stabilize . . .").

²⁶ See Geen & Tumlin, *supra* note 3, at 7. However, many decisions are "ultimately left up to caseworkers and/or their immediate supervisors. Rates of screening (the proportion of cases closed before investigation), substantiation, out-of-home placement, and family reunification could partially be explained by variances in demographic differences (e.g., poverty rate, single-parent family prevalence) in the populations served by different local child welfare offices." *Id.*

²⁷ *Id.*

foster care, when and under what circumstances to reunify the child with her family after having removed her, and when and under what circumstances to move for terminating parental rights.²⁸ In addition, every state has outlined the specific procedures a mandated reporter must follow when reporting suspected child abuse or neglect.²⁹

In most states, CPS only became an integral part of the child welfare system during the last half-century.³⁰ Almost since its inception, CPS has struggled with a mixed agenda: providing for the “welfare” of children by ensuring their health and safety, both financially and practically, and protecting children from harm and removing them from their homes when necessary.³¹

²⁸ See, e.g., CONN. GEN. STAT. ANN. § 17a-101a (West 2006); CONN. GEN. STAT. ANN. § 17a-101b(a), (c)-(d) (West 2006); CONN. GEN. STAT. ANN. § 17a-101c (West 2006); CONN. GEN. STAT. ANN. § 17a-101d (West 2006); CONN. GEN. STAT. ANN. § 17a-103(a) (West 2006); DEL. CODE ANN. tit. 16, § 904 (2003); DEL. CODE ANN. tit. 16, § 905(a), (c), (d) (2003); DEL. CODE ANN. tit. 16, § 906(a), (b)(1)-(4), (13), (15) (2003); D.C. CODE ANN. § 2-1352 (LexisNexis 2001); D.C. CODE ANN. § 2-1353 (LexisNexis 2001); MD. CODE ANN. FAM. LAW § 5-704 (LexisNexis 2006); MD. CODE ANN. FAM. LAW § 5-705(a)(1) (LexisNexis 2006); MASS. GEN. LAWS ANN. ch. 119, § 51A (West 2003); MASS. GEN. LAWS ANN. ch. 119, § 51B(1), (4), (9), (10) (West 2003); N.J. STAT. ANN. § 9:6-8.10a(e) (West 2002); N.J. STAT. ANN. § 9:6-8.11 (West 2002); N.Y. SOC. SERV. LAWS § 413(1) (McKinney 2003); N.Y. SOC. SERV. LAWS § 415 (McKinney 2003); N.Y. SOC. SERV. LAWS § 416 (McKinney 2003); 23 PA. CONS. STAT. ANN. § 6311(a), (c) (West 2001); 23 PA. CONS. STAT. ANN. § 6313 (West 2001); VA. CODE ANN. § 16.1-283 (West 2007); VA. CODE ANN. § 63.1-248.3(A) (West 2007); VA. CODE ANN. § 63.1-248.4 (West 2007).

²⁹ See, e.g., 49 PA. CODE §§ 47.52 (c)-(d) (2007).

³⁰ The Social Security Act of 1935 established many of the welfare policies and programs that prevail today. See MARTIN GILENS, WHY AMERICANS HATE WELFARE 18 (1999); DAVID KELLEY, A LIFE OF ONE'S OWN: INDIVIDUAL RIGHTS AND THE WELFARE STATE 4 (1998). With this legislation, the government provided for the first time federal funding for child welfare services in all states “for the purpose of establishing, extending, and strengthening public personal services for children, particularly in rural areas. The services provided for were the protection and care of homeless, dependent, and neglected children, as well as children in danger of becoming delinquent.” Cohen, *supra* note 19, at 26.

³¹ Insoo Kim Berg, *Foreword* to ANDREW TURNELL & STEVE EDWARDS, SIGNS OF SAFETY: A SOLUTION AND SAFETY ORIENTED APPROACH TO CHILD PROTECTION, at vii, vii (1999).

At least one commentator has noted that the mandate to protect children and preserve families causes significant tension within CPS because “[p]rotecting children whose families are suspected as the perpetrators appears to conflict with providing the family with autonomy.”³² As the Supreme Court has declared, a home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . . . The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to . . . raise a family are of a similar order and magnitude as the fundamental rights specifically protected.³³

Because of the autonomy and privacy rights traditionally afforded to the familial unit,³⁴ the CPS mission becomes a balancing act between interfering with a parent’s right to raise her child and its obligation to protect vulnerable children. Although these “distinct and competing purposes”³⁵ may often raise the same public concerns and necessitate the same services to both children and their families, sometimes protecting a child’s safety can be at odds with providing for the child’s welfare. In such a case, the process may, perhaps unwittingly, disintegrate the child’s family life.³⁶

³² Fields, *supra* note 2, at 247.

³³ *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J. concurring) (quoting *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting)).

³⁴ *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 34 (1981).

³⁵ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978).

³⁶ Public cash assistance for children is the classic example of these mixed agendas imposing potentially conflicting obligations on a family. *See* Jennifer Ehrle et al., *Welfare Reform and Opportunities for Collaboration Between Welfare And Child Welfare Agencies* 1 (Urban Inst., Occasional Paper No. 53, 2001), available at <http://www.urban.org/uploadedPDF/occa53.pdf>. Public benefits for the poor originated during the late 19th century “as a response to the new problems and opportunities created by industrialization and economic growth.” GILENS, *supra* note 30, at 13.

Until the mid-1960s, identification by CPS agencies of children suffering from mistreatment by their families was a haphazard project.³⁷ In 1962, the medical profession first recognized a “battered child syndrome,”³⁸ and the Children’s Bureau developed a model statute “requiring certain types of persons to report known cases of child abuse and neglect to social services agencies.”³⁹ Soon thereafter, every state adopted a mandatory reporting requirement for certain professionals who interacted routinely with children.⁴⁰ These reports are channeled to the CPS agencies who then investigate the

Industrialization effectively destroyed the prior agrarian economy, and public “welfare” was used as a means to sustain the nation’s unemployed as the country transitioned to an industrial economy. Later, the Social Security Act was part of New Deal efforts to assist families to survive the pernicious effects of the depression. Along with a host of other social improvement programs, under the Aid to Dependent Children program, cash “welfare” benefits were given for the first time to poor families with children. *Id.* at 18. Providing financial assistance to indigent families with children has remained at the core of welfare programs ever since. Even under its current incarnation of Temporary Assistance to Needy Families (“TANF”), cash welfare benefits are provided for the needy child, with the caretaker getting only ancillary financial support. If the child and the caretaker separate, the TANF benefits go with the child. *See WELFARE REFORM: THE NEXT ACT*, at xi, xxi (Alan Weil & Kenneth Finegold, eds., 2002) (noting child-only cash welfare cases are those living with nonparent caregivers). This can lead to a situation where the welfare of the child may be in direct conflict with CPS guidelines because only families in financial need qualify for TANF. If the family’s hardships demonstrate sufficient need, the welfare eligibility workers may be compelled to report this to the CPS agency, which may respond by removing the child from the home. *See Morgan B. Ward Doran & Dorothy E. Roberts, Welfare Reform and Families in the Child Welfare System*, 61 MD. L. REV. 386, 410-11 (2002). When this happens, the TANF benefits likely will cease for the family unless there are other children who remain in the home.

³⁷ *See* Gail L. Zellman & C. Christine Fair, *Preventing and Reporting Abuse*, in *THE APSAC HANDBOOK OF CHILD MALTREATMENT* 449, 450 (John E. B. Myers et al. eds., 2d. ed. 2002).

³⁸ *See id.* (identifying battered child syndrome as “a ‘disease’ that could afflict anyone”).

³⁹ *Id.*

⁴⁰ *Id.*

allegations.⁴¹ With implementation of mandatory reporting requirements, the states finally had earnestly begun to concentrate efforts to protect more children from mistreatment in their homes by increasing the likelihood that these children would be identified by the professionals treating children for physical injuries.⁴² At the time, however, child mistreatment was considered a rare phenomenon. Moreover, there was no expectation that “the reporting laws would become the driving force for the expansion of child welfare.”⁴³

Prior to the mid-1960s, reported incidents of child mistreatment were in the thousands annually.⁴⁴ Immediately after mandatory reporting laws became the norm in most states, the incidence of reported abuse and neglect began its steady climb.⁴⁵ In 1973, Senator Walter Mondale of Minnesota proposed legislation that expanded the definition of what circumstances amount to child mistreatment as well as which professionals qualified as mandated reporters.⁴⁶ Concurrently, the Child Abuse Prevention and Treatment Act⁴⁷ (“CAPTA”) established the National Center on Child Abuse and Neglect and

⁴¹ *Id.*

⁴² California was the first to pass a child abuse reporting requirement for physicians. SCOTT, *supra* note 20, at 25. Following California’s lead, within five years every state had a mandatory reporting requirement for specified professionals. *Id.*; Zellman & Fair, *supra* note 37, at 450-51.

⁴³ *Id.* at 450.

⁴⁴ *Id.* at 471 n.2; DOUGLAS J. BESHAROV, RECOGNIZING CHILD ABUSE: A GUIDE FOR THE CONCERNED 9 (1990) (noting that during 1963, “150,000 children came to the attention of public authorities because of suspected abuse or neglect. By 1976, an estimated 669,000 children were reported annually.”).

⁴⁵ See WALDFOGEL, *supra* note 10, at 30-31; Zellman & Fair, *supra* note 37, at 450.

⁴⁶ By 1974, all states required physicians to report suspected child abuse and neglect; half the states also required social workers to report; only 9 states required police officers to report their suspicions. See Zellman & Fair, *supra* note 37, at 451.

⁴⁷ Pub. L. No. 93-247, 88 Stat. 5 (1974) (codified as amended at 42 U.S.C. §§ 5101-5107).

provided financial incentives for states to improve their investigation capacities and provide more supportive services for parents upon identification of child mistreatment.⁴⁸ In addition, as a condition of the federal funding, states were required to have mandatory reporting requirements and to develop a specialized agency like the CPS to investigate reports and assure treatment availability for the child and her family.⁴⁹ In the years immediately after CAPTA was enacted in 1974, the incidence of reported child abuse or neglect increased dramatically.⁵⁰ Incidence rates have increased annually, and by 1996 more than three million incidents of abuse or neglect were being reported each year, representing nearly a 400% increase over the past twenty year span.⁵¹

To respond to the dramatic increase in reports of suspected child abuse and neglect since the mid-1960s, as a whole, the child welfare system has evolved more as a policing mechanism than as a helping one.⁵² It is time to reconsider whether total reliance on an overburdened and under-resourced investigative and quasi-prosecutorial system like CPS is effectively fulfilling the community's responsibility for its children.⁵³ In the zeal for protecting every child, reports of suspected mistreatment are sometimes made when they should not be. All the while, some that should have been made were not.⁵⁴ Ensuring children's

⁴⁸ See WALDFOGEL, *supra* note 10, at 30-31; Zellman & Fair, *supra* note 37, at 451.

⁴⁹ WALDFOGEL, *supra* note 10, at 31.

⁵⁰ See Zellman & Fair, *supra* note 37, at 451 (noting increase of 225% of reported cases between 1976 and 1987; by 1993, the increase was nearly 400% over pre-CAPTA figures).

⁵¹ *Id.*

⁵² See Ward Doran & Roberts, *supra* note 36, at 390.

⁵³ See, e.g., GARY B. MELTON & FRANK D. BARRY EDS., PROTECTING CHILDREN FROM ABUSE AND NEGLECT: FOUNDATIONS FOR A NEW NATIONAL STRATEGY (1994); ANDREW TURNELL & STEVE EDWARDS, SIGNS OF SAFETY: A SOLUTION AND SAFETY ORIENTED APPROACH TO CHILD PROTECTION (1999).

