

**STRIKING HOUSING AS A GROUND FOR FAMILY  
SEPARATION: LEGAL AND POLICY STRATEGIES FOR  
MOVING FORWARD**

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I. HOME REMOVALS AS AN INAPPROPRIATE REMEDY .....	2
II. RECOMMENDATIONS .....	4
A. <i>Reconceptualize the Law's Relationship to Poverty</i> .....	4
1. Institutionalize Poverty Defenses .....	4
2. Bolster Services and Training .....	6
B. <i>Strengthen Federal Language Against Punitive Responses to         Poverty</i> .....	8
C. <i>Expand Right to Counsel</i> .....	9
D. <i>Require a Hard-to-Reach Minimum Level of Services</i> .....	12
CONCLUSION .....	14

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STRIKING HOUSING AS A GROUND FOR FAMILY SEPARATION:  
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*Nearly one-third of all children in foster care could be reunited with their families immediately if they were provided safe, affordable housing. Homelessness is not safe, healthy, or beneficial for adults, and especially not so for developing children. Removing children from their families, however, is not safe, healthy, or beneficial either, and is directly correlated with poorer life outcomes and short- and long-term mental, physical, and behavioral issues.*

*A true solution to the problem of removing children from families based on poverty and housing concerns requires deep reform of the housing, child welfare, and social services industries, among others. In the meantime, this article proposes a non-exhaustive yet comprehensive series of macro-level harm-reduction strategies that could work together to keep children with their families; limit the extent, duration, and need for child welfare interventions; and achieve more positive, sustainable outcomes for children and families facing housing instability. Such strategies include strengthening alternatives to removal, institutionalizing poverty defenses, striking homelessness as a statutory ground for removal, strengthening rights to counsel, and articulating a clear minimum for the level of services provided before removal can occur.*

## I. HOME REMOVALS AS AN INAPPROPRIATE REMEDY

The relationship between children, homelessness and housing instability, and government systems is, when viewed in the most favorable light, fraught. Case law promotes the principle that structural deficiencies and poverty must not be interpreted as bad parenting,<sup>1</sup> and yet, in 2016, 10% of foster care placements — directly affecting 27,871 children —

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<sup>1</sup> See *Nicholson v. Scoppetta*, 116 F. App'x 313, 2 (2d Cir. 2004) (holding that children cannot be removed from their parents based solely on homelessness and requiring the court to balance “whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal”); *In re C.J.V.*, 746 S.E.2d 783 (Ga. Ct. App. 2013) (holding that parental rights cannot be terminated based on “economic inability to provide for the children”); *In re Victoria M.*, 207 Cal. App. 3d 1317, 255 Cal. Rptr. 498 (Ct. App. 1989) (holding that the removal of children is not justified by homelessness alone); *In re G.S.R.*, 159 Cal. App. 4th 1202, 1205 (2008) (finding that parental rights cannot be terminated for housing alone and commenting on the absurdity of the state paying for foster care but refusing to help a parent secure housing); *In re J.B.*, 188 Cal. App. 4th 1015, 115 Cal. Rptr. 3d 890 (Ct. App. 2010) (holding that when children are well cared for, removal is not justified based on homelessness alone).

were made based on inadequate housing.<sup>2</sup> While point-in-time counts drastically underestimate the number of people experiencing homelessness,<sup>3</sup> in 2022, the U.S. Department of Housing and Urban Development (HUD) reported that over 163,000 people experiencing homelessness did so as part of a family with at least one child.<sup>4</sup> Homeless children are more than 34 times as likely as housed youth to be removed to out-of-home placements,<sup>5</sup> and housing instability often “delay[s] reunification, preventing the achievement of timely permanency and forcing children to remain in care for longer periods of time.”<sup>6</sup> Nearly one-third of all children in foster care could be reunited with their families immediately if they were provided safe, affordable housing.<sup>7</sup>

Homelessness is not safe, healthy, or beneficial for adults,<sup>8</sup> and especially not for developing children.<sup>9</sup> Removing children from their families, however, is not safe, healthy, or beneficial either, and is directly correlated with poorer life outcomes and short- and long-term mental, physical, and behavioral issues.<sup>10</sup> Home removals are an ineffective means of remedying homelessness, as demonstrated by the fact that approximately one in four foster care youth becomes homeless within four years of aging out of

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<sup>2</sup> U.S. Dep’t. of Health & Hum. Serv., *The AFCARS Report* (Oct. 20, 2017).

<sup>3</sup> See generally Don’t Count on It: How the HUD Point-in-Time Count Underestimates the Homelessness Crisis in America, Nat’l. L. Ctr. on Homelessness and Poverty (2017).

