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## God Bless the Child: Poor Children, *Parens Patriae*, and a State Obligation to Provide Assistance

KAY P. KINDRED\*

The face of poverty has changed considerably in this country over the past twenty-five years.<sup>1</sup> In the early 1970s the aged comprised the largest group of poor people, but in the 1990s, children have displaced the elderly as the poorest group. One in five children in this country—14.6 million—is poor. In 1992 more than one out of every five American children younger than eighteen lived in a family whose income was below the poverty line. One in every four children under six years of age is poor, nearly double the rates for adults ages eighteen to sixty-four. Twenty-seven percent of children under age three live in poverty. The number of poor children younger than eighteen years of age has increased by five million—from 9.6 million to 14.6 million since 1973—while the poverty rate of children has increased by one-half—from 14.4% to 21.9%. Approximately one in every two poor children lives in extreme poverty, in families whose income falls below half the federal poverty line. The average poor family with children in 1992 had a total income of \$7,541 or \$5.40 per person per day, or \$37.80 per person per week.<sup>2</sup>

A variety of reasons have been advanced for the increase in the child poverty rate: (1) the declining value of the minimum wage means that many people work, but remain below the poverty level; (2) unemployment rates do

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<sup>1</sup> The official definition of poverty used by the U.S. Census Bureau for annually assessing the number of poor Americans sets poverty thresholds that take into account total family income, family size, and an adjustment each year for inflation in consumer prices. According to the official government definition of poverty, a family of four with less than \$14,335 of annual cash income in 1992 was considered poor. However, poor families' incomes usually fall significantly below the official poverty threshold—an average of \$6,289 below the threshold in 1992. The official poverty definition does not consider geographic variations in cost of living; does not account for the value of "in-kind" help such as food stamps and housing assistance received by families, or for the impact of federal taxes, or for income lost due to high medical bills, child care, or other expenses. See ARLOC SHERMAN, *WASTING AMERICA'S FUTURE: THE CHILDREN'S DEFENSE FUND REPORT ON THE COSTS OF CHILD POVERTY* 3, 7 (1994) [hereinafter, *CHILDREN'S DEFENSE FUND*].

<sup>2</sup> *Id.* at xvi.

not reflect the growing number of employed people who work only part-time because full-time work is unavailable; (3) high unemployment persists in the inner cities particularly among minorities and young workers; (4) the increasing numbers of female-headed, single-parent households are particularly burdened in overcoming poverty; and, (5) inadequate government welfare programs fail to raise many families out of poverty.<sup>3</sup>

As a matter of social and economic policy, the family is regarded not only as the appropriate institution for provision of the love and affection necessary for the proper development of the child, but also as the institution responsible for provision of the economic and material needs of the child.<sup>4</sup> Current constitutional theory comports with this premise. The Supreme Court has long interpreted the Constitution as creating a zone of privacy that insulates families from state intrusion.<sup>5</sup> The constitutional right to family integrity encompasses the autonomy of adults in marriage and in family matters such as procreation and childrearing.<sup>6</sup> It protects the right of parents to the care and companionship of their children and the corresponding right of children in their parents.<sup>7</sup> Although the Court has repeatedly upheld a right to family privacy, it has not construed the Constitution to impose on government the obligation to fund the

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<sup>3</sup> CHILDREN'S DEFENSE FUND, *supra* note 1, at 5; *see also* Daan Braveman, *Children, Poverty and State Constitutions*, 38 EMORY L.J. 571, 571-85 (1989); Peter B. Edelman, *Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697, 1722-24 (1993).

Contrary to popular stereotypes, although past and continuing racial discrimination in employment, housing, and education contribute to making Black and Latino children more likely to be poor than non-Latino White children, the *number* of poor non-Latino White children (6.0 million) is considerably larger than the *number* of poor Black children (4.9 million) or poor Latino children (3.1 million). In addition, more poor children live outside cities—in suburban and nonmetropolitan smaller cities and rural areas than in major cities. Further, poor families no longer tend to be large families; the average poor family with children consists of an average of 2.2 children, only slightly larger than the average of 1.9 children in all families. CHILDREN'S DEFENSE FUND, *supra* note 1, at 5.