⁵⁴ See, e.g., Besharov, *supra* note 10, at 165; WALDFOGEL, *supra* note 10, at 208.

welfare and enforcing the child protection mandate sometimes can lead to antithetic efforts. Moreover, role identity issues stemming from the conflict between the agency's police powers and its obligations to provide supportive services can make decisions about families highly complex and permeated with confounding interests.⁵⁵

In the process of fulfilling its protective obligations for vulnerable children, at times, the CPS makes adversaries of parent and child by assuming that their interests diverge dramatically.⁵⁶ In addition, over the past two decades, CPS agencies have experienced a myriad of adverse forces that have left many in an almost permanent state of crisis,⁵⁷ with ever expanding responsibilities that include both protecting children and providing more supportive services to families. This marks a confluence of events that has made ensuring the safety of vulnerable children increasingly more difficult.⁵⁸ According to some researchers, as many as half of the children now in foster care originated in families eligible for welfare; more than half of all reported incidents of child abuse or neglect occur in welfare

⁵⁵ See WALDFOGEL, *supra* note 10, at 78-81 (detailing assumptions underlying most CPS decision-making and the balance between individual and family autonomy with the safety of children).

⁵⁶ Once engaged with the system, children may be represented by an advocate (e.g., attorney, guardian, or a court appointed special advocate); parents may have their own legal representative (either hired directly or court appointed); the CPS (representing the community) adds a third. See 42 U.S.C. §§ 5106a(b)(6), 5106c(b)(1) (1999) (requiring as a condition of receiving federal funds that states provide independent representation to children in abuse or neglect cases that result in judicial proceedings); N.Y. FAM. CT. LAW § 262 (McKinney 2006); 23 PA. CONS. STAT. § 2313(A.1) (court may appoint counsel if the parent demonstrates an inability to pay).

⁵⁷ See Malm et al., *supra* note 8, at 2-5 (discussing crisis-oriented system driven by knee-jerk responses to criticism, frequent changes in leadership, and caseworker overload/burnout).

⁵⁸ With the economic recession of the early 1990s, and with increased substance abuse and the rise in single and teen parenting, more families came to the attention of CPS. While funding for CPS has increased substantially over the years, other resources generally have not expanded to meet the demand for services. "As needs have grown and the problems families face have become more severe, many of the services necessary to assist these families have been lacking." Geen & Tumlin, *supra* note 3, at 2.

families.⁵⁹ Increasing the burdens on an already severely overtaxed system appears destined to have disastrous consequences for our nation's most vulnerable children.⁶⁰

Because the overall traditional mission of the child welfare system is to ensure the health and safety of children, literature and research concerning CPS agencies purposes or outcomes, have had a narrow focus. Generally, these materials lack information on the needs of the adult caregivers whose past and future behavior is at the core of any CPS intervention.⁶¹

⁵⁹ The public cash assistance programs and the child welfare system may overlap substantially. See, e.g., Ward Doran & Roberts, *supra* note 36, at 387 (both systems “share overlapping histories, philosophies, and client populations”). Research suggests that “close to half of all identified incidents of child maltreatment occur in families receiving welfare and ‘the great majority’ of these families have received welfare at some point.” Kristen Shook, *Does the Loss of Welfare Income Increase the Risk of Involvement in the Child Welfare System?*, 21 CHILDREN & YOUTH SERVS. REV. 781, 781-82 (1999) (quoting Leroy H. Pelton, *The Role of Material Factors in Child Abuse and Neglect*, in PROTECTING CHILDREN FROM ABUSE AND NEGLECT 131, 167 (Gary B. Melton & Frank D. Barry eds., 1994)).

⁶⁰ See, e.g., Ward Doran & Roberts, *supra* note 36, at 410-11 (noting that children in families receiving welfare “are at the greatest risk for involvement with the child welfare system due to the extreme poverty among this population”); Daan Braveman & Sarah Ramsey, *When Welfare Ends: Removing Children from the Home for Poverty Alone*, 70 TEMP. L. REV. 447, 468-69 (1997) (noting that parents are “expected to provide the level of care the state requires without state aid. If the parent fails to do so, the state can remove the children, even though foster care costs more than providing a service that would enable the children to stay home. Similarly, if a family has exceeded [welfare] time limits . . . states may remove children from impoverished families rather than provide the level of financial support necessary to keep the family intact.”).

⁶¹ See, e.g., Ward Doran & Roberts, *supra* note 36, at 388, 402-05 (arguing that the purpose of the child welfare system is to “fix” parental deficits “rather than [to address] the systemic causes of child maltreatment”). Research usually focuses on the Due Process rights of adults while neglecting their supportive or therapeutic needs; this focus results in inadvertent neglect of children's needs. See also Sarah H. Ramsey, *Children in Poverty: Reconciling Children's Interests with Child Protective and Welfare Policies A Response to Ward Doran and Roberts*, 61 MD. L. REV. 437, 452 (2002) (“To paint the welfare and child welfare systems in their worst light, both systems place all responsibility and focus all attention on parents. If parents fail to become self-sufficient . . . or fail to comply . . . they are no longer to receive assistance; their children, if necessary, will be placed in foster care. If the parents further fail to correct the problems that led to placement within the

Although concern about the child usually triggers CPS attention initially, it almost always is the adult's behavior that will be scrutinized most heavily and evaluated in the hopes of changing it.⁶² Adults involved with CPS generally exhibit prevalent and recurring problems resulting from inadequate parenting skills, underdeveloped or underutilized social connections, as well as from the pervasive adverse effects of poverty, substance abuse, psychological difficulties, and troubled family backgrounds of their own, including ongoing domestic violence and incidents of child abuse or neglect in their own childhood.⁶³ Because of the autonomy and privacy rights traditionally afforded to the family, the CPS must make a reasoned choice between interfering with the right of a parent who may be experiencing temporary difficulties and its obligation to protect children from abuse or neglect. This tension is at the heart of the mixed agenda that underscores every decision made regarding interactions with families reported to CPS.

ASFA time limits, their rights will be terminated and their children placed for adoption, shifting the responsibility for the children to new parents.”); Amy Sinden, “*Why Won't Mom Cooperate?: A Critique of Informality in Child Welfare Proceedings*,” 11 YALE J.L. & FEMINISM 339, 347-49 (1999) (detailing procedural rights afforded adults in CPS proceedings). It is perhaps less costly to remedy the procedural issues than the more substantive problems associated with poverty.

⁶² While funding and services may have remained stable for foster care, adoptive parent recruitment, and investigation and enforcement efforts – all necessary resources for the protection and safety of the child--there has been little funding (or actual resources) dedicated to something seemingly as elementary as in-patient mental health or substance abuse facilities that could accommodate a mother and her child. See Foster & Macchetto, *supra* note 16, at 54-55. Moreover, supervision of foster care placements has decreased over the years due to the privatization of this component of CPS and the excessive workloads of caseworkers, which in some cases translates into a deplorable lack of attention on the psychological and physical well-being of the placed child. See Richard P. Barth, *Foster Family Care: Before, During, and Beyond*, in 2 CHILD WELFARE RESEARCH REVIEW 151, 154 (Richard Barth et al. eds., 1997) (explaining that children in large foster homes “have little likelihood of achieving maximum educational or emotional benefits” and are “more vulnerable to abuse by other children in the homes”).

⁶³ See, e.g., BARTHOLET, NOBODY'S CHILDREN, *supra* note 11, at 226-27 (noting that parents who maltreat children often are victims of childhood abuse or neglect themselves).

A. CPS'S MIXED AGENDA IN ACTION

Today, there is a greater chance than ever that once removed from their homes, children will never be reunited with their families. Erroneous removals, therefore, can be very damaging for a child.⁶⁴ Since passage of the Adoption and Safe Families Act⁶⁵ ("ASFA"), after a child is removed from her home, her parents generally have only twelve months to make progress toward remediating whatever circumstances prompted the CPS intervention.⁶⁶ This is a very brief window of opportunity for adults to correct many behavioral and circumstantial problems that may have been developing over an entire lifetime.⁶⁷ A host of supportive services ought to be available to parents to assist them in making the changes necessary to preserve their families. Under the best of circumstances, these services would be readily available and parents could quickly engage in making the changes that the law requires them to make within one year. Unfortunately, for a variety of reasons, often totally beyond their control, many parents have inordinate, and, frequently, insurmountable difficulties accessing these services on their own.⁶⁸ According to some of its critics, ASFA was designed to make the health and safety of children of paramount concern. The law, however, has managed to overlook some of the systemic problems in the child welfare system. It fails to address problems with state child welfare authorities, the court system, ASFA's interaction with other laws, and the lack of services available to children and their families, and it has misplaced

⁶⁴ See JOHN W. PEARCE & TERRY D. PEZZOT-PEARCE, *PSYCHOTHERAPY OF ABUSED AND NEGLECTED CHILDREN* 133-35 (1st ed.1997) (describing difficulties children may experience on reunion with separated parent).

⁶⁵ Adoption & Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

⁶⁶ 42 U.S.C. § 675(5)(C) (requiring permanency hearing no later than 12 months after child enters foster care placement).

⁶⁷ See Ward Doran & Roberts, *supra* note 36, at 402-05.

⁶⁸ *Id.* at 425-33.

priorities by offering states adoption bonuses rather than focusing on the possibility of family reunification.⁶⁹

Passage of ASFA reflected a modification in child welfare policy that created a preference for adoption of children whose parents are unwilling or unable to provide adequate parenting. This “marks a departure in articulated federal child welfare policy from family preservation to adoption.”⁷⁰ As a result, ASFA has created additional crises for families, as well as for CPS agencies, making it more crucial than ever that sensible alternatives to the removal of children are available and that assiduous efforts to preserve families are accomplished. To a disproportionate degree, the parents and children who become involved with CPS are from low-income families.⁷¹ The family’s poverty has significant implications for how families are affected by their relations with the child welfare system and may influence the type and range of supportive services provided. Moreover, because the majority of CPS cases involve neglect, rather than abuse, the correlation between poverty as the

⁶⁹ Jim Moye & Roberta Rinker, *It’s a Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?*, 39 HARV. J. ON LEGIS. 375, 394 (2002).

⁷⁰ Annette R. Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 729 (2001).

