

2003

Low-Income Parents Victimized by Child Protective Services

Candra Bullock

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/jgspl>

 Part of the [Constitutional Law Commons](#), and the [Torts Commons](#)

Recommended Citation

Bullock, Candra. "Low-Income Parents Victimized by Child Protective Services." *American University Journal of Gender Social Policy and Law* 11, no. 2 (2003): 1023-1053.

This Comment is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *Journal of Gender, Social Policy & the Law* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

LOW-INCOME PARENTS VICTIMIZED BY CHILD PROTECTIVE SERVICES

CANDRA BULLOCK*

Introduction.....	1023
I. Parental Due Process Rights.....	1027
A. Supreme Court Decisions Establishing Due Process Right for Parents to Raise their Children	1028
B. Standards of Proof and Judicial Process for Determining Neglect.....	1030
1. The Role of Santosky v. Kramer with Regard to Neglect Proceedings	1030
C. No Absolute Right to Counsel for Indigent Parents	1036
1. Need for Legal Representation for Indigent Parents	1037
2. Lassiter v. Department of Social Services	1038
II. Lack of narrow Definitions of Child Abuse	1040
A. Low-income Family Unfairly Separated on Grounds of Child Neglect.....	1043
B. The Poverty Exemption as a Solution for the Confusion Between Neglect and Poverty	1044
III. Low-Income Families are Victims of Federal Legislation that Provides Funding to States	1047
A. Legislative Intent vs. Impact on Low-income Families	1047
1. Child Abuse Prevention and Treatment Act.....	1047
2. Adoption Assistance and Child Welfare Act	1048
IV. Possible Solutions	1050
Conclusion	1053

INTRODUCTION

In the United States, approximately three million cases of child abuse and neglect are reported annually¹ to child protective service

* J.D. Candidate, *Washington College of Law, American University*, 2003; B.A., Psychology and Spanish, *University of Virginia*, 1999. I would like to thank my Mom, Dad, and Adria for providing their continued support. I would also like to thank the staff and editors of the *American University Journal of Gender, Social Policy & the Law*.

1. Cf. Elena Neuman, *Child Welfare or Family Trauma?*, INSIGHT ON THE NEWS, May

1024 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

agencies.² Children from low-income households are more likely than children from middle and high-income households to be reported to child protective service agencies.³ According to the United States Census Bureau's poverty data for the year 2000, approximately 31.1 million people were classified as poor⁴—this figure includes 22.1% of African Americans, 21.2% of Hispanics and 10.8% of Asians and Pacific Islanders in comparison to 7.5% of Caucasian Americans.⁵ Thus, children from some ethnic minority families, specifically African Americans and Hispanics, are three times more likely to be poor than Caucasians.⁶ Low-income children, as compared to middle and high-income children, are disproportionately reported to child protective service agencies, which results in a disparate impact on racial or ethnic minorities being reported.⁷

9, 1994, at 7 (stating that 60% of reported child abuse and neglect cases are unsubstantiated and are eventually dropped, but not before children are sometimes temporarily placed in foster care).

2. See Charles Wilson & Donna Pence, *How should Child Protective Services and Law Enforcement Coordinate the Initial Assessment and Investigation?*, in HANDBOOK FOR CHILD PROTECTION PRACTICE 101 (Howard Dubowitz & Diane DePanfilis eds., 2000) (stating that the goal of child protective service agencies is to reduce the risk of future maltreatment of children and to maintain and strengthen the child's family unit); see also ADMIN. ON CHILDREN, YOUTH AND FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERV., 10 YEARS OF REPORTING CHILD MALTREATMENT 1999 3-11 (2001). The U.S. Department of Health & Human Services, Administration for Children and Families, Administration on Children, Youth and Families, and the Children's Bureau compiled national data regarding child abuse and neglect for the year 1999, and noted the duty of child protective services as preventing future harm and remedying harm that has occurred due to child maltreatment. *Id.* at viii.

3. See generally Douglas J. Besharov, *Child Abuse Realities: Over-reporting and Poverty*, 8 VA. J. SOC. POL'Y & L. 165, 183-84 (2000) (suggesting that the child welfare system is inappropriately involved in the surveillance of families who receive public assistance); see also DANA MACK, THE ASSAULT ON PARENTHOOD: HOW OUR CULTURE UNDERMINES THE FAMILY 67 (1997) (arguing that poor children disproportionately suffer impositions of child welfare because families on public assistance are four times more likely than others to be investigated and have their children removed from the family home on the basis of child maltreatment).

4. See U.S. CENSUS BUREAU, HOW THE CENSUS BUREAU MEASURES POVERTY (2001), available at <http://www.census.gov/hhes/poverty/povdef.html>. The Census Bureau uses income thresholds that vary by family size and composition to determine who classifies as poor. For example, if a family's income is less than the set threshold for families of the same size and composition, then that family and each of its members are classified as poor. *Id.*

5. See U.S. CENSUS BUREAU, POVERTY: 2000 HIGHLIGHTS (2000) (presenting data derived from a sample survey of approximately 50,000 households across the nation), available at <http://www.census.gov/hhes/poverty/poverty00/pov00hi.html>; see also D'Vera Cohn, *Poverty Down, Income Steady in U.S. Survey*, WASH. POST, Sept. 26, 2001, at A18 (summarizing poverty results of the 2000 census).

6. See U.S. CENSUS BUREAU, *supra* note 5 (stating that although poverty rates decreased for African-Americans and Hispanics between 1999 and 2000, they remain disproportionately more impoverished than Caucasians).

7. See JANE WALDFOGEL, THE FUTURE OF CHILD PROTECTION 8-9 (1998) (stating

Children possess the right to be raised in a safe environment, which sometimes warrants the removal of the child from the parent.⁸ However, it is also in a child's best interest not to disrupt the strong parent-child emotional bond by unnecessarily removing the child from the family home, especially in many unfortunate cases where poverty has been mistaken for child neglect.⁹ The large number of low-income parents reported for child abuse and neglect results in the unfortunate separation¹⁰ of many low-income and minority families, making both children and parents victims of the United States' child welfare system.¹¹

This Comment examines the due process issues faced by low-income and minority parents who have been unjustly accused of child abuse and neglect due to their financial situations. As a result of their indigence, these parents are stripped of the constitutional right to raise their children. Part I analyzes Supreme Court decisions establishing the fundamental interest in parenting¹² and argues for

that in 1996, over 40% of children reported to child protective service agencies were racial or ethnic minorities and that poverty may explain the overrepresentation of minorities in the child protective service system).

8. See Sari Horwitz & Scott Higham, *Brianna's Case Spurs Call for Change; D.C. Agency Head Releases Report*, WASH. POST, Mar. 1, 2000, at B3 (discussing the case of Brianna Blackmond, a twenty-three month old child who was mistakenly removed from foster care and returned to her abusive and neglectful mother, who later killed the toddler with blows to the head); see also *Matter of D.C.*, 561 A.2d 477, 478-79 (D.C. 1989) (holding that a mother, who could afford to hire a babysitter, had neglected her baby, who had been severely burned on a space heater, when she left the infant in the care of his nine-year-old brother).

9. See Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1191 (1999) (arguing that child welfare reforms should focus on children's rights to grow up in a safe environment, but that this focus must be placed in the context of children's interests in maintaining relationships with their parents because disrupting the parent-child bond has a severe impact on children). See, e.g., Sari Horwitz & Scott Higham, *Record Numbers of D.C. Children go to Foster Care*, WASH. POST, Feb. 28, 2000, at A1 (stating that removing a child from his or her family emotionally traumatizes the child due to the loss of all that is familiar).

10. This Comment uses the term "separation" to refer to the temporary or permanent placement of children in the foster care system.

11. See Susan K. Sarnoff, *"Sanctified Snake Oil": Ideology, Junk Science, and Social Work Practice*, 80 J. CONT. HUM. SERV. 396, 400 (1999) (arguing that the substandard state of child abuse programs has led to angry parents whose children are unjustly taken from their homes and children who fail to receive proper care as a result).

12. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (holding that a clear and convincing evidence standard of review should be applied in child neglect and abuse proceedings); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (establishing the three-pronged test to be applied in determining the sufficiency of due process owed to parents in child abuse and neglect proceedings); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (establishing that the Fourteenth Amendment liberty interest includes the right to "bring up children"). But see *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31-34 (1981) (ruling that indigent parents have no due process right to counsel in termination of parental rights proceedings).

1026 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

the need to protect indigent parents' right to raise their children.¹³ Part II of this Comment discusses the lack of a narrow definition of child abuse and neglect at both the federal and state levels.¹⁴ Furthermore, Part II considers how broad definitions of child neglect encompass many characteristics of poverty,¹⁵ thus leading to a greater likelihood that poverty will be mistaken for child neglect.¹⁶ Part III examines federal legislation, specifically the Adoption Assistance and Child Welfare Act¹⁷ and the Child Abuse Prevention and Treatment Act,¹⁸ which provide funding to state child protective service agencies based on the number of children placed in foster care.¹⁹ Further, Part III discusses how the uncapped financial incentives provided by federal legislation, which are based upon the number of children in a state's foster care system, encourage the disproportionate rate of low-income and minority parents accused of abusing and neglecting their children when poverty is really the issue.²⁰ Part IV recommends that

13. See *infra* Part I.A (citing cases involving the fundamental right of parents to raise their children free from government intervention); *infra* Part I.B (demonstrating that the preponderance of the evidence standard of proof applied at neglect proceedings, in comparison with the clear and convincing evidence standard applied at parental termination proceedings, violates parents' due process right to raise their children); *infra* Part I.C (demonstrating the injustice served by failing to appoint legal counsel for indigent parents during neglect proceedings).

14. See *infra* Part II (providing examples of broad state statutory and federal definitions of child abuse and neglect and discussing the repercussions of such broad definitions for low-income parents).

15. See SETH C. KALICHMAN, MANDATED REPORTING OF SUSPECTED CHILD ABUSE: ETHICS, LAW & POLICY 184-86 (2d ed. 1999) (describing characteristics of neglect as malnutrition, lack of adequate clothing, poor hygiene, inadequate health care and periods of being left without supervision). *But see* Charles Wilson & Susan Caylor Steppe, *Backlash and Child Protective Services from the Perspective of State CPS Administrators*, in THE BACKLASH 60, 63-64 (John E. B. Myers ed., 1994) (admitting, from the perspective of a child protective service administrator, that confusion exists in distinguishing between poverty and neglect, but arguing that a parent's lack of resources sometimes leads to serious harm to children). See generally Douglas J. Besharov, *Child Abuse: Arrest and Prosecution Decision-Making*, 24 AM. CRIM. L. REV. 315, 343 (1986) (emphasizing the need for the criminal justice system to play a more active role in child maltreatment cases from beginning to end, but cautioning that child neglect is often related to broader social needs of indigent families and thus neglect will more likely be solved by helping families escape from poverty rather than separating parents and children).