<sup>4</sup> Tanya de Sousa et al., *The 2022 Annual Homelessness Assessment Report (AHAR) to Congress*, U.S. DEP’T. OF HOUSING & URBAN DEV. 1, 11 (Dec. 2022).

<sup>5</sup> Cheryl Zlotnick et al., What Research Tells Us About the Intersecting Streams of Homelessness and Foster Care, 79 AM. J. ORTHOPSYCHIATRY 319, 319-325.

<sup>6</sup> Annie E. Casey Foundation, *The Impact of Homelessness on Child Welfare*, <https://www.casey.org/impact-homelessness-child-welfare/> (last visited May 3, 2023).

<sup>7</sup> H. Elenore Wade, Note, *Preserving the Families of Homeless and Housing-Insecure Parents*, 86 GEO. WASH. L. REV. 869, 881-85 (2018).

<sup>8</sup> *Homelessness as a Public Health Law Issue: Selected Resources*, CTR. FOR DISEASE CONTROL & PREVENTION (March 2, 2017), <https://www.cdc.gov/phlp/publications/topic/resources/resources-homelessness.html>. See also Allie Schneider and Hailey Gibbs, *Disparities in Housing, Health Care, Child Care, and Economic Security Affect Babies for Life*, CTR. FOR AM. PROGRESS (Dec. 7, 2022), <https://www.americanprogress.org/article/disparities-in-housing-health-care-child-care-and-economic-security-affect-babies-for-life/>.

<sup>9</sup> Amy Phillips, *Homelessness and Its Impact on Children*, ASSOC. FOR CHILD & ADOLESCENT MENTAL HEALTH (Oct. 16, 2019), <https://www.acamh.org/blog/homelessness-impacts-on-children/>.

<sup>10</sup> See generally Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523 (2019) (describing the trauma and harms of removing children from families and the dangers that the child welfare system poses for children).

care.<sup>11</sup> Removals not only fail to address children’s or families’ needs, but exacerbate their trauma, prolong system exposure and oversight, and continue the cycle of “shuttling”<sup>12</sup> and instability that the child welfare involvement is intended to break.<sup>13</sup>

This paper proposes a non-exhaustive but comprehensive set of macro-level strategies that could work together to keep children with their families; limit the extent, duration, and need for child welfare interventions; and achieve more positive, sustainable outcomes for children and families facing housing instability.

## II. RECOMMENDATIONS

A true solution to the problem of removing children from their families based on housing concerns likely requires deep reform of the housing, child welfare, and social services industries. In the meantime, a series of comprehensive harm-reduction strategies could provide protection and services to families suffering under the current housing and child welfare systems. While easier said than done, each strategy in isolation is likely to result in more positive outcomes for families and children. For best results, all strategies should be treated as goals to work toward. Such strategies include strengthening alternatives to removal, institutionalizing poverty defenses, striking homelessness as a statutory ground for removal, strengthening rights to counsel, and articulating a clear minimum for the level of services provided before removal can occur.

### A. Reconceptualize the Law’s Relationship to Poverty

#### 1. Institutionalize Poverty Defenses

To better serve vulnerable children and families, systemic actors must reconceptualize the law’s relationship to poverty. Accordingly, both

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<sup>11</sup> *Housing and Homelessness*, NAT’L. FOSTER YOUTH INST. (2018), <https://nfyi.org/issues/homelessness/#:~:text=The%20child%20welfare%20system%20is,at%20the%20age%20of%2018> 2018.

<sup>12</sup> Bridget Lavender, *Coercion, Criminalization, and Child ‘Protection’: Homeless Individuals’ Reproductive Lives*, 169 U. PA. L. REV. 1607, 1660-61 (2021). “Shuttling” is included within the definition of physical neglect, but for families who cannot access shelter, there may be no other option. Diane Depanfilis, U.S. Dep’t of Health & Hum. Servs., *Child Neglect: A Guide for Prevention, Assessment, and Intervention* 12 (2006), <https://www.childwelfare.gov/pub-PDFs/neglect.pdf> [<https://perma.cc/66HC-Y4S8>]; Marta Beresin, *Reporting Homeless Parents for Child Neglect: A Case Study from Our Nation’s Capital*, 18 U. D.C. L. REV. 14, 24 (2015).