⁷¹ See Shook, *supra* note 59, at 781-82. See generally DUNCAN LINDSEY, THE WELFARE OF CHILDREN 4 (1994) (families in poverty “are, in overwhelming numbers, relying on the child welfare system for help”); PETER J. PECORA ET AL., THE CHILD WELFARE CHALLENGE: POLICY, PRACTICE, AND RESEARCH 66-67 (1st ed., 1992); Martha Zaslow et al., *How Are Children Faring Under Welfare Reform?*, in WELFARE REFORM: THE NEXT ACT 79, 86 (Alan Weil & Kenneth Finegold eds., 2002) (noting that “[w]elfare receipt and child poverty are both strongly related to child maltreatment.”); Leroy H. Pelton, *Welfare Discrimination and Child Welfare*, 60 OHIO ST. L.J. 1479, 1484 (1999) (“material hardship – and the severity of that hardship – is strongly related to child abuse and neglect is extremely well-documented”); Elizabeth D. Jones & Karen McCurdy, *The Links Between Types of Maltreatment and Demographic Characteristics of Children*, 16 CHILD ABUSE & NEGLECT 201, 213 (1992) (finding “strong connection between neglect, poverty status and female-headed households”). But see WILLIAM M. EPSTEIN, CHILDREN WHO COULD HAVE BEEN: THE LEGACY OF CHILD WELFARE IN WEALTHY AMERICA 37 (1999) (arguing that “the nature of the relationship between poverty and child welfare placements remains elusive”).

underlying predicate for CPS involvement is significant for understanding some of the resistance to modifying the mandatory reporting requirements. Specifically, it should be the goal of any reform efforts to reduce the number of neglect cases that are improperly reported because their remedy requires alleviation of the family's poverty, not just removing the child from the home. The key, of course, is to reduce the improper, borderline reports primarily based on a family's poverty without jeopardizing any child who may remain at risk of actual abuse.⁷²

The daunting task of maintaining family autonomy is complicated by the demographics of the population of families who generally become involved with CPS. Most of the adults are young, single mothers who are in jeopardy of involuntarily relinquishing custody of their children primarily because they have developed few of the necessary skills to deal successfully with the typical stressors confronting low-income families.⁷³ Many suffer from health-related problems, such as mental illness, addiction, HIV, AIDS, and other significant medical conditions that can affect their ability to adequately parent their children.⁷⁴ To compound these dynamic and adverse factors, a majority of these adults experienced physical and/or emotional abuse by their own parents.⁷⁵ Consequently, although most

⁷² See *infra* notes 109-134 and accompanying text.

⁷³ Research shows that CPS-involved families are primarily between the ages of 16 and 34, and single females. "Every day of every year, children are separated from their parents amid allegations of abuse or neglect and placed in foster care. The primary caretaker in these families is usually the mother. Also, single parent households appear to be over-represented in the child dependency system in various communities, and single parents are much more frequently women." Lori Klein, *Doing What's Right: Providing Culturally Competent Reunification Services*, 12 BERKELEY WOMEN'S L.J. 20, 20 (1997).

⁷⁴ See Ward Doran & Roberts, *supra* note 36, at 387 (noting that indigent families experience "a number of adverse life events . . . which make them more vulnerable to charges of child maltreatment").

⁷⁵ See, e.g., Richard C. Boldt, *Evaluating Histories of Substance Abuse in Cases Involving the Termination of Parental Rights*, 3 J. HEALTH CARE L. & POL'Y 135, 146-47 (noting that addicted women are more likely to abuse substances "in response to a specific traumatic event, including incest and rape, or other instances of sexual or physical abuse"); Sandra L. Bloom, THE PVS DISASTER: POVERTY, VIOLENCE AND SUBSTANCE ABUSE IN THE LIVES OF WOMEN

desperately want to be good parents for their children,⁷⁶ they simply do not know how because they have never experienced effective parenting themselves. Removing their children, however, is no guarantee that the children will find good homes. All too many of the children removed from their own homes are shuffled among relatives or foster homes, never finding another permanent place to live.⁷⁷ Despite the seriousness and complexity of these issues, these are among the various intangibles that ASFA expects a parent to have resolved within one year. If they are incapable of doing so, they face potential termination of their parental rights.

Furthermore, because CPS purports to ensure the health and well-being of all children, it is important that children identified as needing some protection are provided the most systemically coordinated services. The objective of ensuring the appropriate and necessary services to assist the family in regaining stability has, unfortunately, recently taken a back seat to the enforcement of the police powers of the CPS agencies.⁷⁸ CPS

has focused on rehabilitation of the parents, a focus that is in compliance with federal and state law preferences for family preservation . . . [and] “fixing” the parents is the goal reflected in the typical boilerplate approach to the provision of services for neglectful parents. Often missing from this approach are services for neglected children aimed at treating the harm caused by neglect and

AND CHILDREN 73-75 (2001), available at <http://www.sanctuaryweb.com/Documents/Downloads/WLP%20&%20PVS/PVS%20Final.pdf>.

⁷⁶ See Ward Doran & Roberts, *supra* note 36, at 431-33. *Contra* Gelles & Schwartz, *supra* note 22, at 103-05 (arguing that notion that parents want to change their behavior is “countered” by “research that demonstrates that people in general, including abusive and neglectful parents, are difficult to change.”).

⁷⁷ See ROBERTS, *supra* note 11, at 19 (noting that after “[b]lack children enter the foster care system, they remain there longer, are moved more often, and receive less desirable placements than white children.”); BARTHOLET, NOBODY’S CHILDREN, *supra* note 11, at 85 (explaining that “many children in kin and nonkin foster care continue to bounce from home to home.”).

⁷⁸ See SUSAN G. MEZEY, PITIFUL PLAINTIFFS: CHILD WELFARE LITIGATION AND THE FEDERAL COURTS 32-34 (2000).

preventing further harm. Most neglectful parents require long-term services to make any substantial changes in their parenting abilities. In the meantime, the development of the children lies at the mercy of interventions that fail to directly address these treatment needs.⁷⁹

After a report of suspected child abuse or neglect is made, either anonymously or by a mandated reporter, a social worker from CPS makes an initial determination whether the information provided in the report is sufficient to warrant further investigation. Most reports are screened out at this initial stage.⁸⁰ If the CPS worker decides to investigate, the next step is a visit by a CPS investigator to the home where the parent, child, and any other adults who live in the household are interviewed.⁸¹ Based on the results of this investigation, the next phase involves a determination whether there has actually been abuse or neglect. If abuse or neglect is “substantiated,”⁸² either the family begins CPS supervision while the child remains in the home, or if there is risk of danger to the child, then the child is removed from the family and placed in foster care.⁸³ Removal can be voluntary or involuntary; unless there is imminent danger to the child, in which case CPS will move for

⁷⁹ Janet Weinstein & Ricardo Weinstein, *Before It's Too Late: Neuropsychological Consequences of Child Neglect and Their Implications for Law and Social Policy*, 33 U. MICH. J.L. REFORM 561, 563-64 (2000).

⁸⁰ See Zellman & Fair, *supra* note 37, at 463.

⁸¹ The CPS worker may go to the school to interview a school-age child and may also talk to school personnel, medical providers, neighbors or others who have relevant information. Sinden, *supra* note 61, at 344-45.

⁸² “Substantiated” means that there is some credible evidence to show that abuse or neglect has occurred. See Zellman & Fair, *supra* note 37, at 465. Although the terminology varies by jurisdiction, the meaning of the terms “substantiated,” “founded,” and “indicated” is substantially the same. See Besharov, *supra* note 10, at 179.

⁸³ CPS can pursue court intervention if the parent refuses to allow CPS to conduct its investigation; a court may compel cooperation. If, after determining that there is need for CPS supervision, the parent refuses to comply or to follow the plan devised by CPS, CPS again may seek court-ordered supervision of the family. See Sinden, *supra* note 61, at 344-45.

immediate removal on an emergency basis.⁸⁴ If abuse or neglect is “unsubstantiated,” however, the case will likely be closed in the CPS system.⁸⁵

Typically, when a child is removed by CPS, she is placed in a different home with a foster care family or a relative, and then efforts are directed at correcting the behavior of the child’s caretaker which contributed to the abuse or neglect.⁸⁶ Only after the adult’s behavior is modified, will a child be reunified with her family. Numerous commentators have remarked that “the universal opinion is that the system is broken and that something needs to be done to fix it. However, most people have no comprehensive ideas on how to ‘fix’ the problem and any discussion on the subject generally deteriorates into complaints about everybody else.”⁸⁷ The “fix” may include many things, but certainly it must include re-establishing the primacy of the family system.⁸⁸ Such a goal cannot be accomplished when the attention of CPS is focused on the child to the exclusion of all else that can be remedied within the family and its environment.⁸⁹ Of all of the possible shortcomings of the

⁸⁴ *Id.*

⁸⁵ See Zellman & Fair, *supra* note 37, at 466-67.

⁸⁶ See Deborah Daro & Anne C. Donnelly, *Child Abuse Prevention: Accomplishments and Challenges*, in THE APSAC HANDBOOK ON CHILD MALTREATMENT 431, 433 (John E.B. Myers et al. eds., 2d ed. 2002) (“[T]he most prevalent and best-researched methods to prevent child abuse have been efforts to enhance parental capacity.”).

⁸⁷ BERG & KELLY, *supra* note 8, at 3.

⁸⁸ Part of the “Contract with America” platform espoused by the Republicans in 1994 called for increased government attention on promoting marriage and discouraging illegitimacy. See SANFORD F. SCHRAM, AFTER WELFARE: THE CULTURE OF POSTINDUSTRIAL SOCIAL POLICY 33 (2000) (noting that the policies engendered in Republican reforms were “premised on the idea that ‘marriage is the foundation of a successful society’”); Ward Doran & Roberts, *supra* note 36, at 387-88 (citing welfare reform efforts evolving from Contract’s platform are combination of work requirements and sanctions “designed to deter” illegitimate births and to encourage marriage).

⁸⁹ Professor Elizabeth Bartholet, a longstanding champion of interracial adoption, expresses ennuï about the challenges inherent in trying to rehabilitate the “family” when substance abuse is an issue. See BARTHOLET, NOBODY’S CHILDREN, *supra* note 11, at 67-81. Left unexpressed by Bartholet’s

system, failure to provide children with appropriate services is the most reprehensible because such a failure is a complete abrogation of CPS's obligations to protect children who are under their aegis and to ensure their well-being.⁹⁰ Without assistance to the entire family, many families will have to deal with the ultimate removal of their children from their homes and perhaps eventually the termination of their parental

indefatigable enthusiasm for adoption is her sense of defeat over the intransigence of substance abuse behavior. Substance abuse is acknowledged as the most prevalent factor of family involvement with CPS. Research shows that between 50% and 70% of all cases of abuse and neglect have at least some connection to substance abuse behavior by adults. *See* NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE, NO SAFE HAVEN, CHILDREN OF SUBSTANCE-ABUSING PARENTS 166 (1999) (concluding that the "estimate that 70 percent of the child welfare caseload is substance-involved is a fair characterization of the landscape of child welfare spending") [hereinafter CASA, NO SAFE HAVEN]. *See also* Foster & Macchetto, *supra* note 16, at 46 (noting that "children whose parents were abusing substances were almost three times (2.7) likelier to be abused and more than four times (4.2) likelier to be neglected"). The silent accomplice in the lives of most substance abusing women, however, is a history of trauma. *See* Bloom, *supra* note 75, at 69-73. The complex interactions between trauma and substance abuse in women are only recently being explored. *See id.* Professor Bartholet understandably deplores the recurring (or long-term) "foster" placement, but her remedy of earlier adoption would do nothing about breaking the cycle of abuse or neglect in the child's family of origin. Because substance abuse plays a prominent role in abuse and neglect cases, and because she anticipates no successful rehabilitation of the substance abusing adult, Professor Bartholet believes (as perhaps did the authors of ASFA) that CPS should move children directly to adoption to secure "permanent parents who can give them the kind of love, attention, and on-going commitment that enables human beings to thrive." BARTHOLET, NOBODY'S CHILDREN, *supra* note 11, at 29. The rationale that adult substance abuse is irremediable also informs the advocacy of Richard Gelles, Ph.D., one of the architects of the ASFA provisions for time-limited efforts at family reunification. *See generally* RICHARD J. GELLES, THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES (1996); Gelles & Schwartz, *supra* note 22, at 99, 103-04 (arguing that parents do not want to change their abusive or neglectful behavior).