16. See *infra* Part II.A (providing an example of a parent who lost custody of his children on the basis of characteristics of poverty, which were included in the state statutory definition of neglect).

17. See 42 U.S.C. §§ 602-675 (2001).

18. See 42 U.S.C. §§ 5101-5106 (2001).

19. See *infra* Part III.A (discussing the disparate impact that federal legislation, such as the Child Abuse Prevention and Treatment Act and the Adoption Assistance and Child Welfare Act, has on low-income parents).

20. See Sarnoff, *supra* note 11, at 400 (arguing that child protective services receives funding for breaking apart families and placing children in foster care).

2003] VICTIMIZED BY CHILD PROTECTIVE SERVICES 1027

the legislature define more narrowly the terms “child abuse” and “child neglect” and that the legal system provide counsel to indigent parents who have been accused of child neglect.²¹ Further, Part IV suggests that the state abuse and neglect courts develop computerized tracking systems that are integrated with the computerized systems of state child welfare agencies.²² The Comment concludes that removing low-income children from their families on the basis of poverty and then failing to provide legal counsel to these same indigent parents contradicts the established constitutional principle of the fundamental right of a parent to raise his or her child.²³

I. PARENTAL DUE PROCESS RIGHTS

Ambiguous definitions of child abuse or neglect and federal legislation that fails to discourage states from keeping children in foster care contradict the Supreme Court’s well established principle, originating from the Due Process Clause of the Fourteenth Amendment,²⁴ of a parent’s right to raise his or her children.²⁵ When child abuse is alleged, a child’s safety is set against the child’s interest in remaining part of the family unit as well as the parent’s right to raise the child, which should be afforded due process of the law.²⁶

21. See *infra* Part IV (discussing the importance of providing legal counsel to indigent parents in order to reinforce the Supreme Court’s acknowledgement of the primacy of the family unit).

22. See *id.* (recommending that child welfare agencies and the judicial system integrate computerized tracking systems in order to more effectively identify factors attributable to child abuse or neglect from the agency perspective and follow the judicial outcomes of such cases).

23. See *infra* conclusion (concluding that a parent’s fundamental interest in raising his or her child must be protected and emphasizing that Congress and state legislatures must recognize this right by enacting new legislation that coincides with the Supreme Court’s long recognized belief in family integrity).

24. See U.S. CONST. amend. XIV, § 1 (stating that no State shall “deprive any person of life, liberty, or property, without due process of law”).

25. See *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (commenting that individuals possess a liberty interest in raising their children and that a determination by the Legislature regarding what constitutes proper protection of public interest is not final, but rather is subject to supervision by the courts); see also *Stanley v. Illinois*, 402 U.S. 645, 651 (1972) (noting that the Due Process Clause protects family integrity).

26. See Pamela McAvay, *Families, Child Removal Hearings, and Due Process: A Look at Connecticut’s Law*, 19 QUINNIPIAC L. REV. 125, 126 (2000) (arguing that parental constitutional legal protections must be respected and that this protection includes the notion that states should not interfere with the fundamental interest in family integrity without due process of the law).

A. *Supreme Court Decisions Establishing Due Process Right for Parents to Raise their Children*

Beginning in the early 1920s, the United States Supreme Court reviewed the rights of parents to raise their children and held that parenting is a fundamental constitutional right.²⁷ In *Meyer v. Nebraska*,²⁸ a case involving the right of children to learn a foreign language, the Court determined that the term “liberty” referred to in the Fourteenth Amendment included a parent’s right to raise his or her child.²⁹ Nearly forty years later, in *Stanley v. Illinois*,³⁰ the Court ruled that an unwed father had the right to raise his illegitimate child.³¹ Next, in *Mathews v. Eldridge*,³² a case ruling that disability benefits could be terminated without a hearing, the Court introduced the current balancing test for determining whether procedural due process rights³³ have been violated.³⁴ The test requires the consideration of: (1) the private interest that will be affected by the state’s action, (2) the risk of an erroneous deprivation of the fundamental interest through the procedures used and the benefit of other procedural safeguards, and (3) the Government’s interest, including any administrative or fiscal burdens associated with substituted or additional requirements.³⁵

27. See *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (holding that due process requires the clear and convincing evidence standard to prove child abuse or neglect by a parent and to support termination of parental rights); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (holding that the fundamental interest at issue must be weighed against the Government’s interest); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (holding that parents possess the “essential” right to raise their children by means of the Fourteenth Amendment’s Due Process Clause); *Meyer*, 262 U.S. at 399 (holding that the Fourteenth Amendment includes the right of the individual “to marry, establish a home and bring up children”).

28. See 262 U.S. 39 (1923).

29. See *id.* (defining the Fourteenth Amendment liberty interest as including “not merely freedom from bodily restraint” but also the right to “establish a home and bring up children”). This case was one of the first instances in which the U.S. Supreme Court considered parents’ fundamental rights to raise their children. *Id.* at 399.

30. 405 U.S. 645 (1972).

31. See *id.* at 651 (holding that the right of a parent to raise his or her children is “essential” and is thus afforded protection in the Due Process Clause of the Fourteenth Amendment).

32. 424 U.S. 319 (1976).

33. See *id.* at 334 (describing procedural due process as constitutionally sufficient administrative procedures); see also BLACK’S LAW DICTIONARY 517 (7th ed. 1999) (defining the government’s duty to act with procedural due process as the requirement to provide notice and to convene a hearing).

34. See *Mathews*, 424 U.S. at 335.

35. See *id.*

2003] VICTIMIZED BY CHILD PROTECTIVE SERVICES 1029

These cases established the Supreme Court's due process analysis of family law issues, which weighs the state's interest against parental rights.³⁶ The goal of this approach is the protection of "fundamental values" and traditions found in the nation's history from "significant state interference."³⁷ The Court has recognized a parent's right to care for and raise his or her child as a fundamental value and thus has afforded due process to this right.³⁸

The Fourteenth Amendment of the Constitution states that no state shall "deprive any person of life, liberty, or property, without due process of law."³⁹ Parents possess an interest in the care, custody, and management of their children⁴⁰ and children possess a reciprocal interest in being raised by their parents.⁴¹ However, these rights must be weighed against the government's interest in ensuring that children are free from abuse and neglect.⁴² Therefore, in child abuse and neglect cases, both parents and children are owed due process of the law and protection against the state's interference with their fundamental interest in family integrity.⁴³

36. See NORMAN REDLICH ET AL., UNDERSTANDING CONSTITUTIONAL LAW 231 (2d ed. 1999) (describing the due process analysis approach as protecting "fundamental values" from "significant state interference," but noting that this approach is criticized for its lack of concrete definitions of "fundamental value" and "significant interference").

37. *Id.* (stating that the Court's substantive due process approach has the goal of protecting fundamental interests from state interference).

38. See *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982) (stating that parents possess a vital interest in "preventing the irretrievable destruction of their family" and remarking that parents must be provided fundamentally fair procedures when faced with the dissolution of their parental rights); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (explaining that while the reach of the Due Process Clause has not been defined with exactness, it has long been recognized that the right to raise one's children is included as part of the guaranteed liberty interest); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981) (referring to a parent's right to an accurate and fair decision to terminate parental rights as a "commanding one" due to the fundamental interest in raising one's child).

39. U.S. CONST. amend. XIV, § 1.

40. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1971) (stating that a parent's right to and desire for the "companionship, care, custody and management of his or her children" is a right far more precious than that of property).

41. See *Santosky*, 455 U.S. at 760-61 (stating that the child and his parents share an interest in preventing the unjust termination of their natural relationship); see also *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (stating that a child's interest is linked with a parent's interest in the welfare of the child).

42. See *Reno v. ACLU*, 521 U.S. 844, 869 (1997) (discussing the federal government's compelling interest in protecting children's psychological and physical well-being).

43. See *Santosky*, 455 U.S. at 760 (stating that at the fact-finding hearing, the state cannot presume that a child and parent are adversaries and that the interests of the child and parent do not coincide, thus procedures should be used to decrease the risk of erroneously terminating the parent-child relationship).

1030 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

B. Standards of Proof and Judicial Process for Determining Neglect

A parent's fundamental constitutional right to raise his or her child is a significant consideration when applying the standards of proof used in the judicial process for determining whether a parent is guilty of child neglect.⁴⁴ There are three stages of proceedings for determining whether a child is the victim of child abuse or neglect.⁴⁵ These three stages include (1) an initial hearing through adjudication, (2) case review, and (3) termination of parental rights.⁴⁶ For our purposes, the second stage is not important because unlike the first and third stages, the second stage does not involve a standard of proof. Thus, the first and the third stages will be the focus of this section in order to analyze the differing standards of proof applied at the adjudication hearing and the termination of parental rights proceeding.

1. The Role of Santosky v. Kramer with Regard to Neglect Proceedings

Abuse and neglect cases begin with an initial trial stage called an adjudication hearing.⁴⁷ During this hearing, the court⁴⁸ decides whether the evidence presented by child protective services supports the state's intervention in the family unit.⁴⁹ Since this process can last for months or years,⁵⁰ a temporary custody hearing takes place in the meantime to determine whether the child should remain in the temporary custody of child protective services or be returned home under supervision pending the decision at trial.⁵¹

44. See Murray Levine, *Therapeutic Jurisprudence Analysis of Mandated Reporting of Child Maltreatment by Psychotherapists*, 10 N.Y.L. SCH. J. HUM. RTS. 711, 718 (1993) (stating that a lenient evidentiary standard triggers an investigation of child maltreatment and that society values the protection of children so much that it will intrude on the constitutionally protected interest in family integrity and the due process rights of parents in order to protect a child).

45. See KAREN AILEEN HOWZE, *MAKING DIFFERENCES WORK* 21-67 (1997) (providing detailed descriptions of the three stages of proceedings).

46. See *id.* at 21 (stating that the court's findings during child abuse and neglect proceedings are based upon the facts presented and the main concern of the court is to remove the child from the possibility of additional harm).

47. See *id.* at 24 (explaining that during this trial stage the court decides whether state action is in the best interests of the child).

48. See *id.* Because judges, commissioners, or referees may decide cases at the trial level of neglect proceedings, the term "court" will be used when referring to the decision-maker. *Id.*

49. See RENNY GOLDEN, *DISPOSABLE CHILDREN: AMERICA'S WELFARE SYSTEM* 88 (1997) (noting that the purpose of this adjudication hearing is to decide, based upon the facts presented, whether parents have abused or neglected their children).