<sup>13</sup> U.S. Dep’t. of Health and Human Services, *How the Child Welfare System Works*, *Child Welfare Information Gateway* (2020) (discussing the purpose of the child welfare system).

federal and state governments should incorporate poverty defenses into law. The poverty defense “most closely resembles traditional criminal law defenses of either necessity or duress, in which external forces that compel a defendant to engage in wrongful conduct lessen or extinguish culpability.”<sup>14</sup> In the context of child neglect and homelessness, a poverty defense would provide that when children suffer the effects of homelessness as a by-product of poverty (whether malnutrition, exposure to elements, educational disruption, lack of appropriate clothing, or other poverty symptoms), the parents are not per se guilty of neglect, and thus not automatically at risk of having their children removed.

While several states have codified the poverty defense and made clear that homelessness is not neglect,<sup>15</sup> a small handful of states explicitly hold the opposite,<sup>16</sup> and the vast majority do not take a stance.<sup>17</sup>

The poverty defense protects children’s and families’ best interests,<sup>18</sup> incentivizes restorative rather than punitive approaches, and — as foster care is so often a pipeline into adult homelessness<sup>19</sup> — supports more sustainable, long-term outcomes.<sup>20</sup> At the state level, targeted advocacy should focus on leading the silent majority of states to take a stance and institutionalize poverty defenses, as well as develop individualized plans to remove statutes that name homelessness as neglect. At the federal formula grant program level, an explicit, affirmative statement on what does *not* constitute neglect might find a place among the definitions or compliance requirements of the McKinney-Vento Homeless Assistance Act,<sup>21</sup> the Child Abuse Prevention and Treatment Act (CAPTA),<sup>22</sup> or the Family First Prevention Services Act (FFPSA),<sup>23</sup> none of which currently broach the issue. While small, such an adjustment would position vulnerable families to be connected to services rather than investigated.

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<sup>14</sup> Michele E. Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495, 498 (2013).

<sup>15</sup> Calif. Welf. & Inst. Code 300(B)(2)(A); Okla. Stat. Ann. § 1-1-105(21)(a); Wash. Rev. Code. § 26.44.020(19). See Josh Gupta-Kagan, *Distinguishing Family Poverty from Child Neglect*, IOWA L. REV. (forthcoming 2023).

<sup>16</sup> Conn. Gen. Stat. §§ 46b-120(6) & 46b-129(j)(2); Colo. Stat. § 19-3-102(1)(e).

<sup>17</sup> See Josh Gupta-Kagan, *Distinguishing Family Poverty from Child Neglect*, IOWA L. REV. (forthcoming 2023).

<sup>18</sup> See generally Gilman, *supra* note 14.

<sup>19</sup> Rachel Rosenberg and Youngmi Kim, *Aging Out of Foster Care: Homelessness, Post-Secondary Education, and Employment*, 12 J. PUB. CHILD WELFARE 99, 99 (2018).

<sup>20</sup> See generally Gilman, *supra* note 14.

<sup>21</sup> McKinney-Vento Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (1987).

<sup>22</sup> 42 U.S.C. § 5101 (2012).

<sup>23</sup> Families First Prevention Services Act, Pub. L. No. 115-123, 132 Stat. 64 (2018).

## 2. Bolster Services and Training

While the poverty defense has succeeded in keeping some families together,<sup>24</sup> to achieve widespread, sustainable, and successful implementation, it must be backed by adequate services and judicial competency. Poverty defenses rarely succeed without courts' sophisticated understanding of the link between poverty and neglect.<sup>25</sup> To implement poverty defenses with fidelity, gatekeepers within the child welfare and court systems must not "conflate[] poverty with culpability and ignore[] the structural realities of our economy."<sup>26</sup>

Addressing family court actors' misconceptions about poverty is critical to avoiding unnecessary and unjust family separations. One path to recognizing this is through educational programming on both voluntary and mandated bases. While jurisdictions vary in their requirements, the vast majority of states require Continuing Legal Education (CLE) for attorneys and judges.<sup>27</sup> While one approach might be to advocate for adoption of mandatory CLE across all states, another is to increase the availability of CLE programs at the intersection of poverty, housing, and family law so that attorneys and judges could choose to explore the issue as part of their already-existing educational obligation. Of the more than 1,850 CLE programs currently provided by the American Bar Association, none focus on any iteration of poverty, housing, and family law.<sup>28</sup> Non-profits and advocates could begin to fill this void and increase judicial competency through the provision of additional voluntary training.

The intersection of poverty, housing, and family law, however, is most relevant to a niche set of legal experts, and widespread accessibility to general practitioners may not achieve its desired effect in the relevant population. To address knowledge vacuums, states sometimes institute mandatory training within specialized courts. For example, twenty-three states mandate domestic violence trainings for relevant judges.<sup>29</sup> Additionally,

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<sup>24</sup> Gilman, *supra* note 14 at 553.