⁹⁰ Foster & Macchetto, *supra* note 16, at 51-52 (stating "Although we know that children who suffer maltreatment at the hands of substance-abusing parents are at high risk for later problems, from substance abuse to suicide attempts, few resources are devoted to helping these children with counseling and support services when child welfare systems have identified them.").

rights.⁹¹ By facilitating timely access to health care, establishing eligibility for public benefits, providing high school equivalency or parenting classes, following up with treatment at mental health or substance abuse facilities, locating a supportive network of self-help or twelve-step programs or domestic violence shelters, or establishing and maintaining adequate housing or other basic necessities like beds and clothes for the children, CPS may be able to prevent removal or aid unification so that the familial unit can remain intact.⁹²

B. SUBSTANTIATION RATES AND THEIR RAMIFICATIONS

There is little disagreement that incidence rates for physical and sexual abuse account for less than half of all reported and substantiated cases.⁹³ There remains some controversy,

⁹¹ According to the National Center on Addiction and Substance Abuse at Columbia University, an overwhelming majority of responding CPS agencies reported that “what treatment is ‘available’ determines what treatment is ‘appropriate’ for the parent [T]he type of treatment provided to parents through the child welfare system is determined almost exclusively by what is available at the moment, rather than a careful assessment of need.” CASA, NO SAFE HAVEN, *supra* note 89, at 2.

⁹² *Id.*

⁹³ See Olivia Golden, *The Federal Response to Child Abuse and Neglect*, 55 AM. PSYCHOL. 1050, 1050 (2000) (stating that “more than 50% of all victims suffered neglect, and almost 25% suffered physical abuse. Nearly 12% of the victims were sexually abused. Victims of psychological abuse, medical neglect, and other types of maltreatment accounted for 6% or less each.”). Although the aggregate data originated from the states, the tallies can be somewhat misleading because the Children’s Bureau, the focal point of the federal agency that monitors this data, uses the definition of abuse and neglect in the Child Abuse Prevention Treatment Act of 1996, Pub. L. No. 104-235 (1996). See 42 U.S.C. § 5106g (2007) (defining child abuse and neglect as “any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm”). The states have their own definitions for abuse and neglect, some of which may differ from the federal statutory definition. See, e.g., N.Y. FAM. CT. LAW § 1012(f) (McKinney 2006) (defining an abused child as one whose parent or legally responsible adult inflicts or allows to be inflicted physical injury on the child “by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ;” defining neglected child as one “whose physical, mental or emotional condition

however, over whether the actual incidence of neglect is properly assessed.⁹⁴ Research suggests that most neglect cases brought against parents are the direct result of poverty related circumstances. These circumstances include inadequate housing, utility shut-offs, and the lack of health insurance coverage for children who need medical care.⁹⁵ Many of the parents at risk of having their children removed from their homes are in situations where, with assertive and timely assistance, they often can become adequate caregivers and provide safe and nurturing homes for their children. However, accomplishing this objective requires paying close attention to the wide range of evolving needs presented by each parent, including deficiencies in housing, income, health care, and addiction issues, as well as promoting the development of appropriate social skills and effective parenting techniques.

Regretfully, deficiencies in basic parenting skills can lead to the neglect of children and the dissolution or fragmentation of

has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . in supplying the child with adequate food, clothing, shelter or education"); 23 PA. CONS. STAT. ANN. § 6303 (defining abuse as "a recent act or failure to act . . . which causes nonaccidental serious physical injury" or imminent injury to a child; defining neglect as "prolonged or repeated lack of supervision or the failure to provide essentials of life, including adequate medical care, which endangers a child's life or development or impairs the child's functioning"). The federal definition is almost tautological and appears to be more global in its reach than many state child abuse and neglect laws. See 42 U.S.C. § 5106g.

⁹⁴ See Elizabeth Bartholet, *Whose Children? A Response to Professor Guggenheim*, 113 HARV. L. REV. 1999, 2002-03 (2000) (commenting that "we must take seriously the neglect cases that family preservation advocates treat as marginal, and . . . we should not buy into their claim that the only cases worthy of child welfare agencies' attention are the abuse and safety cases") (reviewing Guggenheim, *supra* note 9).

⁹⁵ See Besharov, *supra* note 10, at 183-86 (noting a "clear relationship between maltreatment and poverty" and even greater for welfare families); WALDFOGEL, *supra* note 10, at 125 (explaining that many of the low-risk reported cases are poverty-related, such as "inadequate housing or inappropriate child care arrangements while a parent works"); Ward Doran & Roberts, *supra* note 36, at 405 (citing neglect as the most common form of child maltreatment and "neglect is difficult to disentangle from poverty" conditions such as environmental problems, inadequate supervision, shelter, clothing or food).

familial units. If serious enough, neglect can lead to the removal of children from their homes, a terrible disruption in the child's development and a major trauma to everyone in the family. Most parents involved with CPS are in constant fear of losing custody of their children.⁹⁶ Very often, when the full story is comprehended, it is not at all unusual to discover that the events leading up to the mistreatment of the child are intricately entwined with the daily circumstances of the family's poverty.⁹⁷

It is incumbent upon society to shore up whatever fragile bonds may already exist so that families can develop ways to deal with poverty without having their lives further fractured by government interference. Resolution of most child mistreatment, therefore, should involve ameliorating a number of social and economic hardships that may exist independent of any parenting problems or issues with a family's dynamics.⁹⁸ Without adequate supports to remedy at least some of the socioeconomic pressures they confront routinely, most parents involved with CPS face the daunting challenge of modifying their behavior without the luxury of modifying their family's environment. The pressures of an inhospitable environment may interfere with any positive behavioral changes made as a result of the original interventions.

Given the proper support, many parents and children should not have to be separated and hence, should not have to endure the trauma that separation can impose on everyone in the family. Without this support, however, many will not be able to access the appropriate services, their efforts to make timely changes will be thwarted, and many families will be unnecessarily destroyed. The most frustrating experience for

⁹⁶ See Ward Doran & Roberts, *supra* note 36, at 389 (stating that "threats of child removal and termination of parental rights are used to rehabilitate parent charged with maltreating their children").

⁹⁷ According to some critics, the correlation between a family's poverty and a finding of neglect by CPS demonstrates class- or race-conscious discrimination. See ROBERTS, *supra* note 11, at 25 (arguing that the "color of America's child welfare system undeniably shows that race matters in state intervention in families").

⁹⁸ See Ward Doran & Roberts, *supra* note 36, at 403 (concluding that the "child welfare system hides the systemic reasons for families' hardships by laying the blame on individual parents' deviant behavior").

many parents who need and want to make rapid changes in their lives is finding that there are many more obstacles to making these changes than they ever could have anticipated. Skilled advocacy during these moments of frustration can mean the difference between the parents being able to make the necessary changes and having their families torn further apart.⁹⁹

Although in the last decade “child welfare spending has increased substantially, resources for child welfare services have generally not kept up with demand.”¹⁰⁰ As the needs have grown and the challenges that families living in poverty routinely confront have become more severe, many of the supportive services that would be most advantageous to these families have been at best deficient, where available at all.¹⁰¹ For example, the early 1990s saw an almost epidemic rise in the incidence of substance abuse (primarily the explosion in low-cost, highly addictive forms of cocaine) in poorer neighborhoods, which led directly to marked increase in CPS reports.¹⁰² As commentators have observed,

the increasing number of families referred to child welfare and the increasing number of families with severe problems and multiple needs further strain the capacity of child welfare agencies to provide services to their clients Since families are

⁹⁹ One often repeated CPS requirement is, for a family who is living with several people in a room, to relocate to larger accommodations. Expecting a family that has been struggling to make ends meet financially to save enough money for first and last months rent plus a security deposit to move to a safe and adequate place to live is almost Beckettian in its absurdity: “I can’t go on. I’ll go on.” SAMUEL BECKETT, *THE UNNAMEABLE* 179 (1970). As commentators have remarked, “[it] can be impossible to become stable, stay clean from drugs, and maintain a job without an appropriate place to live. The housing issue can be very difficult to resolve in areas where the housing market is overcrowded and costs are high.” Moye & Rinker, *supra* note 69, at 389.

¹⁰⁰ Geen & Tumlin, *supra* note 3, at 2.

¹⁰¹ See, e.g., Ward Doran & Roberts, *supra* note 36, at 390; Ramsey, *supra* note 61, at 442-43.

¹⁰² See Nat’l Ctr. on Addiction and Substance Abuse, *CASAWORKS for Families: A Promising Approach to Welfare Reform and Substance-Abusing Women 2-3* (May 2001) (unpublished report, on file with the National Center on Addiction and Substance Abuse at Columbia University).

generally in crisis when they are referred to child welfare, long waits for services decrease the chance that children will remain in their own homes. Likewise, children may spend lengthy periods in “temporary” placements if child welfare staff cannot access the services parents need to allow for reunification. In some states, caseworkers noted that many children placed in foster care could have remained in their parents’ home had intensive family preservation services been available.¹⁰³

While CPS agencies are “struggling with more clients and less money,”¹⁰⁴ negative media attention has created a “climate of fear”¹⁰⁵ both within CPS and in the community. As a result, decisionmakers are increasingly responding to public uproar over isolated cases with broad policy changes, the probable consequences of which have not been carefully assessed. Child welfare staff are now so afraid of hostile attention . . . that they are removing children from their parents’ homes and/or choosing not to reunite families whenever they have even the smallest doubt about a child’s safety.¹⁰⁶

Notwithstanding the state of crisis in CPS generally, children should have stable and permanent living arrangements.¹⁰⁷ Some

¹⁰³ Geen & Tumlin, *supra* note 3, at 4-5.

¹⁰⁴ *Id.* at 8.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 8-9.

¹⁰⁷ See Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, 94 Stat. 500 (1980) (stressing need for CPS to ensure timely placement through reunification with parents, adoption, or other living arrangements, and by mandating “reasonable efforts” to maintain families). A major goal of this legislation was to “prevent unnecessary separation of children from their families with a number of key reforms, such as requiring states to make ‘reasonable efforts’ to prevent foster care placements and encouraging states to undertake ‘permanency planning’ to ensure a child’s right to be raised with his or her birth family In spite of this legislation . . . large numbers of children were placed outside the home.” Geen & Tumlin, *supra* note 3, at 13.

(although not all) parents, even if accused of having abused or neglected their children, should be given the opportunity, time, and support needed to become better parents. Choosing between locating a stable and permanent home for a child, and allowing sufficient time and dedicating sufficient resources for an adult to rehabilitate her circumstances is fraught with opportunities for errors in judgment.¹⁰⁸ It is understandable, therefore, that with this kind of “mixed agenda,” that CPS agencies continue to experience a serious identity crisis.

When the reporting requirements were first enacted in the mid-1960s, the incidence of child abuse and neglect was intolerable, but addressing the needs of the identified children was a manageable proposition. While the states continued to expand the definition of what constituted reportable abuse or neglect, and as more professionals were required to report suspected incidents, the complexities of the family troubles that CPS was asked to supervise, as well as the needs of individual children, also grew. Meanwhile, an unacceptable number of children in desperate need of respite from their families remain unknown to CPS because they are not reported; and an unacceptable number of families have their lives traumatized unnecessarily because they are reported on suspicions without foundation.