<sup>4</sup> *See* DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 322 (1994); *see e.g.*, VA. CODE ANN. §§ 63.1-249 to 63.1-274.10 (Michie 1995); N.Y. JUD. § 413 (McKinney 1995).

<sup>5</sup> *See* *Griswold v. Connecticut*, 381 U.S. 479, 481-85 (1965) (Harlan, J. and White, J., concurring) (recognizing a limited substantive due process fundamental right to privacy).

<sup>6</sup> *See* *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978); *Roe v. Wade*, 410 U.S. 113, 154-56 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 391-92 (1923); *see also* *Moore v. City of East Cleveland*, 431 U.S. 494, 500-06 (1977) (plurality decision) (recognizing a substantive due process fundamental right to make choices concerning family living arrangements).

<sup>7</sup> *See* *Caban v. Mohammed*, 441 U.S. 380, 385 (1979); *Stanley v. Illinois*, 405 U.S. 645, 647-52 (1972).

exercise of that right.<sup>8</sup> Implicit in the Court's interpretation of family privacy is the notion that family integrity is best protected when the family is shielded from state interference, even when that interference is beneficent. Thus, prevailing constitutional doctrine does not recognize a right of families to state assistance, even when such assistance is necessary to protect and maintain family integrity.

Under the common law doctrine of *parens patriae* the state has an obligation to ensure the safety and well-being of children. Despite the weight imparted in both law and social policy to the parent-child relationship and to the values of family privacy, the state, in the proper exercise of its power as *parens patriae*, can require parents to provide proper food, clothing, shelter and medical care to their children.<sup>9</sup> Parental failure in that regard can lead to the removal of children from their parents' care.

Current constitutional theory balances the right to family integrity against the state's power as *parens patriae* by characterizing that right as one of noninterference by the state in family matters absent a showing of compelling state interest in preventing criminal conduct<sup>10</sup> or protecting children from parental harm.<sup>11</sup> State statutes that allow for the removal of children from their parents for neglect are considered proper manifestations of the exercise of that power.<sup>12</sup>

In this Article, I argue that poor parents who are willing, but economically unable, to provide proper care for their children are entitled to some minimum level of state assistance grounded in the constitutional right to family integrity. The right to family integrity, when coupled with the state's power as *parens patriae*, creates an affirmative obligation on the state to provide income assistance to impoverished families when necessary to protect the welfare of the children and maintain the family intact.

This Article is divided into five parts. Part I reviews the limitations to a right to state assistance under current constitutional doctrine. Part II discusses development of the family privacy right and the *parens patriae* doctrine. Part III considers how the exercise of state authority to protect needy children has tended to operate in such a way as to undermine the integrity of impoverished families to the detriment of poor children. The state has an affirmative

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<sup>8</sup> See *Harris v. McRae*, 448 U.S. 297, 316-17 (1980); *Maher v. Roe*, 432 U.S. 464, 472-74 (1977) (holding that a state cannot create obstacles to prevent a woman from exercising her freedom of choice concerning abortion; however, there is no obligation on the state to provide equal funds for indigent childbirths and abortions).

<sup>9</sup> See *supra* text accompanying note 4.

<sup>10</sup> *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

<sup>11</sup> *Quilloin v. Walcott*, 434 U.S. 246, 255-56 (1978).

<sup>12</sup> See *infra* note 50.

obligation to provide some minimum level of assistance to poor families arising from the intersection of the family privacy right and the state's common law duty as *parens patriae*, when maintaining the family unit is in the best interest of the child. Finally, Parts IV and V examine the benefit of revisiting the issue of an assistance entitlement for poor families in light of some current proposals for welfare reform.