<sup>25</sup> *Id.* at 498.

<sup>26</sup> *Id.* at 553.

<sup>27</sup> *Mandatory CLE*, AM. BAR ASSOC., <https://www.americanbar.org/events-cle/mcle/>.

<sup>28</sup> *CLE Marketplace*, AM. BAR ASSOC., <https://www.americanbar.org/cle-marketplace/>. The ABA is not the only provider of CLE options, though it is a mainstream venue.

<sup>29</sup> MANDATORY DOMESTIC VIOLENCE TRAINING FOR JUDGES, RESOURCE CENTER ON DOMESTIC VIOLENCE: CHILD PROTECTION AND CUSTODY, A PROJECT OF THE FAMILY VIOLENCE AND DOMESTIC RELATIONS PROGRAM (FVDR) OF THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGE (Dec. 31, 2014), [https://rcdvcpc.org/index.php?option=com\\_mtree&task=att\\_download&link\\_id=50&cf\\_id=39](https://rcdvcpc.org/index.php?option=com_mtree&task=att_download&link_id=50&cf_id=39).

some states require training before new judges take the bench.<sup>30</sup> Training on poverty, housing, and child welfare could be incorporated into both specialized trainings and new judge curricula. An issue as nuanced, rooted in prejudice and misconception, and high stakes as removing children from families is an ideal candidate for such mandated training, and could challenge judges' preconceived notions about poverty while providing information on the effects of removals and alternatives.

In addition to training, services must be invested in and made accessible. Without resource-backed, accessible, and appropriate support services, any attempts by judges to serve homeless children and families will be met with operational execution failures. In such cases, families might not be separated, but the poverty that triggered child welfare involvement is not alleviated — thereby creating a cycle of instability that can lead to re-entry into the system. While creation of new programs is a welcome step, investment in existing evidence-backed, comprehensive service infrastructures could achieve better outcomes with less legwork. This would likely require support through Congressional and state budget allocations, time, and human capital, but if implemented effectively, such programs would curb the number of families re-entering the system — ultimately saving time and money down the road.

As one example of an existing program with potential for larger-scale implementation, HUD's Family Unification Program (FUP), the "largest child welfare-related permanent housing program," allocates Housing Choice Vouchers to families whose housing instability could lead to delays in reunification or children being placed out-of-home.<sup>31</sup> FUPs are effective and offer "significant benefits for keeping homeless families together."<sup>32</sup> Depending on state policies, Housing Authorities often provide services that disrupt cycles of instability, such as mobility counseling, utility assistance, career counseling, job-readiness training and help finding jobs, educational services, and assistance with housekeeping skills, nutrition, and meal preparation.<sup>33</sup>

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<sup>30</sup> Corey Kilgannon, *Legal Bootcamp for New Judges in New York, N.Y.* TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/nyregion/judges-new-york.html>.

<sup>31</sup> Annie E. Casey Foundation, *The Impact of Homelessness on Child Welfare*, <https://www.casey.org/impact-homelessness-child-welfare/> (last visited May 3, 2023).

<sup>32</sup> Patrick Fowler, Derek Brown, Michael Schoeny & Saras Chung, *Homelessness in the Child Welfare System: A Randomized Controlled Trial to Assess the Impact of Housing Subsidies on Foster Care Placements and Costs*, 83 CHILD ABUSE NEGLECT 52, 52 (2018); Program Profile: Family Unification Program (Chicago, Ill.), Nat'l. Inst. For Just. Crime Solutions (Feb. 11, 2020), <https://crimesolutions.ojp.gov/ratedprograms/669#pd>.

<sup>33</sup> Amy Dworsky et al., 95 CHILD WELFARE 9, 16 (2017); *The Family Unification Program (FUP): A Housing Option for Former Foster Youth*, U.S. DEP'T. OF HOUSING & URBAN DEV., [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/programs/hcv/family](https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/family).

There are, however, myriad barriers to FUP implementation that must be addressed before broader implementation can occur. For example, the need far exceeds the number of available vouchers, waitlists for public housing often extend beyond twelve months, and “child welfare-involved families disproportionately experience challenges that could disqualify families from voucher assistance.”<sup>34</sup> Other implementation failures are illustrated by case studies of Washington D.C., which has failed to allocate approximately twenty percent of its available vouchers each year, denies the majority of FUP applications, and adheres to private internal criteria for approval.<sup>35</sup> FUPs are understudied, underutilized, and little-known.<sup>36</sup> Because local housing authorities must affirmatively choose to apply for FUP funding (and thus, must be aware of FUPs as an option), the vouchers are not available everywhere.<sup>37</sup> By increasing the accessibility and quality of existing infrastructures like FUPs and programs like it, strides could be made at the intersection of child welfare and homelessness. Existing programs could disrupt vicious cycles of poverty, homelessness, and child welfare involvement, but the programs must be invested in and made adequately accessible, reliable, and responsive.