50. See, e.g., *id.* at 19 (referring to the case of James Norman, who lost custody of his daughters for four years as the result of an allegation of child neglect).

51. See HOWZE, *supra* note 45, at 24 (explaining that this initial temporary custody

2003] VICTIMIZED BY CHILD PROTECTIVE SERVICES 1031

During this temporary custody hearing, the court hears the facts and balances the fundamental rights of parents to raise their children against the child's need for safety.⁵² A fair preponderance of the evidence, which is a minimal standard of proof,⁵³ is applied at this stage of the child abuse and neglect proceedings.⁵⁴

The third and final stage in a neglect proceeding is the termination of parental rights.⁵⁵ This stage involves the severance of the legal relationship between the parent and the child.⁵⁶ The Supreme Court has held that this permanent termination of parental rights requires an elevated standard of proof of clear and convincing evidence.⁵⁷

When a parent's rights are terminated, the result is "severing completely and irrevocably the rights of parents in their natural child."⁵⁸ The holding in *Santosky v. Kramer*⁵⁹ has been frequently cited in cases involving the termination of parental rights due to child abuse and neglect.⁶⁰ In *Santosky*, the Supreme Court struck down a New York law that terminated parental rights upon a finding that the

hearing is also referred to as a shelter care hearing, detention hearing or emergency removal hearing).

52. See GOLDEN, *supra* note 49, at 88 (stating that the temporary custody hearing is usually held within forty-eight hours after the child has been removed from the home).

53. See *Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (explaining that a fair preponderance of the evidence standard signifies society's minimal concern with the outcome and causes the parties to share the risk of error in an equal manner).

54. See, e.g., *Padilla v. Norfolk Div. of Soc. Servs.*, 472 S.E.2d 658, 659 (Va. Ct. App. 1996) (explaining that when the placement of the children is temporary, the proper standard of proof is a preponderance of the evidence, but in a parental rights proceeding, proof must be clear and convincing).

55. See HOWZE, *supra* note 45, at 62 (noting that child abuse and neglect proceedings continue to the termination of parental rights stage if parents are unable to reform themselves and their families during the case review stage).

56. See *id.* at 63 (describing the termination of parental rights stage as a determination made following evidence presented by social workers, psychologists and witnesses).

57. See *Santosky*, 455 U.S. at 754-56 (stating that clear and convincing evidence should be applied when the interests at risk are both "particularly important" and "more substantial than mere loss of money"). In a parental rights termination proceeding, parents should be provided with "fundamentally fair procedures." *Id.*

58. *Id.* at 746, 748 (stating that termination denies parents the right to visit, communicate with or regain custody of their children).

59. 455 U.S. 745, 755 (1982) (holding that clear and convincing evidence of abuse is required to terminate parental rights).

60. See, e.g., *Cynthia D. v. San Diego County Dep't of Soc. Servs.*, 851 P.2d 1307, 1311-21 (Cal. 1993) (citing *Santosky v. Kramer*, 455 U.S. 745 (1982), and applying the due process analysis used by the Supreme Court); *Wright v. Arlington County Dep't of Soc. Servs.*, 388 S.E.2d 477, 477-79 (Va. Ct. App. 1990) (citing *Santosky* and distinguishing standards of proof required for temporary custody hearings versus termination of parental rights proceedings).

1032 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

child involved was permanently neglected.⁶¹ Under this New York law, if the state proved by a “fair preponderance of the evidence” that the child was permanently neglected, the natural parents’ rights were terminated.⁶² Relying on the parents’ fundamental interest to raise their children,⁶³ the Court held that a parent’s right to raise his or her child could be terminated only upon “clear and convincing” proof⁶⁴ that the child was neglected.⁶⁵

The Supreme Court in *Santosky* established that clear and convincing evidence must be proven prior to terminating parental rights.⁶⁶ This standard of proof further emphasizes the Court’s strong belief and adherence to the fundamental right of a parent to raise his or her child.⁶⁷ The Court reasoned that the clear and convincing evidence standard best prevents the risk of an erroneous termination of parental rights.⁶⁸

Nonetheless, the clear and convincing evidence standard articulated in *Santosky* fails to ensure that indigent parents will not be

61. See *Santosky*, 455 U.S. at 747 (referring to N.Y. SOC. SERVS. LAW § 384(b) (McKinney Supp. 1981-1982), which provided that a State could terminate the rights of a parent to his or her child upon finding that the child was “permanently neglected”).

62. *Id.* (stating that the New York Family Court Act § 622 requires that the determination that a child is permanently neglected be supported by a “fair preponderance of the evidence”).

63. See *id.* at 754, 759 (stating that parents have a vital interest in preserving their family and emphasizing the fundamental liberty interest possessed by natural parents in the “care, custody and management” of their children).

64. See *id.* at 769 (noting that the majority of States determined that the clear and convincing evidence standard creates a fair balance between the rights of the parents and the State’s legitimate interest).

65. See *id.* (stating that the fair preponderance of the evidence standard mandated by New York law violates the Due Process Clause of the Fourteenth Amendment).

66. See *id.* at 756 (stating that the clear and convincing evidence standard is an intermediate standard of proof used when the interests at stake are “particularly important” and “more substantial than mere loss of money”). *But see* The Honorable Matthew E. Franklin & Christine P. Franklin, *Termination of Parental Rights*, in ILL. INST. FOR CONTINUING LEGAL EDUC., JUVENILE LAW AND PRACTICE HANDBOOK § 11(F)(1) (2001) (suggesting that the clear and convincing evidence standard is a higher standard than the manner in which the Court interprets it and stating that the standard of proof has been referred to as: (a) proof that leaves no reasonable doubt concerning the truth of the matter at issue; (b) similar to the “beyond a reasonable doubt” burden of criminal cases; and (c) more than a preponderance but not quite the amount of proof needed to convict someone of a criminal offense).

67. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (holding that the Fourteenth Amendment Due Process Clause gives parents the right to raise their children); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating that the right to raise one’s child is included in “liberty” under the Fourteenth Amendment).

68. See *Santosky*, 455 U.S. at 759 (noting that a parent’s interest in an accurate and fair decision to terminate parental rights is a “commanding one”).

2003] VICTIMIZED BY CHILD PROTECTIVE SERVICES 1033

subjected to the unjust termination of their parental rights.⁶⁹ The statutory standards required for judicially declaring a parent unfit, sufficient to terminate parental rights, include such broad language as “substantial neglect of the child if continuous or repeated” and “failure to protect the child from conditions within his environment injurious to the child’s welfare.”⁷⁰

Furthermore, courts have interpreted *Santosky*’s holding to mean that the lesser fair preponderance of the evidence standard of proof should be applied at the initial trial stage (adjudication hearing) of a neglect proceeding because this stage only involves the possibility of temporary, not permanent, loss of the child’s custody.⁷¹ Because a parent’s temporary loss of child custody fails to rise to the level of the permanent loss of custody faced by parents in termination of parental rights proceedings, the Court held that the lower standard of proof was sufficient to support the lesser degree of intrusion into parental rights.⁷² Thus, the majority of states interpreted the reasoning in *Santosky* to require only a preponderance of the evidence at the fact-finding initial adjudication hearing.⁷³

For example, in *In re Tammie Z.*,⁷⁴ the New York Court of Appeals considered the proper standard of proof regarding an allegation of

69. See WALDFOGEL, *supra* note 7, at 61-62 (pointing out that in the United States, poverty is strongly related to the likelihood of reports of child neglect). Such a strong link between poverty and reported child neglect suggests that the standard of proof articulated by *Santosky* fails to serve as sufficient protection against the erroneous termination of parental rights. *Id.*

70. HARRY D. KRAUSE, *FAMILY LAW IN A NUTSHELL* 279 (1995) (demonstrating that the statutory standards for declaring a parent unfit in order to terminate parental rights are no less ambiguous than those required for finding neglect).

71. See *Santosky*, 455 U.S. at 753-54, 759 (stating that the extent of procedural due process is influenced by the amount of “grievous loss” the recipient may suffer and that “persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention” as in a temporary custody proceeding). The Court also stated that in a termination proceeding, the State seeks to not merely “infringe” a fundamental liberty interest, but to “end it.” *Id.*

72. See *id.* at 746, 766-69 (concluding that before a state may terminate [meaning “sever completely and irrevocably”] the rights of a parent, due process requires that the State must prove allegations of child abuse or neglect by clear and convincing evidence).

73. See, e.g., *Wright v. Arlington County Dep’t of Soc. Servs.*, 388 S.E.2d 477, 478 (Va. Ct. App. 1990) (distinguishing *Santosky* by stating that the present case involved a temporary custody hearing, and because the state action resulting from the hearing is neither final or irrevocable, a preponderance of the evidence is sufficient to support the court’s findings); see also N.Y. FAM. CT. ACT § 1046(23) (Consol. 2001) (stating that “in a fact-finding hearing [initial adjudicatory hearing], a determination that a child is neglected must be based on a preponderance of the evidence rather than clear and convincing evidence.”).

74. 484 N.E.2d 1038 (N.Y. 1985).

1034 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

neglect.⁷⁵ In this case, the father appealed a decision of the family court ruling that his children were neglected, claiming that the court should have applied a standard of clear and convincing evidence rather than a preponderance standard.⁷⁶ In holding that the family court applied the correct standard of proof, the New York Court of Appeals distinguished this case from *Santosky*,⁷⁷ because the maximum period for the separation of a parent and child following a neglect proceeding is eighteen months, whereas *Santosky* involved the permanent separation of a parent and child.⁷⁸

Tammie Z. is illustrative of the approach in the majority of states that require only a preponderance of the evidence standard of proof during the initial stage of neglect proceedings.⁷⁹ The Court in *Santosky* articulated that the standard of proof reflects the degree of importance which society places on the interest at stake.⁸⁰ Further, the Court stated that a clear and convincing evidence standard reflects interests that are both “particularly important” and “more substantial than mere loss of money,” whereas a fair preponderance of the evidence standard suggests society’s “minimal concern with the outcome.”⁸¹ For an indigent parent, an initial temporary custody (adjudicatory) hearing could result in the temporary loss of his or her children for months or even years.⁸² Yet the Supreme Court has

75. See *id.* at 1039 (discussing the proper standard of proof for neglect proceedings versus termination of parental rights proceedings).

76. See *id.* (noting that the trial court applied a preponderance of the evidence standard in reaching its determination that the father’s children were neglected, which in turn led the court to place the children in the custody of the Department of Social Services).