### I. DOCTRINAL LIMITATIONS ON A THEORY OF ENTITLEMENT TO MINIMUM SUPPORT

Consideration of the possibility of a constitutionally-based right to entitlements—nutrition, shelter, health care—is not new. During the past twenty-five years, legal scholars have debated whether the federal Constitution supports the notion of judicially enforceable substantive rights that would compel expenditure of government funds to address the economic needs of the poor.<sup>13</sup> Such arguments run counter to traditional precepts that view the Constitution as a charter of negative rights that restrain government from certain conduct, rather than a charter of positive rights that impose affirmative obligations upon government to act.<sup>14</sup> The Supreme Court has adhered to the negative rights philosophy and, thus, has rejected arguments asserting an

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<sup>13</sup> See Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (suggesting that government has an affirmative duty under the Constitution to provide for minimum support for the poor); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 11-4. (1978); Charles L. Black, Jr., *Further Reflections of the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1108-10 (1986); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 3 (1987); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 659; Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 783-85 (1964) (arguing that welfare rights should be viewed as property and, as such, should be entitled to the same protections as other property rights); Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1252-53 (1965). But see Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 695-96.

<sup>14</sup> "[T]he Constitution is a charter of negative rather than positive liberties; it tells the state to let people alone. It does not require the federal government or the state to provide services." *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984); see *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989). For an insightful critique of the negative rights view of the Constitution, see Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990); Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409 (1990).

affirmative governmental obligation under the federal Constitution to expend funds to provide resources for the poor.<sup>15</sup>

Arguments asserting federal constitutional rights to meet the needs of the poor have rested on equal protection or due process grounds. In *Goldberg v. Kelly*,<sup>16</sup> the Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires that a pretermination evidentiary hearing be held when welfare benefits are to be discontinued. Although the Court accepted the notion of welfare benefits as property,<sup>17</sup> and found that "[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them,"<sup>18</sup> it did not reach the question of the existence of an affirmative duty on the state under the Constitution to provide some minimal degree of assistance.

In *Dandridge v. Williams*,<sup>19</sup> decided only two weeks after *Goldberg*, the Court considered the validity of the method by which the state of Maryland distributed benefits under the Aid to Families with Dependent Children Program (AFDC)<sup>20</sup> under an equal protection analysis. According to AFDC procedures, each state determines the standard of need for each eligible family. Maryland had adopted a "maximum grant" program by which it would provide grants to most families in full based on the computed standard of need, but with a ceiling for the total amount any one family could receive. The standard of need was based on the number of children in the family and the circumstances under which the family lived. The standard of need increased with each additional person in the household, but the increments became proportionally smaller and the aggregate could not exceed the maximum limit.<sup>21</sup>

The plaintiffs were all members of large families whose calculated standard of need exceeded the maximum grant they actually received. They argued that the maximum grant limitation operated to discriminate against them based on the size of their families in violation of the Equal Protection Clause of the Fourteenth Amendment. The plaintiffs argued that the maximum grant denied benefits to younger children in a large family. Moreover, they argued that in limiting the amount of money any single household could receive, the State's

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<sup>15</sup> See, e.g., *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3051-53 (1989); *Lyng v. UAW*, 485 U.S. 360, 368 (1988); *Harris v. McRae*, 448 U.S. 297, 316-17 (1980); *Maher v. Roe*, 432 U.S. 464, 469-70 (1977); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30-34 (1973).

<sup>16</sup> 397 U.S. 254, 264 (1970).

<sup>17</sup> "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'" *Id.* at 262 n.8.

<sup>18</sup> *Id.* at 262.

<sup>19</sup> 397 U.S. 471 (1970).

<sup>20</sup> 42 U.S.C. § 601-617 (1994).