#### *B. Strengthen Federal Language Against Punitive Responses to Poverty*

The federal government must also take a stronger stance against removing children based on poverty, and specifically, housing. Its guidance serves to inform and steer lower tribunals’ decision-making. In addition to the lack of action taken in McKinney Vento, CAPTA, or FFSPA,<sup>38</sup> one U.S. Department of Health and Human Services’ child neglect manual states that “[i]t is unclear whether homelessness should be considered neglect” and that homelessness should be “considered neglect when the inability to provide shelter is the result of mismanagement of financial

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<sup>34</sup> Patrick Fowler, Anne Farrell, Katherina Marcal, Saras Chung & Peter Hovmund, *Housing and Child Welfare: Emerging Evidence and Implications for Scaling up Services*, 60 AM. J. CMTY. PSYCH. 134, 138 (2017).

<sup>35</sup> Annemarie Cuccia, *Some Face Homelessness When Leaving Foster Care, Despite D.C. Having Housing Vouchers*, NPR (Apr. 17, 2023), <https://www.npr.org/local/305/2023/04/17/1170512984/some-face-homelessness-when-leaving-foster-care-despite-d-c-having-housing-vouchers>.

<sup>36</sup> Patrick Fowler et al., *Scaling Up Housing Services Within the Child Welfare System: Policy Insights from Simulation Modeling*, 25 CHILD MALTREATMENT 51, 51 (Feb. 2020).

<sup>37</sup> HUD’s *Family Unification Program (FUP)*, NAT’L. CTR. FOR HOUSING AND CHILD WELFARE, <https://www.nchcw.org/pricing-services>; Betsy Gwin, *Housing Resources for Families at Risk of Separation*, AM. BAR ASSOC. (March 1, 2011), [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/child\\_law\\_practice/vol30/march\\_2011/housing\\_resourcesforfamiliesatriskofseparation/](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol30/march_2011/housing_resourcesforfamiliesatriskofseparation/).

<sup>38</sup> See *supra* Part A.1; Families First Prevention Services Act, Pub. L. No. 115-123, 132 Stat. 64 (2018).



resources.”<sup>39</sup> Such ambiguity at the highest level has led to further confusion at local, state, and federal levels, especially in regard to the subjective nature of interpreting what constitutes financial mismanagement.<sup>40</sup> Federal authority is often treated deferentially by lower courts and agencies, and with this power comes responsibility. Considering recent research, federal governance across the board should realign to clarify that homelessness and housing instability are not neglect, nor appropriate grounds for removal.

Further, the government should shift the burden from families to its own providers by substituting its financial management test — which encourages scrutiny and regulation over poor families’ most personal decisions — for a service provision test. In some cases, it is theoretically possible that neither services nor support will lead to meaningful parenting.<sup>41</sup> To separate cases of poverty from those of abuse and neglect, the government should provide necessary, evidence-backed services to families who are at risk of having a child removed by child protective agencies.<sup>42</sup> Once appropriate services and supports have been meaningfully provided, the conditions leading to the removal will have either been rectified, or the agency will have reason beyond poverty to intervene.<sup>43</sup>

### C. *Expand Right to Counsel*

Expanding the right to counsel in child welfare proceedings could help ensure that the question of removal is never reached and that families are connected to appropriate services, as well as aid in disentangling poverty from neglect. While this could be achieved by providing counsel for either children<sup>44</sup> or parents (and in an ideal courtroom, both), provision of counsel to parents is likely a more immediately feasible step, as a right to counsel has been established in analogous specialized courts, like New York housing courts (albeit, a right facing significant implementation issues).<sup>45</sup> Counsel is especially important for low-income families, who are

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<sup>39</sup> Lavender, *supra* note 12, at 1660 (citing Depanfilis, *supra* note 12).

<sup>40</sup> *Id.*

<sup>41</sup> Gilman, *supra* note 14 at 539.

<sup>42</sup> See Josh Gupta-Kagan, *Distinguishing Family Poverty from Child Neglect*, IOWA L. REV. (forthcoming 2023).

<sup>43</sup> *Id.*

<sup>44</sup> Counsel for Kids, Nat’l. Assoc. of Counsel for Children, <https://naccchildlaw.org/counsel-for-kids/>.