77. See *id.* at 1039 (explaining that the neglect proceeding resulted in temporary loss of custody pending a final order determining if the child should be returned to the parents).

78. See *id.* (reasoning that unlike a parental termination proceeding, the less stringent preponderance of the evidence standard should be applied in the neglect proceeding because of the temporary loss of custody involved).

79. See *supra* note 60 and accompanying text (providing examples of cases that used a preponderance of the evidence as the standard of proof during temporary custody hearings).

80. See *Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (stating that the standard of proof represents a societal judgment regarding the manner in which the “risk of error should be distributed between the parties”); see also *Addington v. Texas*, 441 U.S. 418, 423 (1979).

81. See *Santosky*, 455 U.S. at 755-56 (explaining that with a fair preponderance of the evidence standard, the parties share the risk of error equally, whereas a clear and convincing evidence standard preserves fundamental fairness when the government has taken action that involves a “significant deprivation of liberty” and therefore shifts the burden of proof to the government).

82. See GOLDEN, *supra* note 49, at 19 (relating the story of a man who lost custody of his children for four years following an adjudicatory hearing).

2003] VICTIMIZED BY CHILD PROTECTIVE SERVICES 1035

assigned merely a minimal standard of proof for such a hearing.⁸³ If the indigent parent is unable to improve his or her economic situation following this hearing, a termination of parental rights proceeding often takes place.⁸⁴ Such a risk at least requires that proof of neglect be supported by clear and convincing evidence at both the temporary custody hearing and the termination of parental rights proceeding in order to provide the most sufficient protection against the erroneous termination of parental rights.⁸⁵

Parental rights advocates argue that the mere requirement of a fair preponderance standard at initial adjudicatory hearings creates a due process violation for parents and that raising the standard to clear and convincing evidence will reduce the risk of error.⁸⁶ While this solution would provide a better safeguard against erroneously depriving parents of the right to raise their children, indigent parents will still remain at risk for losing their parental rights.⁸⁷ For the indigent parent, the core of the problem lies with the imprecise statutory definitions of child neglect, which encompass characteristics of poverty.⁸⁸ Without changing these definitions, raising the standard of proof will serve as an insufficient safeguard for indigent parents.⁸⁹

83. See *id.* at 88 (emphasizing the duration of separation between an accused parent and child by stating that if neglect is determined at the temporary custody hearing, the child will be placed in foster care until a case review is conducted approximately forty-five days later and a civil trial ninety days later; lastly a dispositional hearing usually takes place approximately 120 days later).

84. See KRAUSE, *supra* note 70, at 279 (explaining that parental rights are terminated if the parent fails to make reasonable efforts to correct the conditions that caused the removal of the child from the home within a year after an adjudication of neglect or abuse).

85. See Colleen McMahon, *Due Process: Constitutional Rights and the Stigma of Sexual Abuse Allegations in Child Custody Proceedings*, 39 CATH. LAW. 153, 164-91 (1999) (noting that family preservation is a societal goal, but arguing that courts' use of the fair preponderance of the evidence standard exacerbates the risk of error in custody proceedings because allegations of sexual abuse are difficult to disprove).

86. See *id.* at 192 (arguing that there is an increased risk of error in child abuse cases because determinations in these proceedings are subjective and application of the preponderance of the evidence standard fails to reflect the potential severity of the outcomes of such proceedings).

87. See Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 580-81 (1997) (stating that the primary problem with the child protective system is that the public system, rather than the private system, hears custody cases involving poor parents and that the government intervenes more often in the parent-child relationship of poor families based on ill-defined reasons).

88. See KALICHMAN, *supra* note 15, at 75 (arguing that characteristics of poverty leading to allegations of child neglect must be viewed in the context of differing cultures as well as the known relationship between neglect and poverty).

89. See Jennifer Wriggins, *Parental Rights Termination Jurisprudence: Questioning the Framework*, 52 S.C. L. REV. 241, 259 (2000) (arguing that the standards for the termination of parental rights are vague and thus the application of vague standards to the facts is "murky" in many cases).

1036 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

Removing indigent children from their families, even temporarily, as a result of vague definitions and an inappropriate standard of proof results in the unfair disruption of emotional parent-child bonds.⁹⁰

C. No Absolute Right to Counsel for Indigent Parents

In addition to the cursory standard of proof applied in temporary custody proceedings, the Supreme Court fails to mandate that counsel be appointed to indigent parents accused of child abuse and neglect.⁹¹ In line with the Court's strong belief in maintaining the family unit,⁹² it would seem that, in addition to requiring clear and convincing evidence in parental termination proceedings, the Court would at least require that indigent parents be afforded legal counsel in termination proceedings as a safeguard against the erroneous termination of parental rights.⁹³ By failing to provide counsel to indigent parents during child abuse or neglect proceedings, the current legal framework renders indigent parents extremely vulnerable to losing their parental rights.⁹⁴ In such cases, the State possesses the necessary funding and expert witnesses to present a strong case demonstrating neglect and potentially leading to the termination of parental rights.⁹⁵ Surprisingly, however, despite the

90. See Cahn, *supra* note 9, at 1191 (arguing that children possess the right to be raised in a safe environment, but removing children from their homes disrupts the strong emotional bonds shared between family members and the separation has a severe impact on children); see also *Ex Parte Petition of C.E.H.*, 391 A.2d 1370, 1372 (D.C. 1978) (emphasizing the importance of the emotional bond shared between a parent and child when determining the best interests of a child).

91. See *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 33 (1981) (holding that due process does not require appointing counsel for indigent parents during parental termination proceedings where the parent demonstrates disinterest in custody of the child).

92. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (holding that parents possess the "essential" due process right to raise their children); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the Fourteenth Amendment includes the fundamental right to bring up children).

93. See *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982) (stating that individuals faced with the termination of their parental rights have the right to procedural protections). *But see Lassiter*, 452 U.S. at 33 (holding, in a five to four opinion, that due process does not demand appointing counsel for indigent parents during every parental termination proceeding, such as that in which the parent demonstrates disinterest in the custody of the child).

94. See *Santosky*, 455 U.S. at 763 (stating that State's ability to build and present its case is disproportionate to the parents' ability to prepare a sufficient defense).

95. See *id.* at 763-64 (explaining that the child protective services agency possesses the ability to spend large amounts of money to prosecute a termination case and the State calls expert witnesses whom the State hires to both investigate allegations of child abuse or neglect and testify against the parents); *id.* at 790 n.13 (noting in dicta that the parents in the *Santosky* case claimed that the State sought court orders to prevent the parents from visiting their children while in protective custody, which would have prevented the parents from fulfilling the necessary visitation required to

2003] VICTIMIZED BY CHILD PROTECTIVE SERVICES 1037

previously discussed vulnerabilities of indigent parents and the fundamental nature of the interest of the state, the Court has refused to require the appointment of counsel to indigent parents in parental termination proceedings.⁹⁶

1. *Need for Legal Representation for Indigent Parents*

Low-income families often cannot afford to pay the costs associated with cases of child abuse.⁹⁷ For example, in 1988, a Prince William County, Virginia, couple arrived home to find that their ten-year-old son was missing and in the custody of the Virginia Department of Social Services due to an allegation of child neglect.⁹⁸ As a result of this incident, “the couple spent more than \$30,000 in counseling fees alone to regain custody of their son”⁹⁹—an amount of money most low-income families cannot afford to spend.¹⁰⁰ Low-income parents, who often can barely afford to provide necessities for their children, should not be expected to pay for legal assistance in child neglect proceedings which may be erroneously initiated.¹⁰¹

regain custody of their children).

96. See *Lassiter*, 452 U.S. at 27 (noting that an indigent individual has a right to appointed counsel only where he or she risks losing personal freedom). *But see* *M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1996) (holding that an indigent mother who lacked funds to pay court fees could not be denied the right to appellate review of the trial court’s finding that she was unfit as a parent).

97. Cf. Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The State’s Response to Lassiter*, 14 *TOURO L. REV.* 247, 257 (1997) (stating that the right to counsel is vital to low-income parents because the expectation that they can hire an attorney at their own expense is unrealistic).

98. See Neuman, *supra* note 1, at 6 (recounting the story of the Jordans, who arrived home to find a note attached to their front door specifying a court date and notifying them that they had been charged with child neglect).

99. *Id.* at 6 (stating that the Jordans spent more than \$30,000 in counseling fees alone to help “their son cope with his fear of abandonment,” which resulted from being removed from his home and parents and placed in foster care); see also MACK, *supra* note 3, at 56 (noting another case where a father accused of sexually abusing his daughter paid \$260,000 for Child Protective Services therapy and sex offender tests in order to regain custody of his daughter).

100. See Jeanne Brooks-Gunn et al., *Toward an Understanding of the Effects of Poverty upon Children*, in *CHILD WELL-BEING, CHILD POVERTY AND CHILD POLICY IN MODERN NATIONS* 3 (Hiram E. Fitzgerald et al. eds., 1995) (stating that in 1991, the poverty thresholds in the United States ranged from \$10,860 to \$16,460 before taxes); Karen Christopher et al., *Gender Inequality in Poverty in Affluent Nations: The Role of Single Motherhood and the State*, in *CHILD WELL-BEING, CHILD POVERTY AND CHILD POLICY IN MODERN NATIONS* 199, 200 (Koen Vleminckx et al. eds., 2000) (stating that individuals are classified as being “in poverty” if their household incomes fall below half the median household income for the nation); see also Cohn, *supra* note 5 (demonstrating that indigent parents cannot possibly afford to hire legal representation in child neglect proceedings, and reporting that while the national median household income was \$42,148 for the year 2000, a total of 31.1 million individuals still remain in poverty).

101. See Wriggins, *supra* note 89, at 257 (arguing that retaining counsel for child

1038 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

2. *Lassiter v. Department of Social Services*

*Lassiter v. Department of Social Services*¹⁰² is the leading Supreme Court case establishing that low-income parents do not possess a constitutional right to counsel with regard to child abuse and neglect proceedings.¹⁰³ In *Lassiter*, the petitioner's infant son was removed by the Durham County Department of Social Services due to allegations of child neglect and later held to be neglected by a North Carolina state court.¹⁰⁴ The petitioner appealed the state court decision claiming that she was entitled to counsel under the Fourteenth Amendment due to her indigence.¹⁰⁵ The Court held that the Constitution does not require the appointment of counsel to indigent parents, and that the determination of whether to provide counsel should be made on a case-by-case basis.¹⁰⁶

The Fourteenth Amendment guarantees due process of law and equal protection of the laws.¹⁰⁷ However, the *Lassiter* decision does not afford due process to indigent parents forced to defend themselves against allegations of child neglect due to their indigent status.¹⁰⁸ Being that low-income parents are accused of child neglect at a higher rate than parents of other income levels, it is both unjust

neglect proceedings is extremely difficult especially if the party lacks a substantial income).