<sup>21</sup> *Dandridge*, 397 U.S. at 473-75.

maximum grant regulation encouraged the breakdown of families as parents of large families "farmed out" their children to live with relatives.<sup>22</sup>

Applying a rational basis test,<sup>23</sup> the Court concluded that Maryland's maximum grant regulation did not violate the Equal Protection Clause. Although the Court acknowledged that the maximum grant program resulted in the per capita diminution of benefits to children in large families,<sup>24</sup> and that the system may provide incentive for a parent to send a child away from the immediate family to live with relatives,<sup>25</sup> it found no constitutional violation. The Supreme Court held that in matters of social welfare programs, as with economic regulation of business and industry, the Constitution imposes only limited restraint. Although "[t]he administration of public welfare assistance . . . involves *the most basic economic needs* of impoverished human beings,"<sup>26</sup> if the classification made by the state has "some reasonable basis," courts must defer to legislative and administrative judgments in the allocation of public assistance, notwithstanding the resulting system may be unjust or inhumane.<sup>27</sup>

Six years later, in *Lavine v. Milne*,<sup>28</sup> the Supreme Court expressed more definitively its position on a constitutional entitlement to minimum subsistence. A New York welfare statute provided that anyone who voluntarily terminated employment would be disqualified from receipt of benefits for a period of seventy-five days following the termination.<sup>29</sup> A person who applied for assistance within the seventy-five days after voluntarily terminating employment would be deemed to have terminated employment for the purpose of qualifying for assistance.<sup>30</sup> The statute placed the burden of presenting evidence to the contrary on the applicant. The lower court held in favor of the plaintiffs, finding that the statutory presumption that an applicant who voluntarily terminated his employment did so for a wrongful reason violated Fourteenth Amendment Due Process.<sup>31</sup> The Supreme Court reversed.<sup>32</sup> Although under the facts of the case it was not necessary for the Court to address the broader question of a constitutional right to minimum support, the

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<sup>22</sup> *Id.* at 476-77.

<sup>23</sup> "In the areas of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Id.* at 485.

<sup>24</sup> *Id.* at 478.

<sup>25</sup> *Id.* at 479-80.

<sup>26</sup> *Id.* at 485 (emphasis added).

<sup>27</sup> *Id.* at 485, 487.

<sup>28</sup> 424 U.S. 577 (1976).

<sup>29</sup> *Id.* at 578-79.

<sup>30</sup> *Id.* at 579.

<sup>31</sup> *Id.* at 581-82.

<sup>32</sup> *Id.* at 582.

Court, in an opinion by Justice White, reached out to do so. Citing *Dandridge*, the Court said "[w]elfare benefits are not a fundamental right, and neither the state nor federal government is under any sort of constitutional obligation to guarantee minimum levels of support."<sup>33</sup> This pronouncement seemed to effectively close the door on arguments for a minimum assistance entitlement.

## II. THE RIGHT OF FAMILY INTEGRITY AND THE *PARENS PATRIAE* DOCTRINE: WHERE CONSTITUTIONAL AND COMMON LAW DOCTRINE MEET

### A. *An Intersection of Competing Principles*

Freedom of choice in marriage and family relationships is a central tenet of our jurisprudence.<sup>34</sup> Since its early due process cases dealing with the education and rearing of children,<sup>35</sup> the Supreme Court has demonstrated repeatedly that matters incident to marriage and to the establishment and maintenance of family life are fundamental and, thus, entitled to constitutional protection.<sup>36</sup> Personal choice with respect to decisions to marry,<sup>37</sup> to procreate,<sup>38</sup> to bear children,<sup>39</sup> to choose family living arrangements,<sup>40</sup> and to direct the education and upbringing of children<sup>41</sup> are among the rights

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<sup>33</sup> *Id.* at 584 n.9.

<sup>34</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 499-501 (1977) (plurality opinion) (zoning ordinance that limited occupancy of a dwelling unit to members of a statutorily defined "family" was held unduly restrictive of the right to choose family living arrangements). *Moore* interprets the line of Supreme Court cases dating from *Meyer v. Nebraska*, 262 U.S. 390 (1923), as establishing the constitutional right to freedom of choice in matters of marriage and family life. See generally JOHN NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW §14.28 (5th ed. 1995).