<sup>45</sup> Right to Counsel, NYC Mayor’s Public Engagement Unit,

disproportionately likely to come from minority communities,<sup>46</sup> may distrust courts based on lived experiences, and are less likely to have attained an education that lends familiarity with courts' inner workings.<sup>47</sup> Legal representation for children and parents is associated with increases in perceptions of fairness, expedited permanency, increased visitation and parenting time, more individualized case plans and services, increased party engagement in cases, and reductions in government costs due to reductions in the amount of time children spend in state-funded systems.<sup>48</sup> Even the Administration of Children and Families (ACF) has called for high-quality parent representation, noting that lack of counsel is a "significant impediment to a well-functioning child welfare system."<sup>49</sup> Despite this, as of 2016, as many as thirteen states have declined to provide an absolute right to counsel in state-initiated dependency matters.<sup>50</sup>

Both ACF and Congress have the power and the responsibility to affect change in this arena. Congress has sought to advance the uniformity of child welfare administration by requiring uniform standards in its eligibility criteria to benefit from the billions of dollars allocated to programs like CAPTA,<sup>51</sup> the Adoption Assistance and Child Welfare Act,<sup>52</sup> and the Adoption and Safe Families Act.<sup>53</sup> CAPTA has paved a way for similar mandates through its requirement of guardians ad litem for children in foster care.<sup>54</sup> Despite ACF's current pro-representation position, it has historically "interpreted federal law to prohibit federal funds from being used

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2022), <https://www.thecity.nyc/2022/10/27/23425792/right-to-counsel-housing-court-tenant-lawyers>.

<sup>46</sup> Racial Inequities in Homelessness, by the Numbers, National Alliance to End Homelessness (June 1, 2020), <https://endhomelessness.org/resource/racial-inequalities-homelessness-numbers/>.

<sup>47</sup> *Homeless Education Research*, NAT'L. CTR. FOR HOMELESS EDUC., <https://nche.ed.gov/research/#:~:text=Significantly%2C%20the%20lack%20of%20a,peers%20who%20completed%20high%20school>.

<sup>48</sup> Amy Harfeld, *Twenty Years of Progress in Advocating for a Child's Right to Counsel*, AM. BAR ASSOC. (March 22, 2019), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2019/spring2019-twenty-years-of-progress-in-advocating-for-a-childs-right-to-counsel/>.

<sup>49</sup> Admin. For Children and Families, U.S. Dep't. of Health and Human Servs., Information Memorandum 17-0 and, 2 (2017).

<sup>50</sup> Vivek Sankaran and John Pollock, *A National Survey on A Parent's Right to Counsel in State-Initiated Dependency and Termination of Parental Rights Cases*, NAT'L. COALITION FOR A CIVIL RIGHT TO COUNSEL 1, 1-37 (Oct. 27, 2016).

<sup>51</sup> Vivek Sankaran, *Moving Beyond Lassiter: The Need for a Federal Statutory Right to Counsel for Parents in Child Welfare Cases*, 44 J. LEGIS. 1, 2 (2017); 42 U.S.C. § 5101 (2012).

<sup>52</sup> Pub. L. No. 96-272, 94 Stat. 500 (1980).

<sup>53</sup> Pub. L. No. 105-89, 111 Stat. 2115 (1997).

<sup>54</sup> Sankaran, *supra* note 51 at 2 (citing 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2012)).

to pay for attorneys who represent birth parents.”<sup>55</sup> Advocates argue that to remedy this, Congress should explicitly mandate in Title IV-E of the Social Security Act that for states to receive federal child welfare funds, they must require a right to counsel in all child welfare court proceedings.<sup>56</sup> The federal government, ACF, and advocates should then make clear and engage in affirmative outreach to ensure that affected parties are aware of the right.<sup>57</sup> In addition to this, to support its own position, ACF should encourage states to submit parent representation-focused proposals for the Title IV-E demonstration project waiver program, which “allow[s] states to request permission from the Federal Government to spend child welfare funds received under Title IV-E of the Social Security Acts for a broad range of purposes.”<sup>58</sup> Title IV-E would allow states to be reimbursed for training parent lawyers, hosts the majority of federal child welfare spending, and unlike CAPTA, is an uncapped entitlement.<sup>59</sup>

While legislative change takes time, ACF could begin and lend momentum to the shift at any point by updating its policy guides to clarify that Title IV-E funds can be used by state agencies to support parent representation costs “necessary for the proper and efficient administration of the title IV-E plan.”<sup>60</sup> In the absence of a guidance on which costs are covered, ACF should support such an interpretation.<sup>61</sup> In doing so, it should adjust its 2004 internal policy, which finds that states cannot recover parent representation costs from the government, to reflect its 2017 memorandum on the cruciality of parent representation for a functioning child welfare system.<sup>62</sup> For families facing the removal of a child based on poverty and housing stability, as well as families at risk of such child welfare involvement, counsel could make a significant difference in preventing the question from being reached, in curbing the duration and extent of child welfare involvement, and in advocating for families to be matched with appropriate services rather than punishments. Such funding changes would not only establish and revitalize the role of counsel in child welfare proceedings, but would signal governmental value of family integrity for all people and open the door to funding other critical services.