102. 452 U.S. 18 (1981).

103. See *id.* at 31-32 (reasoning that the Constitution fails to require the appointment of counsel in every parental termination proceeding and that the determination of whether due process requires the appointment of counsel should be decided by the trial court).

104. See *id.* at 20 (noting that because the petitioner failed to provide her infant son with appropriate medical care, the District Court of Durham County, N.C., held that he was a neglected child and placed him in the custody of the Department of Social Services).

105. See *id.* at 24 (discussing Ms. Lassiter's argument that she was indigent and thus due process required that she be appointed counsel). However, the North Carolina Court of Appeals held that the invasion of privacy was not "so serious or unreasonable" as to require granting the appointment of counsel as a constitutional mandate. *Id.*

106. See *id.* at 31 (applying the three factors introduced in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) – (1) parent's interest in raising the child, (2) State's interest in protecting the child, and (3) the risk of error for an erroneous deprivation of parental rights—and concluding that the complex proceedings and lack of counsel for the parent would not "always be great enough to make the risk of erroneous deprivation of the parent's rights insupportably high").

107. See U.S. CONST. amend. XIV, § 1 (stating that no State shall deprive any individual of "life, liberty, or property, without due process of law" or deny any person "equal protection of the laws").

108. See Kathleen A. Bailie, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285, 2297 (1998) (demonstrating that an indigent parent's right to hire counsel at his or her own expense does not actually provide protection).

2003] VICTIMIZED BY CHILD PROTECTIVE SERVICES 1039

and unrealistic to require such parents, who often cannot afford basic necessities, to hire legal counsel.¹⁰⁹ The failure to appoint legal counsel to indigent parents during neglect proceedings places the fundamental interest in raising one's child at risk.¹¹⁰

The Court in *Lassiter* notes that an indigent individual only possesses a right to legal counsel when the individual could potentially lose his or her physical liberty.¹¹¹ Yet, in this case, as well as preceding cases, the interest in raising one's child has been regarded as fundamental.¹¹² Thus, an indigent individual's right to counsel should apply not only when the risk of being deprived of personal freedom is at hand, but also when the risk of losing one's child is at issue.¹¹³ The risk that an indigent parent will lose the right to raise his or her child is increased by the absence of legal counsel during a neglect proceeding.¹¹⁴ Not only is an indigent parent likely to lack the financial means to secure legal representation,¹¹⁵ but the indigent parent is also likely to lack the requisite training to understand all of the important legal terms and issues involved

109. See *Lassiter*, 452 U.S. at 57 (Blackmun, J., dissenting) (inferring that the right to counsel is essential for indigent parents who do not possess the ability to properly represent themselves during child abuse or neglect proceedings and stating: "I find virtually incredible the Court's conclusion today that her termination proceeding was fundamentally fair. To reach that conclusion, the Court simply ignores the defendant's obvious inability to speak effectively for herself, a factor the Court has found to be highly significant in past cases.").

110. See *id.* at 37 (Blackmun, J., dissenting) (emphasizing that the interest at stake when deciding not to appoint counsel to indigent parents is fundamental because it directly affects that individual's liberty interest).

111. See *id.* at 26-27 (stating that an indigent has a right to counsel only when the indigent may be deprived of physical liberty if he or she does not prevail in the case).

112. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating that individuals possess a fundamental liberty interest in raising their children); see also *Lassiter*, 452 U.S. at 38 (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), and emphasizing a parent's interest in the "companionship, care, custody, and management of his or her children").

113. See *Wriggins*, *supra* note 89, at 257 (arguing that an indigent parent should be granted counsel in child abuse and neglect proceedings because these proceedings are fact-intensive and require a great deal of time and substantial funds, which an indigent litigant most likely lacks); see also *Young*, *supra* note 97, at 258 (noting that "research offers evidence that counsel is critical to the maintenance of legal rights.").

114. See *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982) (stating that persons facing the dissolution of parental rights have a vital need for procedural protections).

115. See *Young*, *supra* note 97, at 257 (describing the right of indigent litigants to hire legal counsel at their own expense as a "cruel sham"). This statement is based on the fact that, since low-income parents whose children were removed from the home on the grounds of neglect sometimes lacked sufficient financial means to provide basic necessities for their children, they obviously lacked financial means to hire an attorney. *Id.*

1040 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

during a neglect proceeding.¹¹⁶

In essence, low-income parents' due process rights are infringed upon in such a way that they are unjustly punished twice for their state of poverty: first when their children are removed from the home on the grounds of neglect when the true problem is poverty; and second when they cannot afford, nor are they guaranteed, counsel to defend themselves against charges of neglect. Without counsel, low-income parents face a greater risk of permanently losing their children, and thus their fundamental right to raise them, on the basis of their financial situation.¹¹⁷ The Court has long recognized the importance of family integrity as a fundamental value,¹¹⁸ yet this value has been diminished by not requiring states to provide counsel to indigent parents during parental termination proceedings.¹¹⁹

II. LACK OF NARROW DEFINITIONS OF CHILD ABUSE

In the United States, parents possess diverse religious, ethnic, financial and racial backgrounds and thus raise their children in different manners.¹²⁰ However, judges and caseworkers sometimes fail to understand these distinctions.¹²¹ This failure to recognize familial distinctions often results in the separation of families at the

116. See *Lassiter*, 452 U.S. at 30 (recognizing that indigent parents are likely to be uneducated and the issues involved in a termination hearing are sometimes complex).

117. See Young, *supra* note 97, at 257 (arguing that counsel is required to present the parent-child relationship and that indigent parents without counsel may fail to understand the complexities of the proceeding and will not properly be heard without the assistance of counsel); see also *Lassiter*, 452 U.S. at 51 (Blackmun, J., dissenting) (asserting that indigent parents representing themselves may be unaware of legal standards and practices and thus not present their case in an adequate manner).

118. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

119. See Sheri Bonstelle & Christine Schessler, *Adjourning Justice: New York State's Failure to Support Assigned Counsel Violates the Rights of Families in Child Abuse and Neglect Proceedings*, 28 FORDHAM URB. L.J. 1151, 1151-52 (2001) (arguing that since many indigent parents are too poor to provide food and clothing for themselves and their children, let alone be able to hire counsel, justice requires that parents be appointed counsel to ensure that they are heard).

120. See U.S. CENSUS BUREAU, CENSUS 2000 BRIEF (last visited Mar. 2, 2003) (reporting that out of a total population of 281,421,906 Americans, 75.1% are Caucasian, 12.3% are Black or African-American, 0.9% are American Indian, 3.6% are Asian, and 12.5% are Hispanic or Latino), available at <http://www.census.gov/population/www/socdemo/race.html>.

121. See MACK, *supra* note 3, at 65 (quoting Neil Gilbert, social welfare professor at the University of California, Berkeley, who believes that judges and caseworkers do not seem to appreciate the distinctions in the ways in which parents raise their children, and thus child welfare agencies often undermine fundamental democratic freedoms such as American cultural pluralism).

2003] VICTIMIZED BY CHILD PROTECTIVE SERVICES 1041

hands of the child welfare system.¹²² This is especially true for minority and low-income families who are vulnerable to the unjust termination of their parental rights.¹²³ Reports of child maltreatment are sometimes made in situations where a parent is merely guilty of being poor.¹²⁴ It has been argued that the relationship between poverty and child abuse or neglect is due to reporting bias¹²⁵ on behalf of professionals who are more likely to report low-income families to child protective service agencies.¹²⁶ For low-income parents victimized by the child protective system, reporting bias may result in the placement of their children in the foster care system where many children are both neglected and abused.¹²⁷ Frequently, children who remain in the foster care system for a long period of time are moved from foster home to foster home and are denied the care and nurturing of their parents from whom they have been separated due to the consequences of reporting bias based on their economic situation.¹²⁸

122. See Appell, *supra* note 87, at 589 (arguing that the child protection system places children in foster care based largely on the race, class, and sex of their primary parents, which results in children being harmed by the separation from their families); see also Horwitz & Higham, *supra* note 9 (quoting Thomas Wells, executive director of the Consortium for Child Welfare, who believes that removing a child from his or her home traumatizes the child because the child loses touch with all that is familiar, and that this trauma must be weighed with the safety risk of remaining with the parents).

123. See MACK, *supra* note 3, at 67 (noting that poor children are more likely to be removed from the home and placed in the foster care system).

124. See INFORMATION SERIES ON CURRENT TOPICS: CHILD ABUSE, BETRAYING A TRUST 28-29 (Mei Ling Rein et al. eds., 2001) [hereinafter INFORMATION SERIES ON CURRENT TOPICS] (citing RICHARD WEXLER, WOUNDED INNOCENTS: THE REAL VICTIMS OF THE WAR AGAINST CHILD ABUSE (1995), which discussed instances where child abuse was reported for a parent's failure to pay a utility bill and inability to afford to buy a pair of eyeglasses for the child).

125. See Jane Waldfogel, *Protecting Children in the 21st Century*, 34 FAM. L.Q. 311, 327 (2000) (noting that links between neglect and poverty may be amplified by reporting bias).

126. See Appell, *supra* note 87, at 585 (arguing that child protection authorities are more inclined to separate low-income parents and children due to the fact that low-income families fail to fit the dominant white, middle-class, suburban paradigm, so child protection agencies, judges and attorneys view these families as "less worthy of preservation"); see also GOLDEN, *supra* note 49, at 56 (noting that the majority of child maltreatment reports refer to neglect and the majority of families investigated by child protective service are also on public assistance).

127. See Douglas Besharov, *Child Abuse: Arrest and Prosecution Decision-Making*, 24 AM. CRIM. L. REV. 315, 320 (1986) (stating that while in foster care, many children are neglected or abused and noting that although foster care is theoretically a short-term remedy to protect children, more than 50% of children remain in foster care for over two years and approximately 30% are away from their parents for over six years).