<sup>35</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>36</sup> "[T]he custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . . [There exists a] private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citations omitted).

<sup>37</sup> *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>38</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

<sup>39</sup> *Bellotti v. Baird*, 443 U.S. 622 (1979); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>40</sup> *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

<sup>41</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158



protected by the Constitution. Further, the Constitution protects not only the individual rights of parents from arbitrary governmental intrusion, but also the privacy right of the family unit itself.<sup>42</sup>

The state cannot intervene in matters of the family without establishing a compelling interest to do so, but the family is not beyond regulation in the public interest.<sup>43</sup> When acting to protect the general welfare of children, the state has wide latitude to restrict parental control.<sup>44</sup> This state power, known as the *parens patriae* doctrine, in essence, gives the state authority to serve as a substitute parent and ultimate protector of children's interests.<sup>45</sup>

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(1944); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>42</sup> See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) ("[F]reedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential' . . . . The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment."); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("[The Court's early due process] decisions have respected the private realm of family life which the state cannot enter."). See generally Cheryl M. Browning & Michael L. Weiner, Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 68 GEO. L.J. 213 (1979).

<sup>43</sup> *Stanley v. Illinois*, 405 U.S. 645 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>44</sup> The Supreme Court has described the state's interest in protecting the welfare of children as "traditional and transcendent." *Maryland v. Craig*, 497 U.S. 836, 855 (1990); see *Prince v. Massachusetts*, 321 U.S. 158 (1944). See generally Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745 (1987).

<sup>45</sup> The doctrine of *parens patriae* originated several centuries ago in Anglo-American common law. Acknowledged as a part of equity jurisdiction in seventeenth century England, it is said to emanate from the right of the Crown to protect those of its subjects who were unable to protect themselves. The concept was used reportedly for the first time in 1696 in *Falkland v. Bertie*, 23 Eng. Rep. 814, 818 (1696), where it was held that with the dissolution of the Court of Wards, which had been established by Henry VIII in 1540, the "*pater patriae*" responsibility of the King for the care of charities, infants, idiots, and lunatics returned to the Chancery. The *parens patriae* power was gradually expanded to justify court interference to protect wards from the misdeeds of testamentary guardians, *Beaufort v. Berty*, 24 Eng. Rep. 579 (1721), and later to protect a child from exploitation by third parties, *Butler v. Freeman*, 27 Eng. Rep. 204, 204 (1756). It was not until *In re Spence*, 41 Eng. Rep. 937, 938-939 (1847) that a court held that intervention to protect a child from his parent or guardian was proper in the absence of property.

The *parens patriae* power has been recognized from earliest times in the United States as well and now is largely governed by state statutes. See *People v. Mercein*, 8 Paige 47

While it is generally presumed in the United States that a child's overall growth and development is enhanced by living with her biological parents,<sup>46</sup> in the case of abused or neglected children, the child's well-being often necessitates intervention by the state in the parent-child relationship. Under its *parens patriae* power, the state may remove an abused or neglected child from his or her parents' home and may, under certain circumstances, permanently terminate all relationships and rights between parent and child.<sup>47</sup> The state's compelling interest in preventing harm to children justifies intrusion on the constitutional right to parental custody.<sup>48</sup>

### B. *Intersecting Principles in Operation*

Child welfare cases are decided under the neglect jurisdiction of juvenile courts nationwide.<sup>49</sup> These proceedings are instituted to protect children who

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(N.Y. 1839). For a detailed discussion of the historical development of the doctrine of *parens patriae*, see Lawrence B. Custer, *The Origins of Parens Patriae*, 27 EMORY L.J. 195 (1978).

<sup>46</sup> See *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."); see also 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 147 (1897) (stating that the law has historically recognized that the natural bonds of affection between parent and child lead parents to act in the best interests of their children).