It was the continued increase in foster care placements that motivated Congress to amend the 1980 statute with ASFA. *Id.*

¹⁰⁸ See Geen & Tumlin, *supra* note 3, at 12-13. As commentators have remarked,

[w]hen a child is at significant risk of abuse and neglect, child welfare agencies are directed to remove the child from the abusive setting Likewise, if a caseworker knows that a child will *not* be abused or neglected, there is no reason for removal . . . [but] things are hardly ever that clear. When caseworkers cannot be certain about the fate of a child, they attempt to evaluate the level of risk to the child if allowed to remain in the home and weigh that risk against the benefit of maintaining an intact family by providing services to enhance stability. Child welfare agencies have been struggling with the right balance between child safety and family preservation for many years. *Id.*

1. The Impact of Over- or Under-Reporting

Over-reporting abuse or neglect means that some reports are made when there is no actual mistreatment occurring.¹⁰⁹ Spurious reports result in families being unnecessarily disrupted and CPS making needless investigations, both of which cause additional strain on an already overtaxed system. In making a decision in which the principal concern is about the accuracy of the choice between two alternative outcomes, such as to report suspicions or not, there always exists the possibility that the choice made will be incorrect. Researchers have labeled mistaken decisions of this kind either a Type I or Type II error.¹¹⁰ A common example of this phenomenon in operation arises in a jury's decision making process. In the context of criminal law, for example, incorrectly convicting an innocent person is characterized as a Type I error, while incorrectly acquitting a guilty party is deemed a Type II error.¹¹¹ William Blackstone famously suggested that it should be all but unacceptable for the legal system to convict someone who actually is innocent.¹¹² According to researchers,

¹⁰⁹ There are several reasons why a report might be unsubstantiated by CPS. However, not all unsubstantiated reports are without some evidence of abuse or neglect; for some, there simply is insufficient evidence to meet the legal threshold for CPS to intervene. *See supra* notes 80-85 and accompanying text for a discussion of the reasons reports are being unsubstantiated. As discussed more fully *infra* notes 120-129, reducing the number of unsubstantiated reports made improvidently also risks increasing the number of unidentified instances where a child is abused or neglected, but CPS has not been notified and therefore cannot intervene.

¹¹⁰ *See* Type I and Type II Errors - Making Mistakes in the Justice System, <http://www.intuitor.com/statistics/T1T2Errors.html> (last visited November 14, 2007).

¹¹¹ *See, e.g.*, RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 366 (2001) (discussing Type I and Type II errors). Judge Posner concludes that "[t]rading off type I and type II errors is a pervasive feature of evidence law." *Id.*

¹¹² *See* WILLIAM BLACKSTONE, 4 COMMENTARIES 385 ("it is better that ten guilty persons escape, than that one innocent suffer"). *See also In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (noting that proof beyond reasonable doubt in criminal trial is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free"); *Coffin v. United States*, 156 U.S. 432, 456 (1895) (stating "it must be very warily pressed, for it is better five guilty persons should escape unpunished than one innocent person should die")

[i]t should be clear, however, that the analysis applies to all sorts of legal disputes and even many extralegal issues. Indeed, the critical feature of the analysis is not the legal environment but simply the need to choose between only two alternatives (accept or reject) when there is uncertainty.¹¹³

Regardless of the context, a Type I error represents a “false positive” decision (e.g., erroneously convicting an innocent person); a Type II error represents a “false negative” decision (e.g., erroneously acquitting a culpable person).¹¹⁴ Analogously, in the context of the mandatory reporting requirements, a Type I error means that the professional decides to report a suspected incident, the CPS investigates and determines that there is insufficient evidence of abuse or neglect, and the report is not “substantiated.” This report would, however, leave on the state’s central child abuse database the residual of a “report filed” for the adult. A Type II error means that the professional in the field decides not to report a suspected incident, CPS then would have no knowledge about the child involved, would not investigate, and if the child was in fact being abused or neglected, she would then remain exposed to continuing risk of harm. Table 1 (below) provides a visual representation of the potential outcomes from the decision making options of

(quoting 2 JOHN HALE, P. C. 290 (1678)); Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. REV. 979, 981 n.6 (1993) (stating “I should, indeed, prefer twenty guilty men to escape death through mercy, than one innocent to be condemned unjustly”) (quoting SIR JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE 65 (Dr. Chrimes ed., 1942) (1471)); *id.* at 981 n.7 (reading “it is better that ninety-nine . . . offenders shall escape than that one innocent man be condemned”) (quoting THOMAS STARKIE, EVIDENCE 756 (1724)); Michael L. DeKay, *The Difference Between Blackstone-Like Error Ratios and Probabilistic Standards of Proof*, 21 L. & SOC. INQUIRY 95, 101 (1996). *But see* Patterson v. New York, 432 U.S. 197, 208 (1977) (stating “While it is clear that our society has willingly chosen to bear a substantial burden in order to protect the innocent, it is equally clear that the risk it must bear is not without limits . . . Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.”).

¹¹³ Michael L. Davis, *The Value of Truth and Optimal Standard of Proof in Legal Disputes*, 10 J.L. ECON. & ORG. 343, 346 (1994).

¹¹⁴ POSNER, *supra* note 111, at 366.

mandated reporters.¹¹⁵ This illustrates that a “false positive” results when a report is made and there exists insufficient or no evidence of abuse or neglect; similarly, a “false negative” occurs when a report is not made but should have been.

TABLE 1: False Positive Errors (Type I) and False Negative Errors (Type II)

Mandated Reporting Circumstances		
Reporter’s Decision	CPS Would Not Substantiate Abuse / Neglect	CPS Would Substantiate Abuse / Neglect
Report (positive)	Type I Error	Correct decision
No Report (negative)	Correct decision	Type II Error

Some have argued that just as society is loathe to accept Type I errors in the criminal context (i.e., false conviction of an innocent person), so society should be loathe to accept Type I errors in CPS proceedings (i.e., reporting a suspected incident when a child possibly is not being abused or neglected).¹¹⁶ For most advocates, however, there is no excuse for accepting any Type II errors because no child who experiences abuse or neglect should go without the protections of CPS.¹¹⁷ This is a laudable goal, but it may be unrealistic when the cost, in terms of potentially exhausting, very limited CPS resources, is considered. Due to a myriad of intangible factors, including lack of precise and reliable information about the child’s circumstances, for most professionals, the degree of accuracy in

¹¹⁵ See SETH C. KALICHMAN, MANDATED REPORTING OF SUSPECTED CHILD ABUSE: ETHICS, LAW & POLICY 80-81 (2d ed. 1999).

¹¹⁶ See, e.g., Besharov, *supra* note 10, at 190-92.

¹¹⁷ See, e.g., Margaret F. Brinig, *Choosing the Lesser Evil: A Comment on Besharov*, 8 VA J. SOC. POL’Y & L. 205, 213-214 (2000).

whether to make a report is unpredictable. Therefore, mandated reporters must deal with irreducible uncertainty in most of their decisions about whether to report a suspected incident.¹¹⁸

According to one commentator,

[t]here is an inevitable tradeoff between the two kinds of error; steps taken to reduce one will increase the other. Often, this results in cycles of policy adjustments intended to reduce one kind of error, then the other, and then the first again, and so on. Reducing both kinds of errors simultaneously, and breaking the back-and-forth cycle of policy change, requires improving the accuracy of predictions, where accuracy is simply defined as the correlation between that which is predicted and that which actually occurs.¹¹⁹

Because the only way to protect all children at risk, and hence to avoid all Type II errors, would be to have universal reporting, which would be impracticable and certainly not beneficial to those children whose families provide them with good and loving care, a significant volume of errors in reporting will continue to occur. The unavoidable nexus between Type I and Type II errors means that a shift in one type automatically influences a concomitant shift in the other.¹²⁰ The real

¹¹⁸ See, e.g., KENNETH R. HAMMOND, HUMAN JUDGMENT AND SOCIAL POLICY: IRREDUCIBLE UNCERTAINTY, INEVITABLE ERROR, UNAVOIDABLE INJUSTICE 40-48 (1996) (describing duality of error in decision-making that inevitably leads to inaccurate results).

¹¹⁹ Thomas R. Stewart, *Uncertainty, Judgment, and Error in Prediction*, in PREDICTION: SCIENCE, DECISION MAKING, AND THE FUTURE OF NATURE 41, 41 (Daniel Sarewitz et al., eds., 2000).

¹²⁰ HAMMOND, *supra* note 118, at 45. "Only by increasing the accuracy of prediction . . . can both kinds of error be reduced simultaneously." *Id.* To reduce Type II errors, it seems logical to increase the volume of reports – that is, an increase in the volume of reports can be expected to account for more children being identified who may be at risk. With more children being observed closely by CPS agencies, we would expect fewer children remaining at risk. However, increasing the volume of reports to reduce Type II errors (i.e., incorrect decisions not to report when a child is at risk) would also mean increasing the number of children who are not at risk whose families would become connected with the CPS system unnecessarily, or Type I errors (i.e., incorrect decisions to report when a child is not at risk). More families

conundrum for society is how many Type I errors can be tolerated when it is recognized that reducing, or attempting to eliminate Type II errors means ineluctably increasing the Type I errors that occur. To put this dilemma another way, how should society balance the reporting of mistreatment so that the fewest or no Type II errors occur at the cost of the least number of Type I errors? It is important to remember that children's lives are impacted in every possible outcome in this decision making process, except where no report is made and no abuse or neglect is occurring. Are we willing to live with a reporting system that at its best is able to assist only one-third of the families reported to CPS to obtain CPS-linked services, while the remainder are left to live with the status quo, even when this might leave a substantial number of children at risk of harm?

If as a society, we are unwilling to dedicate the needed resources to permit CPS to effectively intervene in every situation where there is the potential for abuse or neglect, then the tradeoff must come in some amount of Type I errors, or unsubstantiated reports. However, to the extent that mandated reporters are deciding not to report suspected incidents – in order to avoid Type I errors – the likelihood of Type II errors increases. The balance must be struck, therefore, between the burdens imposed on scarce CPS resources by over-reporting, and the hazards of under-reporting through the potential harm that may befall innocent children. Because some professionals already incorporate this calculus into their decisions about whether to report, at this point the CPS resources are only severely strained and not irredeemably exhausted by over-reporting.

a. The Burdens of Over-reporting: Type I Errors in the Reporting Decision

No one disputes that the volume of reports of abuse or neglect far exceeds the capacity of CPS agencies to investigate thoroughly or to intervene appropriately for every family that could benefit from CPS assistance.¹²¹ In 1975, only one year

unnecessarily connected with CPS means fewer CPS resources available for the children actually at risk.

¹²¹ See, e.g., KALICHMAN, *supra* note 115, at 65-66; MURRAY LEVINE ET AL., THE IMPACT OF MANDATED REPORTING ON THE THERAPEUTIC PROCESS: PICKING

after the passage of CAPTA, and less than a decade after the states began implementing mandatory reporting requirements for physicians, the Model Child Abuse and Neglect Reporting Law Project, funded by the U.S. Department of Health, Education and Welfare, concluded that the

sole purpose of reporting legislation . . . is to protect children. Reporting which does not foster this purpose should be discouraged. Ultimately, the protective purpose of reporting cannot be realized until sufficient effort and funds are invested to improve the level of services offered to the child and his family. While child abuse and neglect are certainly serious issues, undue emphasis on reporting may serve to direct attention away from more pervasive social problems of which child mistreatment may be a symptom . . . An emphasis on reporting also leads to the belief that once a report is made, care and treatment will be extended automatically to those in need of services. Unfortunately, this is not true in many cases.¹²²

As already mentioned, of the approximately three million reports made annually, less than one million are substantiated by CPS; and of these, less than a third become active CPS cases.¹²³ Any reporting obligation based on the suspicions – even reasonable ones¹²⁴ – of citizens, only some of whom have

UP THE PIECES 15 (1995). “No matter which element of the system [was] examined – prevention, investigation, treatment, training, or research – [the report] found a system in disarray, a societal response ill-suited in form or scope to respond to the profound problems facing it.” S. Rep. No. 104-117, at 3-4 (1995), *reprinted in* 1996 U.S.C.C.A.N. 3490, 3492-93 (citing Committee report of U.S. Advisory Board on Child Abuse and Neglect on pending amendments to CAPTA).