128. See *id.* at 320-21 (stating that children who remain in foster care for more than a short time are denied consistent nurturing and support, which results in severe emotional and behavioral problems). In one county, 29% of the children in

1042 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

Moreover, reporting bias is further facilitated by the broad and ambiguous statutory definitions of the terms “child neglect” and “child abuse.”¹²⁹ The Child Abuse Prevention and Treatment Act¹³⁰ defines child abuse and neglect as “the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child under the age of 18 by a person who is responsible for the child’s welfare under circumstances which indicate that the child’s health or welfare is harmed or threatened thereby.”¹³¹ This federal definition of child abuse and neglect is broad and fails to clarify terms used within the definition, such as “negligent treatment” and “maltreatment.”¹³² Likewise, states and communities throughout the nation possess various definitions for child maltreatment.¹³³ Definitions of child abuse range from narrow definitions emphasizing specific characteristics of abuse or neglect,¹³⁴ to broader definitions emphasizing maltreatment in general,¹³⁵ and to yet broader definitions focusing on the development of a child.¹³⁶ The vagueness of these broad definitions may encompass characteristics of poverty and result in the unnecessary removal of children from the home.¹³⁷

foster care had been moved to at least four homes in less than five years. *Id.*

129. See ROBIN E. CLARK ET AL., *THE ENCYCLOPEDIA OF CHILD ABUSE* 42-47 (2d ed. 2001) (providing examples of broad state statutory definitions of child abuse).

130. 42 U.S.C. §§ 5101-5106 (2000).

131. 42 U.S.C. § 5101 (2001).

132. See Sana Loue, *Legal and Epidemiological Aspects of Child Maltreatment*, 19 J. LEGAL MED. 471, 472 (2000) (stating that vagueness and ambiguities surrounding definitions of child abuse and neglect prove problematic for every aspect of the child maltreatment field, including the reporting system, policy planning and research).

133. See Michael Freeman, *Child Abuse: The Search for a Solution*, in *OVERCOMING CHILD ABUSE: A WINDOW ON A WORLD PROBLEM* 3-4 (Michael Freeman ed., 2000) (arguing that definitions of child abuse reflect ideological differences and have an important impact on civil liberties because these definitions serve as the basis for deciding where and with whom children belong).

134. See, e.g., ARIZ. REV. STAT. ANN. § 8-531(11) (West 2002) (stating that characteristics of neglect include lack of adequate food, clothing, shelter, medical care, and supervision).

135. See, e.g., FLA. STAT. ANN. § 39.01(45) (West 2002) (stating that neglect includes allowing a child to live in an environment that “causes the child’s physical, mental, or emotional health to be significantly impaired or to be in danger of being significantly impaired”).

136. See, e.g., OHIO REV. CODE ANN. § 2151.03(A)(3), (6) (West 2002) (defining abuse or neglect as refusal or negligence to provide “care necessary for the child’s health, morals, or well-being” and due to this refusal or negligence, the child “suffers physical or mental injury that harms or threatens to harm the child’s health or welfare”).

137. See Besharov, *supra* note 3, at 201 (arguing that a distinction should be made between child neglect and living conditions typical of a family’s poverty); see also 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, 565 (2001) (stating that a lack of a clear definition of neglect leaves too much

2003] VICTIMIZED BY CHILD PROTECTIVE SERVICES 1043

A. *Low-income Family Unfairly Separated on Grounds of Child Neglect*

In 1991, a recently widowed Chicago resident, James Norman, developed a heart condition making him unable to work full time.¹³⁸ At this time, he was raising his two daughters, ages ten and twelve, in a one-bedroom apartment.¹³⁹ Due to his medical condition and inability to maintain full-time employment, Mr. Norman fell behind on paying his utility bills and the electricity in his apartment was shut off.¹⁴⁰ Following a report, a child protective services worker visited Mr. Norman's apartment and discovered that the apartment was untidy and contained spoiled food in the refrigerator due to the lack of electricity.¹⁴¹ Upon this finding, Illinois' Department of Children and Family Services removed Mr. Norman's children from his home. Consequently, Mr. Norman lost his monthly public assistance stipend, his Social Security dependent payments, his apartment and his job.¹⁴² Four years after the removal of his daughters, Mr. Norman ultimately was awarded the right to be reunited with them.¹⁴³ Unfortunately, although Mr. Norman ultimately prevailed in regaining custody of his daughters, he died one week prior to being reunited with them.¹⁴⁴ Ironically, Mr. Norman's case is regarded as a "victory for Chicago's poor" because his case forced the Illinois Department of Children and Family Services to stop removing children from impoverished

discretion in the hands of social workers and judges). *But see* KALICHMAN, *supra* note 15, at 186 (arguing that vague definitions of child abuse and neglect are helpful in judicial rulings because such definitions permit judges to make determinations about cases that may not fit within a narrow definition of abuse).

138. *See* GOLDEN, *supra* note 49, at 19 (recounting the story of James Norman as an example of the consequences of the child welfare system's failure to distinguish neglect from poverty).

139. *See id.* (noting that due to Mr. Norman's inability to work full time because of his medical condition, he and his children were forced to reside in a one-bedroom apartment).

140. *See id.* (explaining that following his wife's death, Mr. Norman began raising his daughters, but encountered financial troubles when he was diagnosed with a heart condition and could no longer work full-time).

141. *See id.* (commenting that a neighbor contacted Child Protective Services reporting that the two children were often left at home alone).

142. *See id.* (noting that after the state removed his daughters, Mr. Norman lost his monthly \$96 public assistance, his \$200 monthly Social Security dependent payments, his insurance and his job because these stipends were conditioned upon Mr. Norman having custody of his daughters).

143. *See id.* (noting that as a result of Mr. Norman's case, the Illinois Department of Children and Family Services, a child protective services agency, agreed to provide housing and monetary assistance to low-income families).

144. *See id.* at 19 (remarking that the Legal Assistance Foundation of Chicago filed a federal class action suit against the Illinois Department of Children and Family Services and prevailed, thus helping reunite poor families with their children by providing them with housing and cash assistance, but Mr. Norman unfortunately failed to reap the benefits of this victory).

1044 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

families based on allegations of child neglect.¹⁴⁵

Like other low-income families, Mr. Norman suffered the loss of his children at the hands of a child protective services agency on the basis of poverty, which was mistaken for child neglect.¹⁴⁶ The removal of Mr. Norman's daughters from his home also serves as an example of the repercussions of reporting bias, felt by many low-income families who are separated from their children based upon their financial situation.¹⁴⁷

Various characteristics of poverty also fall within the broad statutory definitions provided by states, which facilitate the use of reporting bias.¹⁴⁸ In turn, child protective service workers are able to justify the removal of children from low-income homes on the basis of this vague statutory language.¹⁴⁹ For instance, Nebraska's definition of child abuse and neglect is defined as "knowingly, intentionally, or negligently causing or permitting a minor child to be deprived of necessary food, clothing, shelter or care."¹⁵⁰ This could easily encompass situations of poverty such as clothing, nutritional and hygiene deficiencies.¹⁵¹

B. *The Poverty Exemption as a Solution for the Confusion Between Neglect and Poverty*

As a solution for the abuse of vague definitional standards, a

145. See *id.* (stating that class action suits are often required to force child welfare agencies to distinguish neglect from poverty and that Mr. Norman's case served as an example of such a suit).

146. See UNDERSTANDING CHILD ABUSE AND NEGLECT 69 (Nat'l Research Council ed., 1993) (asserting that the poor are over-represented with regard to reports made to child protection agencies because they have more contact with social services and other agencies that report child maltreatment).

147. See Appell, *supra* note 87, at 581, 584 (noting that the government intervenes more often in the custodial relationships of indigent families because these families lack power and resources and are not entitled to the same privacy as most Americans due to the fact that they receive public assistance).

148. See, e.g., 325 ILL. COMP. STAT. 5/3 (West 2001) (defining child abuse and neglect as conduct that "inflicts, causes to be inflicted or allows to be inflicted" or "creates a substantial risk" of harm). This definition fails to clarify what is meant by a "substantial risk of harm," which leaves open the possibility that some characteristics of poverty may fall within this ambiguous term. *Id.*

149. See KALICHMAN, *supra* note 15, at 184-85 (arguing that broad legal definitions of child abuse are criticized for being so vague as to allow child protective agency professionals to set their own standards for what constitutes abuse or neglect).

150. NEB. REV. STAT. § 28-710(1)(c) (West 2001); see also UTAH CODE ANN. § 62A-4a-402 (West 2001) (defining child abuse or neglect as "causing harm or threatened harm to a child's health or welfare").

151. See Besharov, *supra* note 3, at 201 (noting conditions of poverty that are prone to over-reporting, which include torn clothing or lack of a winter coat, eating unbalanced meals, hygiene, unsanitary homes, insect bites, lice and unsafe homes).

2003] VICTIMIZED BY CHILD PROTECTIVE SERVICES 1045

minority of states and the District of Columbia have added a poverty exemption to their definition of child abuse and neglect.¹⁵² For example, the District of Columbia's statute for child abuse and neglect provides an exception to classifying a child as neglected, which states that the deprivation of proper care must not be due to a lack of parents' financial means.¹⁵³ The case *In re T.G.* provides an example of the benefit of such a poverty exemption.¹⁵⁴

In re T.G. involved four children that were removed from their parents' home after the Washington, D.C., Department of Human Services ("DHS") visited the family home and determined that the house appeared to be in a "deplorable" condition and the children were dirty and lacking clean clothes and baths.¹⁵⁵ DHS filed neglect petitions and the court ordered that all of the children remain in the custody of DHS based on the children's living conditions.¹⁵⁶ The parents appealed the neglect finding based on the poverty exemption in the D.C. Code.¹⁵⁷ The court held that the evidence supporting the determination that the children were neglected was insufficient.¹⁵⁸ The court reasoned that the children should be released from the custody of DHS because the government failed to meet its burden of proving that the reported neglect was not due to the parents'

152. See CLARK, *supra* note 129, at 42-47 (indicating that the states of Arkansas, Florida, Louisiana, Pennsylvania, West Virginia and Wisconsin as well as the District of Columbia possess poverty exemptions within their statutory definitions of child abuse and neglect).

153. See D.C. CODE ANN. § 16-2301(9)(B) (West 2001) (stating that a neglected child is one who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his or her physical, mental, or emotional health, and the deprivation is not due to the lack of financial means of his or her parent, guardian, or other custodian).

154. See *In re T.G.*, 684 A.2d 786 (D.C. 1996) (demonstrating how the use of a poverty exemption may provide a safeguard to an erroneous termination of parental rights or to a finding of neglect based on a low-income financial status).

155. See *id.* at 787 (explaining that an officer said that the conditions in the house were deplorable, so he removed the children from the home).

156. See *id.* at 788 (mentioning that all of the evidence regarding the parents housekeeping was gathered on the day that the children's grandmother died and a neglect petition was filed the following day).

157. See *id.* at 787 (noting that the parents appealed the trial court's findings of neglect and the court order placing the children in the custody of DHS for placement in foster homes and that they claimed a lack of sufficient evidence to support a determination of neglect); see also § 16-2301(9)(B) (stating that a child fails to be classified as neglected if the deprivation of parental care is due to the low-income financial status of the parents).