<sup>47</sup> The Constitution requires clear and convincing evidence of actual harm to a child before a state may terminate a parent's right to the care, control, and custody of a child. *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982); see *In re William L.*, 383 A.2d 1228 (Pa.), *cert. denied*, 439 U.S. 880 (1978).

<sup>48</sup> *Stanley v. Illinois*, 405 U.S. 645 (1972).

<sup>49</sup> See, e.g., VA. CODE ANN. § 16.1-241 (Michie 1988).

[E]ach juvenile and domestic relations district court shall have, within the limits of the territory for which it is created, exclusive original jurisdiction . . . over all cases, matters and proceedings involving . . . [t]he custody, visitation, support, control or disposition of a child . . . who is alleged to be abused [or] neglected . . . [w]hose custody, visitation or support is a subject or controversy or requires determination . . . The authority of the juvenile court to adjudicate matters involving the custody, visitation, support, control, or disposition of a child shall not be limited to the consideration of petitions filed by [a parent or legal guardian] but shall include petitions filed at any time by any party with a legitimate interest therein . . . .

*Id.* For a general discussion of child abuse and neglect procedures, see Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of*

are not being adequately cared for by their parents. The juvenile court makes both a jurisdictional and a dispositional judgment in such cases. The court assumes jurisdiction based not on specific harms to the child, but on such descriptive criteria as observed parental behavior or apparent neglect or abuse of the child. Once jurisdiction is established, the court investigates the specifics of the case and reaches a disposition based upon the standard known as "the best interest of the child." If a court finds that a child has been abused or neglected,<sup>50</sup> the court may leave the child in parental custody, but under the supervision of a court-appointed guardian, or it may commit the child to the

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*Parental Rights*, 28 STAN. L. REV. 623 (1976).

<sup>50</sup> Statutory definitions of "abuse" and "neglect" vary widely from state to state. The language of some statutes is very general, defining abuse as physical injury, sexual abuse, or maltreatment. For example, the Virginia statute states that abused or neglected child

means any child . . . [w]hose parents or other person responsible for his care creates or inflicts, threatens to create or inflict, or allows to be created or inflicted upon such child a physical or mental injury by other than accidental means, or creates a substantial risk of death, disfigurement, or impairment of bodily or mental functions . . . *neglects or refuses to provide care necessary for his health* . . . abandons such child . . . [or] commits or allows to be committed any act of sexual exploitation or any sexual act . . .

VA. CODE ANN. § 63.1-248.2 (Michie 1995)(emphasis added).

Others spell out with greater detail the kinds of conduct which may constitute abuse or neglect. For example, in Colorado child abuse or neglect

means an act or omission in one of the following categories *which threatens the health or welfare of a child* . . . skin bruising, bleeding, *malnutrition, failure to thrive*, burns, fracture of any bone, subdural hematoma, soft tissue swelling, or death . . . sexual assault or molestation, sexual exploitation, or prostitution . . . [any case in which] *the child's parents, legal guardian, or custodian fails . . . to provide adequate food, clothing, shelter, [or] medical care* . . .

COLO. REV. STAT. §19-3-303 (Supp. 1995) (emphasis added).

Child abuse and neglect are qualitatively different issues. Child abuse involves the intentional physical, mental or emotional harm a parent inflicts upon a child. Child neglect involves the failure of parents to properly care for the child, thereby endangering the child's health and well-being. It includes those circumstances in which the parents do not have sufficient economic means to furnish adequate food, medical care, clothing, shelter, etc. See also LINDSEY, *supra* note 4, at 168.

In this Article, I focus on the neglected child and use the term "neglect" to refer to instances in which parents are unable to provide adequate care for their children as a result of indigence.

local child welfare agency for placement in foster care<sup>51</sup> if no alternative is available.<sup>52</sup>

Law and policy experts have long debated whether or not the neglect jurisdiction of juvenile courts should be broadened to allow for increased state intervention on behalf of "neglected" children.<sup>53</sup> That continuing polemic exceeds the scope of this Article. However, there is substantial evidence to suggest that, except in cases involving very seriously harmed children, a child's situation is rarely improved through coercive state intervention.<sup>54</sup> This is particularly true when, as is most frequently the case, intervention takes the form of removal from the parental home, often placing a child in a more

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<sup>51</sup> "The term 'foster care' is [used generally] to apply to any type of care that substitutes others for the natural parent in the parental role, including group homes . . . and institutions, as well as foster family homes." *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 823 n.8 (1977).