¹²² ALAN SUSSMAN & STEPHAN J. COHEN, REPORTING CHILD ABUSE AND NEGLECT: GUIDELINES FOR LEGISLATION xixv (1975).

¹²³ *See, e.g.*, Zellman & Fair, *supra* note 37, at 452.

¹²⁴ *See, e.g.*, Cal. Penal Code § 11166(a)(1) (West 2000) (defining “reasonable suspicion” as “it is objectively reasonable for a person to entertain a suspicion, based upon facts that could cause a reasonable person in a like position, drawing, when appropriate, on his on her training and experience, to suspect child abuse or neglect”). As a threshold matter, it should be observed that for children with mental health issues, this definition

any expertise in identifying child mistreatment, almost by definition “causes a wide net to be cast and inevitably results in a high rate of cases that will not be substantiated.”¹²⁵ According to some commentators,

when large numbers of cases that are investigated are not substantiated, this represents a significant waste of limited CPS resources and poses a significant burden on the families that are investigated. Although there is consensus that some level of failure to substantiate is legitimate in a reporting system that accords mandated reporters no discretion and insists that reports be made on the basis of suspicions only, the amount that will or should be tolerated and the implications of higher rates are in considerable dispute.¹²⁶

Moreover, mandatory reporting requirements are misleading because they give the impression that CPS has the capacity to investigate every report and to assist every family identified in the process. Evidence suggests, however, that in most instances the family will be given no support from CPS unless the child is removed or there is a high likelihood that absent drastic changes in the family’s circumstances the child will need to be removed.¹²⁷ To counteract this misdirected, inefficient distribution of its resources, some critics have admonished that CPS ought to

intervene in fewer families, to close cases more quickly, to recognize the damage done by its very attempts to help children as well as by its authoritarian meddling and bureaucratic self-preservation. It needs, in far more cases than it does now, to do nothing. Utopian goals, false

of reasonable suspicion can be construed so broadly as to encompass almost every child who participates in mental health care. See LEVINE et al., *supra* note 121, at 46.

¹²⁵ LEVINE et al., *supra* note 121, at 139.

¹²⁶ Zellman & Fair, *supra* note 37, at 465-66.

¹²⁷ See WALDFOGEL, *supra* note 10, at 83-84.

assumptions, too-facile definitions of family “dysfunction,” the dark side within each person involved in every case, and habit all combine to encourage unnecessary interventions that can only make children’s lives worse and move us to return children, after too long, to families which are not “fixed” and will endanger them again.¹²⁸

Until the volume of unsubstantiated cases began to interfere significantly with the capacity of CPS to protect the children identified, the only legitimately loud objections to over-reporting pertained to the unnecessary disruptions in family life when CPS later determined that a report was unfounded.¹²⁹ As the volume of unsubstantiated reports has proportionally increased with the escalation in overall reporting of suspected incidents, however, their sequelae have become serious impediments to CPS’s ability to protect some of the children it investigates. At a certain point, and we may have surpassed that point by now, children under the care of CPS become almost as much at risk of mistreatment as they had been in their homes.¹³⁰ This precarious situation prevails today.

b. The Hazards of Under-reporting: Type II Errors in the Reporting Decision

Even acknowledging that there is widespread over-reporting, there also exists powerful, although not rigorously researched, evidence that a substantial amount of child abuse occurs that goes undetected by CPS. Many of these incidents of child abuse are not recognized by anyone, professional or layperson; some go unaddressed because they were not reported; and some, although reported to CPS, are erroneously not substantiated

¹²⁸ Natalie Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children’s Welfare*, 6 MICH. J. GENDER & L. 381, 443 (2000).

¹²⁹ See, e.g., MURRAY LEVINE & ADELIN LEVINE, *HELPING CHILDREN: A SOCIAL HISTORY* 211-13 (1992) (discussing objections earlier in twentieth century related to exercise of arbitrary authority of the Society for Prevention of Cruelty to Children against families who were poor or immigrants).

¹³⁰ See, e.g., BARTHOLET, *NOBODY’S CHILDREN*, *supra* note 11, at 99; ROBERTS, *supra* note 11, at 24-25.

upon investigation due to some overlooked or misinterpreted evidence.¹³¹

These mixed results from the reporting mandate argue persuasively that the reporting requirements need to remain in force, and that additional measures may be called for to ensure that the absolute minimum number of children are left in harm's way. The principal function of the reporting requirements is to identify children at risk. These requirements never were intended to function as a mode of prevention, although some commentators have advocated a separation of the investigation arm of CPS from the supportive services of the child welfare system.¹³² However, by anticipating an immediate report upon discovery of a suspected incident, the current iteration of the reporting requirements, in practice, constrains mandated reporters from conducting further investigation.¹³³ The reporting requirements are intended to act only as a system of identification of mistreatment, as the instigation and "critical first step which triggers investigation and remedy, and will hopefully lead to prevention."¹³⁴ However, as a practical matter, even the most thorough reporting system may overlook some families who should be subject to intervention, either because the children have not come to the attention of a mandated reporter during a period of crisis, or because when they have, the children unwittingly have masked some critical indicators. The quandary for society is determining at what level such a pragmatic view of the reality and human limitations of the reporting system is to be tolerated.

¹³¹ See, e.g., Robin Fretwell Wilson, *The Cradle of Abuse: Evaluating the Danger Posed by a Sexually Predatory Parent to the Victim's Siblings*, 51 EMORY L.J. 241, 269-71 (2002).

¹³² See, e.g., Guggenheim, *supra* note 9, at 1747 (stating that "[w]e need to change this predictable path if we are to improve the lives of poor children. To accomplish this, it is critical that we restructure child welfare to include, for example, early intervention services for health care, child care, and education. Paradoxically, this vision requires that we find a way to narrow what now overwhelms the child welfare system--the investigative function of child welfare personnel.").

¹³³ Zellman & Fair, *supra* note 37, at 462.

¹³⁴ Margaret H. Meriwether, *Child Abuse Reporting Laws: Time for a Change*, 20 FAM. L.Q. 141, 167 (1986).

II. NONDISCRETIONARY MANDATORY REPORTING AND ITS CONSEQUENCES

The primary mission of CPS is to ensure the safety of vulnerable children.¹³⁵ To accomplish this objective, CPS has been granted broad police powers.¹³⁶ Allowing government interference into the privacy of the family system calls for a balancing between the needs of the family and the obligations of the community to protect children whom the family system may not be protecting sufficiently.¹³⁷ The tensions between family autonomy, privacy, and community protection are fraught with points of interlocking conflict.¹³⁸ According to at least one observer, CPS workers are “criticized either for intruding too much into the integrity and sacred privacy of a family or for not doing enough to ‘pull’ children from abusive and neglectful adults who do not deserve to be parents.”¹³⁹

The volume of reported incidents of abuse and neglect continues to be of significant concern to everyone connected with CPS, whether one believes there has been either substantial under-reporting or over-reporting of incidents.¹⁴⁰ Regardless of

¹³⁵ See *supra* notes 31-55 and accompanying text.

¹³⁶ See, e.g., *Croft v. Westmoreland County Child. & Youth Servs.*, 103 F.3d 1123, 1125 (3d Cir. 1997) (finding that the “liberty interest in familial integrity is limited by the compelling governmental interest in the protection of children – particularly where the children need to be protected from their own parents. The right to familial integrity, in other words, does not include a right to remain free from child abuse investigations.” (citation omitted)).

¹³⁷ See *Geen & Tumlin*, *supra* note 3, at 12-13.

¹³⁸ *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982) (stating that “[e]ven when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.”).

¹³⁹ *Berg*, *supra* note 31, at vii.

¹⁴⁰ Data show a dramatic increase in the incidence of abuse and neglect after it became required for certain professionals to report suspicious

whether there have been too many or too few incidents reported, two factors are the main focus of ongoing dispute: the variety of state definitions of abuse and neglect, and the mandatory reporting requirements. Too many erroneous reports of abuse and neglect are made annually and, consequently, the CPS workers expend too many resources investigating too many specious claims.¹⁴¹ As a result, the same CPS workers who must investigate each new report are spending too little time on their already active cases involving identified families with contracted agreements for their progress.¹⁴² The victims of this inefficient use of human resources are the children who are removed from their homes unnecessarily; or those children who, having been removed from their homes, are returned prematurely and unacceptably re-exposed to unsafe conditions; or those children who, having been investigated by CPS, are improperly left in their homes and who unconscionably are exposed to continued abuse or neglect.

None of these outcomes should be tolerated. Therefore, states should modify the definitions of child abuse and neglect so that conditions of poverty are not as influential in the determinations made by CPS as they presently are, and

circumstances. See WALDFOGEL, *supra* note 10, at 100 (noting that “reporting rate more than doubled” following enactment of mandatory reporting laws).

¹⁴¹ See Besharov, *supra* note 10, at 190-92. There is significant evidence that some mandated reporters do not report every suspected incident. See, e.g., Cheryl L. Brosig & Seth C. Kalichman, *Child Abuse Reporting Decisions: Effects of Statutory Wording of Reporting Requirements*, 23 PROF. PSYCHOL.: RES. & PRAC. 486, 486 (1992) (stating that “it is well known that professionals underreport all types of suspected abuse. Between 30% and 40% of practicing psychologists have, at least at one time, failed to report suspected abuse despite mandatory reporting laws.”). The evidence of under-reporting is most disturbing when it involves a child who continues to be exposed to abuse. See WALDFOGEL, *supra* note 10, at 211 (noting that narrowing CPS’s mandate would “sharpen the focus on child safety” and could lead to “improved child protection on high-risk cases”). Consequently, this Article advocates only limited professional discretion when the circumstances of neglect could be attributed to the family’s poverty. See *infra* notes 171-176 and accompanying text for further discussion.

¹⁴² See Besharov, *supra* note 10, at 191 (stating, “[t]he current flood of unfounded reports is overwhelming the limited resources of child protective agencies.”).

mandatory reporters who provide treatment for the family should be permitted to use clinical judgment in determining when to report incidents of neglect. These two modifications would reduce the volume of over-reporting of neglect cases – which implicates too many families – and, consequently, should improve the quality of investigations, which in turn will make CPS interventions more appropriate and ultimately protect more of the children within the families that CPS investigates.¹⁴³ Moreover, mandatory reporting will then focus more on abuse, freeing professionals obligated to report every neglect incident from the ethical and moral dilemma of having to report a family whose main difficulties can be resolved through therapeutic, rather than CPS, interventions.¹⁴⁴ Under-reporting will become a more crystallized area so that research can determine whether what is under-reported is actual abuse and serious neglect or what was previously considered neglect due to poverty.¹⁴⁵

¹⁴³ See WALDFOGEL, *supra* note 10, at 211-13.

¹⁴⁴ See Zellman & Fair, *supra* note 37, at 457. Much to our shame as a democratic society ostensibly committed to family values, “the state does not resolve the underlying problems facing families in the child welfare system . . . does little to reunite families, often providing ‘treatment’ to parents that consists of little more than boilerplate plans . . . [and simultaneously] allocates scant resources for such treatment, virtually ensuring that parents will not succeed” in their efforts to maintain family stability. Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485, 1489-90 (2007). See *supra* note 99 for one example of the Beckettian absurdity that the CPS can embody in its interventions with families. Showing a positive trend, national survey results suggest that more Americans believe that government should help the needy even if it means greater debt. Pew Research Center for the People and the Press, *Trends in Political Values and Core Attitudes: 1987-2007* (Mar. 22, 2007), available at <http://people-press.org/reports/pdf/312.pdf>.