158. See *In re T.G.*, 684 A.2d at 787 (agreeing with the parents that the evidence supporting the determination of neglect was insufficient as a matter of law and that the government failed to meet its burden of proving that the lack of sufficient care was not due to the parents' low-income financial status).

1046 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

financial needs.¹⁵⁹

In re T.G. is an example of how the inclusion of a poverty exemption within the definition of child abuse or neglect provides a safeguard to parents who have incorrectly been accused of neglect due to their low-income status.¹⁶⁰ However, as depicted by the lower court's ruling of neglect, *In re T.G.* simultaneously shows that the poverty exemption is not an absolute safeguard against the unjust termination of indigent parents' rights to raise their children.¹⁶¹ Thus, the risk of the erroneous termination of an indigent parent's parental rights remains a due process issue.¹⁶²

Although a minority of states have included a poverty exemption, the vast majority still lack such an exemption.¹⁶³ While the poverty exemption may not prove to be a guaranteed safeguard,¹⁶⁴ the inclusion of such an exemption does decrease the risk that indigent parents will have their right to raise their children infringed upon by an unfair termination of parental rights based on a lack of financial means.¹⁶⁵

159. See *id.* (stating that the court must reverse the neglect order because the neglect was the result of the lack of financial means of the parents).

160. See *id.* at 791 (holding that the government failed to meet its burden of proving that the finding of neglect was not due to the family's financial needs, and thus reversing the order of neglect, but continuing the mandate of termination until the parties could smoothly transition the children to the parents' home or take other action required to advance the children's best interest).

161. See *id.* at 787 (noting that the Superior Court erroneously determined that the children were neglected and ordered that the children be committed to the Department of Human Services for placement in foster homes).

162. See Richard Wexler, *Katelynn's Case was a Rare Exception*, WASH. POST, Jan. 28, 2001, at B8 (quoting Jerome Miller, former head of the D.C. child welfare system, who estimated that at least one-third of children in foster care would have remained in their homes had their families had decent housing).

163. See ARK. CODE ANN. § 12-12-503(12)(b) (Michie 2001) (including in the definition of neglect a poverty exemption which states that a finding of neglect applies "except when the failure or refusal is caused primarily by the financial inability of the person legally responsible"). But see UTAH CODE ANN. § 62 A-4a-402(3) (2001) (defining child abuse or neglect merely as "causing harm or threatened harm to a child's health or welfare," but not including any exemption based on a parent's indigence).

164. See *Matter of D.C.*, 561 A.2d 477, 478-79 (D.C. 1989) (noting that although the mother's financial situation forced her to receive public assistance in order to care for her children, the court still held that she was neglectful because, despite her financial status, she could have taken her children with her to the store instead of leaving them home alone).

165. See, e.g., *In re T.G.*, 684 A.2d 786 (D.C. 1996) (holding that parents were entitled to prevail in appealing a holding of child neglect by applying the poverty exemption).

2003] VICTIMIZED BY CHILD PROTECTIVE SERVICES 1047

III. LOW-INCOME FAMILIES ARE VICTIMS OF FEDERAL LEGISLATION THAT PROVIDES FUNDING TO STATES

In addition to losing their constitutional right to raise their children as a result of ambiguous definitions of neglect, low-income parents also incur this loss as a result of the disparate impact of federal legislation.¹⁶⁶ Federal legislation provides funding to states as a financial incentive to create child abuse prevention programs, which negatively impacts low-income families.¹⁶⁷ In effect, such monetary incentives not only achieve the goal of persuading states to initiate preventative programs,¹⁶⁸ but also unfortunately provide an incentive for increasing the number of low-income parents reported for child abuse and neglect in order for a state to receive a larger grant.¹⁶⁹

A. *Legislative Intent vs. Impact on Low-income Families*

1. *Child Abuse Prevention and Treatment Act*

Congress enacted the Child Abuse Prevention and Treatment Act (“CAPTA”) in 1974 in response to an increased rate of child abuse and neglect.¹⁷⁰ CAPTA requires states to report and respond to allegations of child abuse in order to receive grants.¹⁷¹ Although the

166. See Sarah H. Ramsey, *Child Protection: New Perspectives for the 21st Century*, 34 FAM. L.Q. 301, 304 (2000) (arguing that federal funding provides a financial incentive to states to keep children in foster care rather than reuniting families).

167. See 42 U.S.C. § 5106(a) (2001) (providing federal funding to states as an incentive to adopt mandatory reporting laws and to create preventive and treatment programs to combat child abuse); see also Ramsey, *supra* note 166, at 302-04 (contending that minority and poor children are overrepresented in the child protective services population and that the federal funding scheme provides an incentive to states to keep these children in foster care).

168. See ADMIN. ON CHILDREN, YOUTH AND FAMILIES, *supra* note 2, at 45 (providing examples of preventive services such as parenting education, housing assistance, individual and family counseling).

169. See Ramsey, *supra* note 166, at 304 (arguing that the federal funding scheme of present legislation provides a financial incentive for states to keep children in foster care and has a particularly harsh impact on black children and their families); see also Robert M. Gordon, *Drifting through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 682 (1999) (proposing that state child protective agencies lack desire to reduce the number of children placed in foster care because federal funding is uncapped and unlimited for foster care expenses).

170. See 42 U.S.C. §§ 5101-5106(a); see also VINCENT J. FONTANA & DOUGLAS J. BESHAROV, *THE MALTREATED CHILD* 6 (1996) (commenting that the federal government established CAPTA to conduct research and provide grants to aid states in developing child abuse treatment and prevention programs due to the severity of the child maltreatment problem).

171. See 42 U.S.C. § 5106(a) (1) (stating that the purpose of grants is to assist States in developing, strengthening and carrying out prevention and treatment programs

1048 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

government intended CAPTA to end child abuse by providing monetary incentives to states if they created programs targeting child protection research, identification and prosecution of abuse, the Act has been criticized as being the source of “huge fundraisers” for child protective service agencies.¹⁷²

The financial incentives provided by CAPTA also serve as incentives for states to report a higher rate of child abuse and neglect, thus making low-income parents particularly vulnerable to unwarranted allegations.¹⁷³ As previously noted, conditions of poverty may classify as child neglect due to broad statutory definitions.¹⁷⁴ Thus, CAPTA creates a monetary incentive for child protective service agencies to engage in reporting bias against low-income families.¹⁷⁵

2. Adoption Assistance and Child Welfare Act

Another act that produces a disparate impact on low-income parents, the Adoption Assistance and Child Welfare Act¹⁷⁶ (“Child Welfare Act”), was enacted in 1980 in response to concerns regarding long-term foster care placement, which resulted from programs supported by CAPTA funding.¹⁷⁷ The Child Welfare Act requires that “reasonable efforts”¹⁷⁸ be made before placing a child into foster care in order to prevent the need for removal of the child

for child abuse and neglect).

172. See Sarnoff, *supra* note 11, at 400 (arguing that child protective services agencies receive a “federal bounty for breaking apart families and putting children in foster care”).

173. See Sylvia Pizzini, *The Backlash from the Perspective of a County Child Protective Services Administrator*, in *THE BACKLASH* 31, 34 (John E. B. Myers ed., 1994) (discussing the monetary incentive provided by child abuse reporting laws and how it has contributed to the increase in the number of children removed from their homes); see also Ramsey, *supra* note 166, at 302 (stating that poor children, and especially African-American children, are subjected to child abuse and neglect reporting).

174. See *supra* intro. (arguing that characteristics of poverty are sometimes mistaken for child neglect, causing the separation of low-income parents from their children).

175. See Gordon, *supra* note 169, at 682 (claiming that because child protective service agencies rely on foster care to fund themselves, they would suffer financially if fewer children remained in foster care); see also Appell, *supra* note 87, at 579 (arguing that the larger society fails to view poor families, especially when they are minorities, as “real” families and that this view facilitates removing children from such families).

176. See 42 U.S.C. § 670 (2002).

177. See INFORMATION SERIES ON CURRENT TOPICS, *supra* note 124, at 25 (stating that the Act was a reaction to over-zealousness on behalf of child protective service agencies, who, as a result of CAPTA moved to remove children from their homes and place them in foster care because their parents were poor).

178. 42 U.S.C. § 671(a)(15)(B) (stating that “reasonable efforts shall be made to preserve and reunify families prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child’s home”).

2003] VICTIMIZED BY CHILD PROTECTIVE SERVICES 1049

from the home and to “make it possible for the child to return to his [or her] home.”¹⁷⁹ This law was enacted in response to a large number of children, especially African-American children, who were being taken from their homes in the 1970s merely because their parents were poor.¹⁸⁰ In such instances, parents were denied their fundamental right to raise their children and a lack of distinction existed between a parent who abused his or her child and one who suffered economic problems.¹⁸¹ The Child Welfare Act permits the emergency removal of a child from the home, but requires that a hearing be held within twelve months of the removal to determine whether the child should remain in foster care or be returned to his or her parents.¹⁸²

At first glance, the Child Welfare Act may appear to have solved the injustice created by CAPTA.¹⁸³ However, although the Child Welfare Act’s requirement of a hearing satisfies procedural due process,¹⁸⁴ low-income parents remain at risk for the violation of their substantive due process right to raise their children.¹⁸⁵ The Child Welfare Act was enacted to create a balance between the increased number of child abuse and neglect reports created by CAPTA’s monetary incentive and the resulting placement of children in foster

179. *Id.* § 671(a)(15)(B)(ii) (stating that in each case, reasonable efforts will be made “to make it possible for the child to return to his [or her] home”).

180. See Tracey B. Harding, *Involuntary Termination of Parental Rights: Reform is Needed*, 39 BRANDEIS L.J. 895, 911 (2001) (stating that Congress enacted the Child Welfare Act due to the fact that children were not being returned to their biological parents, even when returning the children was possible); see also INFORMATION SERIES ON CURRENT TOPICS, *supra* note 124, at 25 (stating that the Child Welfare Act was created as a reaction to the removal of children, especially black children, from their homes merely because of their parents’ low-income status).

181. See INFORMATION SERIES ON CURRENT TOPICS, *supra* note 124, at 25 (discussing co-director of the Family Research Laboratory of the University of New Hampshire Richard Gelles’ view that professionals are naïve to believe that a mother who seriously injured her child is similar to one who cannot keep house).

182. See 42 U.S.C. § 675(5)(c) (1998). In November 1997, the time period within which a dispositional hearing must be held occurred between eight to twelve months after removing the child from the home. *Id.*

183. See Pizzini, *supra* note 173, at 34 (asserting that the Child Welfare Act represented a shift from earlier laws, such as CAPTA, that rewarded child protective services agencies for separating children from their parents and placing them in the foster care system).