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<sup>55</sup> *Id.* at 3 (citing Admin. for Children and Families, U.S. Dep’t. of Health and Hum. Servs., Child Welfare Policy Manual 8.1B Question 18, available at [https://www.acf.hhs.gov/cwpm/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=36](https://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=36)).

<sup>56</sup> *Id.* at 3-4; 17-21.

<sup>57</sup> *Id.* at 4.

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

<sup>59</sup> *Id.* at 17.

<sup>60</sup> *Id.* at 3; 17.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

*D. Require a Hard-to-Reach Minimum Level of Services*

Race- and class-based overreporting within the child welfare system has led to a disproportionate number of Black and Indigenous children in foster care, distrust of medical and school systems by minority communities, strain upon the system, and no improved maltreatment detection or outcomes for children.<sup>63</sup> Additionally, current reporting systems, which typically require investigations to determine whether neglect or abuse reports are founded, “prioritize[] investigations over the provision of services.”<sup>64</sup> While reforming reporting and investigation policies is a worthy goal, it is also true that unhoused children and families are in dire need of services gatekept by the government. Typically, before children can be removed from their family, services must be provided, but the level of services required is often held to an ambiguous “reasonable efforts” standard, with variation across state statute and case law.<sup>65</sup> From a harm-reduction lens within the realities of the current child welfare system for unhoused families, rather than changing which reports are investigated, reports ought to trigger appropriate services. The level of services required before removal should be heightened, made difficult to reach, and clearly articulated. In many cases, this would remove the need for the expense, time, and trauma of future child welfare involvement.

Both state and federal action is necessary to achieve this goal. At the federal level, Title IV-E requires that states make “reasonable efforts to preserve and reunify families” that can eliminate the need for an out-of-home placement and that may make it possible to reunify child and family.<sup>66</sup> Under the Adoption and Safe Families Act of 1997 (AFSA), the extent of services provided is determined subjectively by the child’s health and safety.<sup>67</sup> The child welfare system is meant to serve children and families — not regulate, separate, and harm them.<sup>68</sup>

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<sup>63</sup> Human Rights Watch, “*If I Wasn’t Poor, I Wouldn’t Be Unfit*,” Human Rights Watch (Nov. 17, 2022), <https://www.hrw.org/report/2022/11/17/if-i-wasnt-poor-i-wouldnt-be-unfit/family-separation-crisis-us-child-welfare>; American Bar Association, ABA to Address Overreporting in Child Welfare System (Apr. 17, 2023), Ctr. on Children and the L., <https://www.americanbar.org/news/abanews/aba-news-archives/2023/04/overreporting-in-child-welfare/>; Casey Family Programs, Can Decreasing Unwarranted Reports to Child Protection Agencies Improve Outcomes for Children and Families? (August 2020).

<sup>64</sup> *Id.*

<sup>65</sup> U.S. Dep’t of Health & Hum. Serv., *Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children*, *Child Welfare Info. Gateway* 1, 1-4 (Sept. 2019).

<sup>66</sup> *Id.* (citing 42 U.S.C. § 671(a)(15) (2018)).

<sup>67</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

<sup>68</sup> U.S. Dep’t of Health and Hum. Serv., *How the Child Welfare System Works*, *Child Welfare Information Gateway* (2020) (discussing the purpose of the child welfare system) [hereinafter *Child Welfare Information*].

The language in these bills should be amended to more clearly lay out what “reasonable” means. Further, AFSA should clearly state that at least in poverty-based neglect cases, this language should be interpreted to mean that the greater the risk to a child’s health and safety, the greater the services that must be provided — and not that the greater the family’s need for services, the fewer critical interventions that must be provided to take the child away. While providing an exhaustive one-size-fits-all list of which actions to take in which circumstances is impractical, legislators could instead create a floor of reasonableness. This might entail a test for when services are too briefly provided to create meaningful effects,<sup>69</sup> unresponsive to the need,<sup>70</sup> lack an evidentiary founding, or are implemented at a level so low quality as to be pointless. Such a federal response would address state-to-state inconsistencies in the level of services provided, ensure that families receive a basic level of care, and provide families with services they need.