¹⁴⁵ For example, New York’s definitions for “neglected child” allow for consideration of poverty and exempts poverty-related incidents from “substantiation” by CPS. See N.Y. FAM. CT. ACT § 1012(f)(i)(A) (McKinney 2007) (requiring parent to supply necessary care for child, provided that parent is “financially able to do so or offered financial or other reasonable means to do so”). Pennsylvania’s definitions of abused child also appear to provide some latitude for poverty-related circumstances. See 23 PA. CONS. STAT. ANN. § 6303(b)(2) (West 2007) (“No child shall be deemed to be physically or mentally abused based on injuries that result solely from environmental factors that are beyond the control of the parent or person responsible for the child’s welfare, such as inadequate housing, furnishings,

A. REVISING THE DEFINITIONS OF ABUSE AND NEGLECT

Over-reporting of neglect has contributed significantly to the overburdening of the CPS system.¹⁴⁶ Of the nearly three million reports annually, less than one million are substantiated by CPS; of these, less than a third become active CPS cases.¹⁴⁷ Data shows that reported neglect cases account for more than 55% of the total; abuse reports, including those for physical and sexual abuse, account for only 34% of total reported incidents.¹⁴⁸ Although CPS must make a determination about each report it receives, CPS officially investigates fewer than one-half of these reports.¹⁴⁹ Even after screening out more than half the reported cases, the investigative mission threatens to swallow the family preservation objective. According to Professor Jane Waldfogel, “some families who are currently in the [CPS] system shouldn’t be there.”¹⁵⁰ Under-reporting of incidents is also of significant public concern because some families who should be receiving services from CPS are not. However, “[e]ven the best reporting and screening systems will miss some abusive families who should be subject to intervention.”¹⁵¹

One explanation for the over- or under-reporting phenomena is that the definitions of abuse and neglect are vague or over inclusive.¹⁵² Arguing for a more finely delineated typology for classifying abuse or neglect, and suggesting a continuum of interventions to provide, Professor Martin

income, clothing and medical care.”). However, this does not mean that mandatory reporters have made the distinction between actual neglect and poverty-related circumstances that appear to be neglect. Their reports would still require at least some investigation by CPS.

¹⁴⁶ See *supra* notes 121-130 and accompanying text.

¹⁴⁷ See, e.g., Zellman & Fair, *supra* note 37, at 452.

¹⁴⁸ *Id.* at 451.

¹⁴⁹ *Id.*

¹⁵⁰ WALDFOGEL, *supra* note 10, at 84.

¹⁵¹ *Id.* at 85.

¹⁵² See Besharov, *supra* note 10, at 196; LEVINE et al., *supra* note, at 121.

Guggenheim describes three distinct categories of CPS cases: the first, the most serious, includes about 10% of the more egregious or criminal-like cases; the second “encompasses serious cases that do not require criminal justice intervention”;¹⁵³ and the third category in this schema includes those where the child is at a relatively lower risk of serious harm, and the parents may be willing to work with an agency to secure needed services. According to Professor Guggenheim, the latter two groups comprise 90% of the caseload. Typically, these cases involve less serious physical abuse (for example, a single, minor injury such as a bruise or a scratch) or less severe neglect (such as parental drug or alcohol abuse with no other apparent protective issues, dirty clothes or a dirty home, lack of supervision of a school-age child, or missed school or medical appointments). Many of these lower-risk neglect cases are poverty-related, resulting from inadequate housing or inappropriate child-care arrangements while a parent works.¹⁵⁴

This typology matches well with Professor Waldfogel’s “differential” approach where appropriate interventions are derived from an intensive assessment upon initial CPS referral.¹⁵⁵ Either approach, however, can only be effective if the proper identification of the severity of the family’s problems is accomplished from the outset. “How a case is reported, screened, and investigated may have a dramatic impact on the family and implications for the effectiveness of any subsequent intervention.”¹⁵⁶ To maximize the objectives of CPS and to achieve the most efficient reporting of incidents, there should be clarification within the definitions of abuse and neglect that allow for poverty-related factors to be distinguished from

¹⁵³ Guggenheim, *supra* note 9, at 1724-25.

¹⁵⁴ *Id.* at 1725.

¹⁵⁵ See WALDFOGEL, *supra* note 10, at 138-39.

¹⁵⁶ *Id.* at 99.

intentional behavior that threatens or actually harms the child.¹⁵⁷

B. PROVIDING EXCEPTION FOR CLINICAL JUDGMENT IN REPORTING

The mandatory reporting obligations generally apply to professionals who have regular contact with children.¹⁵⁸ These obligations apply to an ever-expanding list of professionals who are required to report suspected child abuse or neglect.¹⁵⁹ Attorneys are conspicuously absent from these lists.¹⁶⁰ The difference in their reporting obligations can create conflicts for professionals engaged in interdisciplinary advocacy in CPS matters.¹⁶¹ For example, as a result of their not being mandated

¹⁵⁷ Zellman & Fair, *supra* note 37, at 469-70. Many states already have provisions that exclude poverty-related circumstances beyond the control of the family. See N.Y. FAM. CT. ACT § 1012(f)(i)(A) (McKinney 2007); 23 PA. CONS. STAT. ANN. § 6303(b)(2) (West 2007).

¹⁵⁸ See, e.g., 23 PA. CONS. STAT. ANN. § 6311 (West 2007) (enumerating “[p]ersons required to report suspected child abuse” as persons “who, in the course of employment, occupation or practice of a profession, come[] into contact with children”). See also Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality*, 7 CLINICAL L. REV. 403 (2001). Mandatory reporters are immune from criminal or civil liability for any good faith report or testimony about suspected incidents of child abuse or neglect. See, e.g., 23 PA. CONS. STAT. ANN. §§ 6311(d), 6318(a) (West 2007). Mandatory reporters are presumed to make all reports in good faith. See *id.* § 6318(b).

¹⁵⁹ See, e.g., Geen & Tumlin, *supra* note 3, at 2 (noting recent expansion of CPS’s investigative role “has taken place at the same time that many other public social services have been cut and socioeconomic changes have increased the number of families with multiple service needs. As the safety net program of last resort, many believe that child welfare agencies are now being asked to solve many of the general problems associated with poverty.”).

¹⁶⁰ See 23 PA. CONS. STAT. ANN. § 6311(a) (West 2007) (excluding attorneys from list of mandatory reporters).

¹⁶¹ See, e.g., Jean Koh Peters, *Concrete Strategies for Managing Ethically-Based Conflicts Between Children’s Lawyers and Consulting Social Workers Who Serve the Same Client*, 1 KY. CHILDREN’S RTS. J. 15 (Mar. 1991); Lisa A. Stanger, *Conflicts Between Attorneys and Social Workers Representing Children in Delinquency Proceedings*, 65 FORDHAM L. REV. 1123 (1996).

reporters, attorneys may find themselves having a different opinion than social workers or psychologists, for example, about how to deal with some client disclosures.¹⁶² The rules governing confidentiality that apply to attorneys generally cover those professionals who act as agents of the attorneys.¹⁶³ There is no consensus, however, on whether mandated reporters who work with attorneys on CPS matters should be accorded the same protections as apply to attorney-client communications, should the mandated reporter fail to report a suspected incident of abuse or neglect. Because attorneys may breach confidentiality when they anticipate that a client may commit a crime, it is conceivable that were an attorney alerted to recurring physical abuse in a jurisdiction where this was defined as a crime, then the attorney would be permitted to report the client to CPS.¹⁶⁴

Although conflicts arise more often as internal debates that the professional has over how to proceed with a particular action or how to react to a particular action by or communication from the client,¹⁶⁵ these must be resolved in alignment with the professional's obligations to the profession, the community, and the client.¹⁶⁶ Potential conflicts over the mandatory reporting requirements may be resolved in some instances by the current

¹⁶² See, e.g., Gerard F. Glynn, *Multidisciplinary Representation of Children: Conflicts over Disclosures of Client Communications*, 27 J. MARSHALL L. REV. 617, 627 (1994).

¹⁶³ See MODEL RULES OF PROF'L CONDUCT R. 5.3 (1983).

¹⁶⁴ *Id.* at R. 1.6(b)(1); see also MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(3) (1980).

¹⁶⁵ These internal debates sometimes can cause "cognitive dissonance," making the conflict more complicated still. See LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 18-24 (1957) (describing tendency to reinterpret information that conflicts with internally accepted or publicly held beliefs to avoid unpleasant state produced by inconsistent thinking); Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions*, 6 PSYCHOL. PUB. POL'Y & L. 677, 701 n.5 (2000) (cognitive dissonance occurs when "people are driven to maintain consistency between cognitions. Holding two mutually exclusive cognitions produces an aversive state that the person is motivated to reduce through a variety of strategies that aim to adjust the relationship between the cognitions.").

¹⁶⁶ See, e.g., Louise G. Trubek, *Context and Collaboration: Family Law Innovation and Professional Autonomy*, 67 FORDHAM L. REV. 2533 (1999).

law. ASFA allows, and fully expects, the CPS to move immediately for termination of parental rights under the following circumstances: murder, manslaughter, or felony assault of another child from the family, or where the parental rights to another child previously were terminated involuntarily.¹⁶⁷ State laws follow this directive and may incorporate other aggravated circumstances as authorized under ASFA, including abandonment, torture, chronic abuse, and sexual abuse.¹⁶⁸ Therefore, the more extreme forms of aggravated circumstances – like sexual abuse or exploitation, medical neglect, or physical torture – verge on criminal conduct and authorize CPS to petition for termination of parental rights without making any effort to rehabilitate the family.¹⁶⁹ Thus, the most extreme cases of abuse should not raise a conflict for a mandated reporter because these essentially conform to the exception provided to attorneys to breach confidentiality to prevent a client from committing a crime.¹⁷⁰

One explanation for over-reporting is that mandated reporters are permitted no discretion about the circumstances under which to report.¹⁷¹ To reduce at least some of the unfounded reports, therefore, mandated reporters should be granted more discretion; they should be permitted to use their professional judgment at least when only neglect is suspected.¹⁷²

¹⁶⁷ 42 U.S.C.A. § 671(15)(D) (2007).

¹⁶⁸ *Id.* § 671(15)(D)(i). See also N.Y. FAM. CT. ACT § 1039-b (McKinney 2007) (enumerating instances where no reasonable efforts by CPS are required to return the child to his or her home, including: murder or attempted murder in the first degree or second degree or voluntary manslaughter where the victim was another child of the parent; assaulting child under age 11 resulting in serious physical injury to the child or another child of the parent; or when the parental rights over a child's sibling previously were involuntarily terminated); 23 PA. CONS. STAT. ANN. § 2511 (West 2007) (same).

¹⁶⁹ See 42 U.S.C.A. § 671(15)(D) (2007).

¹⁷⁰ See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1983); MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(3) (1980).

¹⁷¹ See WALDFOGEL, *supra* note 10, at 211.

¹⁷² See Seth C. Kalichman, *Reporting Laws, Confidentiality, and Clinical Judgment: Reply to Ansell and Ross*, 45 AM. PSYCHOL. 1273, 1273 (1990) ("Decisions to report . . . often entail dilemmas and always involve either

The reporting requirements should be modified so that neglect becomes a qualified reporting instance, possibly with an additional exception carved out for those professionals who serve families already known to CPS.