184. See BLACK’S LAW DICTIONARY 517 (7th ed. 1999) (defining procedural due process as the minimal requirement of notice and a hearing guaranteed by the Fifth and Fourteenth Amendments’ Due Process Clauses).

185. *Id.* (defining substantive due process as requiring fair and reasonable legislation that furthers a legitimate governmental objective); see also REDLICH, *supra* note 36, at 190 (describing substantive due process as the concept that certain rights are fundamental to traditions of justice and even procedural guarantees cannot abridge those fundamental rights).

1050 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

care.¹⁸⁶ Nevertheless, the Child Welfare Act has not combated the problem of low-income parents being victimized by child protective service agencies that desire increased funding.¹⁸⁷ Thus, the Child Welfare Act provides a solution for the procedural due process right of low-income parents, but the monetary incentive of CAPTA continues to cause the violation of low-income parents' substantive due process right to raise their children.¹⁸⁸

IV. POSSIBLE SOLUTIONS

Broad definitions of child abuse and neglect, funding which serves as an incentive for child protective service agencies to remove children from their homes, the lack of a sufficient standard of proof, and the failure to appoint counsel to indigent parents accused of child abuse or neglect result, separately and cumulatively, in the victimization of indigent parents by the child welfare system.¹⁸⁹ The Supreme Court has reiterated that the right to raise one's child is a fundamental liberty interest,¹⁹⁰ yet legislation fails to adequately protect this interest.¹⁹¹ In *Parham v. J.R.*,¹⁹² the Court held that legislation is not final, but can be changed by the Court.¹⁹³ Thus, in the case of low-income parents who have been unjustly accused of

186. See Gordon, *supra* note 169, at 685 (referring to the Child Welfare Act as "clumsy but well-intentioned" because the Act provided insufficient funding for child welfare services and too much funding for foster care, thus creating an enormous growth in foster care but no policy to discourage states from leaving children in foster care).

187. See Ramsey, *supra* note 166, at 303 (characterizing the Child Welfare Act as a failure and stating that the Act not only failed to stop foster care drift, but actually increased the number of children in foster care).

188. See *id.* (stating that according to the Child Welfare Act, state officials were to report any noncompliance with the reasonable efforts to reunite families requirement; however, because such reporting would result in a loss of federal funding, the Child Welfare Act failed to achieve this goal and the number of children in foster care continued to increase).

189. See GOLDEN, *supra* note 49, at 19 (stating the vital necessity of distinguishing poverty from child neglect); see also Bonstelle & Schlessler, *supra* note 119, at 1152 (arguing that poor parents are placed in the vulnerable position of having their children taken from them and placed in foster care and suffering financial problems, thus making it imperative that parents receive legal counsel during neglect and parental termination proceedings); see also *supra* Parts I, II, and III.

190. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); see also *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 38 (1981) (Blackmun, J., dissenting) (stating that family matters are a fundamental liberty interest deserving of constitutional protection).

191. See Gordon, *supra* note 169, at 639 (proposing that federal child welfare legislation has proven to be a failure due to funding incentives to place children in foster care).

192. 442 U.S. 584 (1979).

193. See *id.* at 628 (noting that the Court has the authority to change laws that it deems are applied in an arbitrary and unfair manner).

2003] VICTIMIZED BY CHILD PROTECTIVE SERVICES 1051

child neglect due to their indigence, the Court should use its authority to reinforce its stated belief in the parental right to raise children.¹⁹⁴

By enacting legislation that promotes the separation of indigent parents from their children under the façade of child neglect, the government is failing to meet the “best interests” of the child, which include love, stability and continuity of care.¹⁹⁵

In an effort to combat the negative effects of prior legislation and improve the child welfare system, the Child Protection Services Improvement Act was recently introduced in the House of Representatives.¹⁹⁶ This Act proposes to improve child welfare services by providing grants to States to increase the salaries of caseworkers, who are overburdened by the large number of child abuse and neglect cases in the United States.¹⁹⁷ In addition, the Act seeks to increase the number of State supervisory and non-supervisory staff involved in strengthening and preserving families and improving the well being of children.¹⁹⁸ Representative Fortney Pete Stark of California proposed the bill in an effort to improve the ability of child welfare agencies to protect abused and neglected children who are society’s most vulnerable members.¹⁹⁹

Although this Act purports to increase trained staff, it fails to resolve the causes of the large number of child abuse and neglect cases.²⁰⁰ Until Congress recognizes that its own definition of child

194. See *Meyer*, 262 U.S. at 399.

195. See *In the Matter of L.W.*, 613 A.2d 350, 356-57 (D.C. 1992) (stating that in determining the best interests of a child, courts usually consider such factors as the child’s continuity of care and the child’s relationship with his or her parents); see also *In re T.G.*, 684 A.2d 786, 788 (D.C. 1996) (reiterating that a child’s best interests are served by being with a parent).

196. H.R. 1371, 107th Cong. (2001) (stating that the purpose of the Child Protection Services Improvement Act is to provide grants to State child welfare agencies to improve standards and outcomes and to increase the number of child protective service workers).

197. See *id.* § 4 (noting that in order to receive a grant, States must provide a detailed plan and budget of how the State will use the money to improve the conditions of child welfare workers and services).

198. See *id.* (stating that the funding will provide increased salaries for child protective workers and will forgive loans for students who become child welfare workers).

199. See S. Res. 47, 107th Cong., 147 CONG. REC. 528 (2001) (enacted) (noting that 568,000 children populate the foster care system nationwide and that child welfare agencies are facing a workforce crisis, with the result that the child welfare system must be improved so that abused and neglected children do not have to bear the brunt of the crisis).

200. See U.S. DEP’T OF HEALTH AND HUMAN SERV., HHS REPORTS NEW CHILD ABUSE AND NEGLECT STATISTICS (Apr. 2, 2001) (stating that in 1999, approximately 2,974,000 cases of possible child maltreatment were referred to child protective service agencies), available at <http://www.hhs.gov/news/press/2001pres/20010402.html>.

1052 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

abuse and neglect and state definitions modeled after it are too broad, the number of false allegations of child abuse will continue to congest the child welfare system.²⁰¹ By narrowing the definitions of child abuse and neglect, and thus diminishing the possibility that poverty will be mistaken for child neglect, child welfare agencies will be better able to expend their time and resources on true incidents of child abuse and neglect which require their attention.²⁰²

In addition to narrowing definitions, increasing the standard of proof would also aid in decreasing the number of unjustly accused low-income parents, and thus the number of children unnecessarily separated from their parents.²⁰³ A minority of states require the application of a clear and convincing standard of proof during the initial fact-finding stage of a child neglect proceeding.²⁰⁴ By requiring a higher standard of proof during the fact-finding stage, the risk that a parent-child relationship will be severed, even temporarily, is greatly reduced.²⁰⁵

In order to reinforce a parent's fundamental right to raise children and to decrease the number of children unnecessarily placed in foster care, indigent parents must be provided counsel at neglect proceedings.²⁰⁶ In support of its holding that due process fails to require that indigent parents be afforded counsel, the Supreme Court noted that many states already required representation for indigent parents.²⁰⁷ However, the Court failed to realize the

201. See WALDFOGEL, *supra* note 7, at 118 (suggesting that children and families will only be adequately served if the mandate of child protective services is narrowed).

202. See *id.* at 118-20 (arguing that child protective services nationwide are presently overwhelmed by its caseload and that narrowing the mandate and creating other services would decrease the number of cases that are unnecessarily referred to child protective service agencies).

203. See McMahan, *supra* note 85, at 187-88 (noting that low-income and minority families are especially subjected to the injustice of the child welfare system).

204. See, e.g., CAL. WELF. & INST. CODE § 361(c) (West 2003) (stating that the court must find clear and convincing evidence of abuse or neglect prior to removing a child from the home).

205. See McMahan, *supra* note 85, at 176 (arguing that states such as California who apply a fair preponderance of the evidence standard in cases involving abuse, but only in those cases that do not result in the removal of the child from the parent's custody, provide a better safeguard against the improper termination of parental rights).

206. See Bonstelle & Schlessler, *supra* note 119, at 1152 (arguing that it is essential for low-income parents to be represented by counsel during child neglect hearings in order to ensure that they receive the services they need to regain custody of their children).

207. See *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 34 (noting that thirty-three states, including the District of Columbia, statutorily required the appointment of counsel to indigent parents during parental termination proceedings).

2003] VICTIMIZED BY CHILD PROTECTIVE SERVICES 1053

possibility that its holding would negatively impact indigent parents by leading states to abandon this requirement.²⁰⁸ In order to combat this problem, Congress should require that pro bono organizations and private law firms engaging in pro bono work be required to represent indigent clients who risk losing a liberty interest, such as the right to raise one's child. Providing indigent parents with such legal services will help ensure that these parents are truly afforded due process of the law.²⁰⁹

Finally, with the advancement of technology, computerized systems for domestic relations courts should be linked to the state's child protective service agencies' computerized systems for tracking purposes. The Strengthening Abuse and Neglect Courts Act of 2000²¹⁰ provides grants to states to improve their courts by means of automated court data systems.²¹¹ Although this legislation is intended to improve the efficiency of the court system, providing grants to state child protective service agencies and linking these two computerized systems would prove beneficial to the entire child welfare system. With computerized tracking systems, the agencies could better analyze what factors their caseworkers are attributing to child abuse and neglect, so as to reduce improper factors, as well as follow their cases to the judicial outcomes.

CONCLUSION

Removing low-income children from their families due to poverty and then failing to provide legal counsel to indigent parents contradicts the Supreme Court's established principle of the fundamental due process right for a parent to raise his or her child.²¹² The Supreme Court has long held that a parent's right to raise his or her child is fundamental and until Congress recognizes the importance of this right, children of low-income families will unfortunately continue to suffer at the hands of legislation that serves to separate them from their families.

208. See *Davis v. Page*, 714 F.2d 512, 518 (1983) (applying the holding in *Lassiter* and reversing the district court ruling that counsel be afforded to indigent parents).

209. See U.S. DEP'T OF JUSTICE, IMPROVING CRIMINAL JUSTICE SYSTEMS THROUGH EXPANDED STRATEGIES AND INNOVATIVE COLLABORATIONS 10 (2000) (asserting that legal counsel is vital for indigent individuals to have a fair trial).

210. See Strengthening Abuse and Neglect Courts Act, Pub. L. No. 106-314, 114 Stat. 1266 (2000).

211. See *id.*

212. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (stating that the right to raise one's child is essential).