State-level legislative reform must also accompany federal actions. Many states not only prescribe a low service requirement, but in cases that are inherently tied to poverty, do not require any services to be provided before removal. For example, in ten states, reasonable efforts are not required to remove a child if a parent has failed to comply with a reunification plan.<sup>71</sup> Often, reunification plans provide no support but require a parent to secure suitable housing or hold employment in order to reunify— all of which are easier said than done, compounded by factors such as poverty and mental illness, and difficult to do when also regularly attending family court. Failure to attend court is often held against parents attempting to reunify, and might be interpreted as disinterest, which is grounds for removal without reasonable efforts in three states.<sup>72</sup> In nine states, reasonable efforts are not required before removal if a parent has

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<sup>69</sup> For one example, see *Int. of J.L.*, 2019 P.A. Super 224, 216 A.3d 233 (2019) (affirming the decision to remove a teenager from the home, even though adequate alternatives to placement had not been provided. At the time that J.L. was removed, he had only had the opportunity to receive two hours of M.S.T., a less invasive, evidence-backed intervention that typically requires six months to work.) See Brief of Education Law Center and Juvenile Law Center as Amici Curiae Supporting Petitioner, *Int. of J.L.*, 2019 PA Super 224, 216 A.3d 233 (2019); *Multisystemic Therapy Frequently Asked Questions*, MST Services, <https://www.mstservices.com/faq-mst>.

<sup>70</sup> For examples, see Editorial Board, *In Philly's DHS Crisis, A Bleak Reminder of How America Treats Its Most Vulnerable Children*, Philadelphia Inquirer (Aug. 9, 2022).

<sup>71</sup> These states are Alabama, Alaska, California, Florida, Kansas, Maine, Minnesota, New York, Washington, and West Virginia. U.S. Dep’t of Health and Hum. Serv., *Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children*, *Child Welfare Info. Gateway* 1, 1-4 (Sept. 2019).

<sup>72</sup> These states are Alabama, Arizona, and California. *Id.*

failed substance abuse treatment,<sup>73</sup> and in nine other states, if this is the second instance of neglect.<sup>74</sup>

Without the provision of sustainable long-term housing, families relying on shelters, doubling up, or other means of temporary housing are especially vulnerable to re-entering the cycle of housing instability, and thus, at-risk of being reported a second time.

In contrast, other states apply a much more protective “reasonable efforts” approach. In West Virginia, for example, for a child to be removed, there must be clear and convincing evidence that placement is necessary, that effective services cannot occur without placement, and that all reasonable efforts have been made to provide appropriate services without out-of-home placement.<sup>75</sup> States ought to revisit statutory grounds for waiving reasonable efforts, and, with the help of judicial training,<sup>76</sup> screen them for punishment of poverty. States should come to require services in most, if not all, cases. Combined with federal guidance on what constitutes reasonable efforts and shifting of funds, such reforms would result in more families connected with necessary services like sustainable housing and nutrition, fewer children funneled into the foster care to homelessness pipeline, and a system better aligned with its own goals.<sup>77</sup>

#### CONCLUSION

Housing instability harms children and families. Rather than helping families and children by connecting them with critical, sustainable services such as long-term housing, the current trend of removing children from their families for reasons of poverty exacerbates the harm already done. It traumatizes and compounds the previous trauma of children and families, heightens the difficulty of reunification, and keeps children and families in a vicious cycle of poverty, dangerous living conditions, and trauma. Government actors are in a position to affect significant change by, among other actions, shifting practices away from the criminalization of poverty, bolstering training and services, strengthening federal stances, expanding the right to counsel, and requiring a minimum level of services to be provided. Doing so would curb cycles of homelessness, keep families safe and together, and allow government objectives to be fulfilled with more integrity. From practical, economic, and moral standpoints, these re-frames are not only in the best of interest of children and families, but in the best interest of the country, the government, and humanity.

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<sup>73</sup> These states are Alabama, California, Florida, Kentucky, North Dakota, Ohio, South Carolina, South Dakota, and West Virginia. *Id.*

<sup>74</sup> These states are Alaska, Arizona, Arkansas, California, Florida, Nevada, New York, South Dakota, and Utah. *Id.*

<sup>75</sup> *State v. Damian R.*, 214 W. Va. 610, 612 591 S.E.2d 168 (2003).

<sup>76</sup> *See supra* Part A.

<sup>77</sup> *Child Welfare Information*, *supra* note 68.

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