Because ongoing CPS cases are supervised regularly, or should be regularly supervised, it should be difficult not to recognize when neglect occurs unless it is so sporadic as to evade the imminence requirement of most abuse and neglect definitions.¹⁷³ Moreover, the horrifying news reports of children harmed by parents while under CPS supervision rarely have neglect as the cause; it is more likely for abuse to go undetected and therefore it is abused children who most come to the public's attention.¹⁷⁴ Consequently, all suspected incidents of child abuse should be reported. Child abuse should remain under compulsory reporting because of the possibility of missing it even under investigation by CPS and because of the dire consequences for children should it go undetected when occurring. However, until attorneys are compelled to report suspected incidents of abuse, non-attorney professionals

adherence to or violation of the law. . . . It would be productive for psychologists to assist in clarifying vague statutes and improving inadequate child protective services rather than to continue justifying failure to report.”).

¹⁷³ See, e.g., N.Y. FAM. CT. Act § 1012(f) (McKinney 2007) (defining neglected child as one “whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . in supplying the child with adequate food, clothing, shelter or education”); 23 PA. CONS. STAT. ANN. § 6303(b)(1)(iv) (West 2007) (defining neglect as “prolonged or repeated lack of supervision or the failure to provide essentials of life, including adequate medical care, which endangers a child’s life or development or impairs the child’s functioning.”).

¹⁷⁴ Astonishingly, among children who have died in circumstances suggesting abuse, about half have died after the family was reported to CPS. See *Improving the Well-Being of Abused and Neglected Children: Hearing Before the Senate Comm. on Labor & Human Resources*, 104th Cong. 9 (1996) (testimony of Richard J. Gelles, Ph.D.). In *DeShaney v. Winnebago County Dep’t of Soc. Services*, 489 U.S. 189, 196-97 (1989), the Supreme Court held that there was no state action in a case where CPS had placed a child with his father who continually abused him even while CPS was repeatedly alerted and followed up with several investigations but did nothing official to intervene on the child’s behalf. See also *id.* at 195 (“[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.”).

supervised by attorneys also should be exempted from the reporting requirements under the general exception from disclosing confidential information allowed for attorneys and their agents.¹⁷⁵

Moreover, it is very unlikely that a parent would be criminally charged when the precipitating event is one of the less severe forms of neglect (e.g., truancy, crowded living conditions). Providing some latitude in clinical discretion in determining when to report suspected incidents of neglect would encourage more exploration of the facts by the professional prior to making any report;¹⁷⁶ this could make professional reports more accurate and aid in identifying more children experiencing neglect caused by parental action and not by poverty alone. Moreover, if providing supportive services ultimately resolves all concerns about the child's safety, then it might be beneficial for the entire family to circumvent CPS intervention. In a system as complex and interconnected as CPS, there are no easy solutions for improving efficiency.

CONCLUSION

For many years, critics of the mandatory reporting requirements have advocated modifications similar to some of those proposed in this Article.¹⁷⁷ While none of these modifications have been implemented by policy makers, over

¹⁷⁵ See MODEL RULES OF PROF'L CONDUCT R. 5.3 (1983). See Appendix, *infra*, for a proposed model of a reporting law that also makes allowance for professional judgment insofar as certain clinically trained professionals should be granted some latitude specifically for persons currently in treatment.

¹⁷⁶ Under current standards, professionals are discouraged from further investigating the facts because they are required to report any suspected incident within a specified time, usually 48 hours. See, e.g., N.Y. SOC. SERV. LAW §§ 413, 415 (McKinney 2007) (requiring oral report "immediately" when there is reasonable cause to suspect child abuse or neglect, and requiring written report within 48 hours of oral report); 49 PA. CODE § 47.52(c) (2007) (same). See also Zellman & Fair, *supra* note 37, at 457 (arguing that "professionals are precluded explicitly from conducting any further investigation, a prohibition reinforced by the short latency period before a report is required.").

¹⁷⁷ See Besharov, *supra* note 10, at 195-98; WALDFOGEL, *supra* note 10, at 211.

the last 15 years the number of reports of child mistreatment has continued to exceed CPS's capacity to appropriately investigate them.¹⁷⁸ Some might view this as a sign that we are justified in applying an even broader definition of what constitutes child mistreatment because we may have only scratched the surface of what could be construed as a deeply rooted, and historically private, problem.¹⁷⁹

However, federal and state funding has not kept pace with the increased need and, therefore, the child welfare system predictably has had to do more with less, and children must pay the price.¹⁸⁰ When other social welfare programs begin to become strained due to inordinate access, and the need for public benefits exceeds available funds, the government usually tightens eligibility requirements, restricting access by making it more difficult to qualify, or by reducing the levels of the public benefit.¹⁸¹ Why are not similar tightening measures applied to a

¹⁷⁸ The data show that reports of child abuse and neglect have leveled off since 1996 at approximately three million annually. See BARTHOLET, *NOBODY'S CHILDREN*, *supra* note 11, at 61; Zellman & Fair, *supra* note 37, at 453-55 (discussing data from National Incidence Study of Child Abuse and Neglect). Some data even suggests that "cases of child abuse have declined" over the past few years. Zaslów et al., *supra* note 71, at 87.

¹⁷⁹ See, e.g., BARTHOLET, *NOBODY'S CHILDREN*, *supra* note 11, at 61 (arguing that although "only about one million of [reported] cases are 'substantiated' as actually involving maltreatment, the evidence indicates that this one million figure represents a gross underestimate of the actual amount of serious maltreatment . . ."); Besharov, *supra* note 10, at 188-89 (contending that for many years, "advocates, program administrators, and politicians have joined the cause to encourage even more reports . . . [and] their efforts have been spectacularly successful . . ."); Zellman & Fair, *supra* note 37, at 455 (stating that most cases of "suspected maltreatment known to professionals are not reported or investigated.").

¹⁸⁰ See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) ("[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.").

¹⁸¹ See, e.g., *Reynolds v. Giuliani*, 35 F.Supp.2d 331 (S.D.N.Y. 1999) (challenging systematic denial of access to food stamps, Medicaid, and cash assistance by unreasonable requirements imposed during application process), *modified in part* by 43 F.Supp.2d 492 (S.D.N.Y. 1999); NEIL GILBERT, *TRANSFORMATION OF THE WELFARE STATE: THE SILENT SURRENDER OF PUBLIC RESPONSIBILITY* 65 (2002) (arguing that despite rhetoric of rights and

CPS system that is admittedly overtaxed and continues to expose too many families to needless, traumatic disruptions while simultaneously failing to protect all of the children who are in need?

Despite the “therapeutic” heritage of CPS,¹⁸² and its purported purpose to do what is in the best interest of mistreated children,¹⁸³ the CPS system more often becomes a punitive method for imposing middle class values about “good enough” parenting¹⁸⁴ at the expense of possibly destroying many families whose only flaw may be their inability to overcome their socioeconomic disadvantages.¹⁸⁵ Because the goal of the child welfare system is to ensure that all children are safe and healthy, the kinds of services provided to families involved with CPS

responsibilities, public benefit programs involve a calculus that weighs rights to social benefits “against the recipients’ efforts to be financially self-supporting”); GILENS, *supra* note 30, at 18-19 (noting that as welfare rolls expanded during 1970s, allotted benefit amounts were reduced and by 1995 average benefits had lost half their purchasing power); JACOB S. HACKER, *THE DIVIDED WELFARE STATE* 44-49 (2002) (describing “punctuated equilibria” of efforts to promote social welfare programs).

¹⁸² See Susan L. Brooks, *Therapeutic Jurisprudence and Preventive Law in Child Welfare Proceedings, A Family Systems Approach*, 5 *PSYCHOL. PUB. POL’Y & L.* 951, 951 (1999).

¹⁸³ See *id.* at 957 (“[W]hile . . . [ASFA] purports to promote the child’s ‘best interests,’ it not only fails to promote what is truly best for children; it actually may exacerbate their already problematic situations.”).

¹⁸⁴ See BARTHOLET, *NOBODY’S CHILDREN*, *supra* note 11, at 63-64.

¹⁸⁵ Professor Barry Feld argues that the entire history of the community’s relationship with its children, from the child-saving days to the present, has been one long, agonizing experiment in something akin to social Darwinism. See, e.g., Barry C. Feld, *The Transformation of the Juvenile Court--Part II: Race and the “Crack Down” on Youth Crime*, 84 *MINN. L. REV.* 327, 334-35 (1999) (“Progressives attempted to ‘Americanize’ the immigrants and poor through a variety of agencies of assimilation and acculturation to become sober, virtuous, middle-class Americans like themselves. The Progressives coupled their trust of state power with the changing cultural conception of children and entered the realm of ‘child-saving.’ Child-centered reforms, such as the juvenile court, child labor laws, social welfare legislation, and compulsory school attendance laws both reflected and advanced the changing imagery of childhood.”).

should help remedy more than just aberrant parental behavior because this is only one factor among many that may contribute to abuse and neglect. Supportive services for the entire family, including housing assistance, job preparation and placement, day care supports, intensive and effective substance abuse treatment, domestic violence counseling and other practical alternatives, do more than just help to change adult behavior, they improve the living conditions of the entire family.

The goal of any intervention made by CPS should be to help the family system endure unless it can be shown that the child's future would be endangered were she left within her family.¹⁸⁶ Family preservation, even in a rehabilitated home, is not only about ensuring parental rights; it is also about ensuring the best opportunity for each child to have a safe family to care for her. Even under the current legal regime, where child protection and permanency are the paramount concerns, this ideal to address the needs of the whole family should be pursued with gravitas and hope.

¹⁸⁶ See Weinstein & Weinstein, *supra* note 79, at 613 n.297 ("Total child welfare spending in fiscal year 1996 was at least \$14.4 billion. More than half of this expenditure is for out-of-home placements. Preventive services that could keep children at home and substantially decrease the likelihood of intergenerational transmission of neglect would be a sound societal investment.") (citation omitted).

APPENDIX: SUSPECTED CHILD ABUSE -- MANDATED REPORTING

Persons required to report suspected child abuse include:

(a) Individuals who, in the course of their employment, occupation, or the practice of their profession, come into contact with children shall report or cause a report to be made to child protective services whenever they have reason to suspect, on the basis of their medical, professional or other training and experience, that a child coming before them is an abused child. Except with respect to confidential communications made to an attorney or ordained clergy, the privilege to communications between any professional person required to report and the patient or client of that professional shall not apply to situations involving child abuse and shall not constitute grounds for failure to report.

(b) Individuals who, in the course of their employment, occupation or practice of their profession, come into contact with children shall report or cause a report to be made to child protective services whenever they have reason to suspect, on the basis of their medical, professional or other training and experience, that a child coming before them is a neglected child. Confidential communications between professionals licensed to practice one of the therapeutic or healing professions (including, but not limited to, physicians, psychiatrists, psychologists, nurses, clinical social workers), that contain information that indicates circumstances that meet the definition of neglect, shall be reported unless in the best clinical judgment of the professional these circumstances are suspected to be the product of poverty conditions, or mental illness, or substance abuse behavior, in which case the decision to report is left at the discretion of the professional provided that the patient or client is voluntarily and regularly participating in a treatment program.

Enumeration of persons required to report -- Persons required to report under subsections (a) & (b) include, but are not limited to, any licensed physician, osteopath, medical

examiner, coroner, funeral director, dentist, optometrist, chiropractor, podiatrist, intern, registered nurse, nurse or nurse practitioner, hospital personnel engaged in the admission, examination, care or treatment of persons, Christian Science practitioner, member of the clergy, school administrator, teacher, social services worker, day-care center worker or any other child-care or foster-care worker, mental health professional, peace officer or law enforcement official.

Persons who may report -- All persons having reasonable cause to believe that a child with whom they have regular contact is or is likely to experience abuse or neglect may report this information to the child protective services.