<sup>52</sup> A state may coercively intervene to protect a child either by ordering that a child be removed from her home or by ordering her parents to accept supervision and treatment as a condition of continued custody. Either form of intervention is, to a greater or lesser degree, an intrusion on parental autonomy.

<sup>53</sup> Some commentators have supported broader powers for juvenile courts and increased intervention. *See, e.g.*, STANLEY KATZ, *WHEN PARENTS FAIL* 61-62 (1971) (supporting increased intervention but also documenting many actual and potential abuses from state intervention); MAX WALD, *PROTECTIVE SERVICES AND EMOTIONAL NEGLECT* (1961); Henry H. Foster, Jr. & Doris J. Freed, *Family Law*, 34 J. AM. TRIAL LAW. ASS'N 285 (1972). Others have criticized state intervention and advocated narrowing the reach of neglect laws. *See, e.g.*, JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* (1979); JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973); Robert H. Mnookin, *Foster Care—In Whose Best Interests?*, 43 HARV. EDUC. REV. 599 (1973); Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975); Symposium, *The Relationship Between Promise and Performance in State Intervention in Family Life*, 9 COLUM. J.L. & SOC. PROBS. 28 (1972).

<sup>54</sup> *See, e.g.*, JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 20 (1973) ("[S]o far as the child's emotions are concerned, interference with [parental ties], whether to a 'fit' or 'unfit' psychological parent is extremely painful"); *see also* HOUSE COMM. ON WAYS AND MEANS, 102D CONG., 1ST SESS., *OVERVIEW OF THE ENTITLEMENT PROGRAM* (Comm. Print 1991); WHITE HOUSE CONFERENCE ON CHILDREN, *THE RIGHTS OF CHILDREN: REPORT OF FORUM* 22 (1970); SHELDON WHITE, *FEDERAL PROGRAMS FOR YOUNG CHILDREN: REVIEW AND RECOMMENDATIONS* (1973); Michael Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199 (1988); Laura Oren, *Deshaney's Unfinished Business: The Foster Child's Due Process Right to Safety*, 69 N.C. L. REV. 113 (1990); Elizabeth A. Sammann, *The Reality of Family Preservation Under Norma v. Johnson*, 42 DEPAUL L. REV. 675 (1992); Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 993-1000 (1975).

detrimental environment.<sup>55</sup>

Although there is a general lack of consensus as to standards establishing what constitutes neglect or when a court should declare a particular child as neglected,<sup>56</sup> poverty is a common characteristic of families charged with neglect.<sup>57</sup> Evidence suggests that the state routinely intercedes in poor families

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<sup>55</sup> See *supra* note 54. A 1986 national survey of foster family abuse and neglect indicated reported cases of abuse were over ten times greater for foster children. RYAN E. MCFADDEN, NATIONAL FOUNDATION/CARE FOUNDATION PROJECT: PREVENTING ABUSE IN FAMILY FOSTER CARE (1986).

Some experts argue that intervention may have harmful effects even when it consists of measures short of removal, as for example, in-home supervision. "The presence of a caseworker supervising parental behavior can interfere with the psychological system of the family." Wald, *supra* note 53, at 999; see JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 52 (1973) (stating that a parent labeled neglectful and subjected to outside control and supervision of parental performance, may experience "harmful and threatening discontinuity by leaving the decision for placement open and subject to special challenges . . .").

<sup>56</sup> The broad range of statutory standards across the fifty states is indicative of the variation in neglect practices of juvenile courts. See, e.g., *supra* note 50.

Generally, many experts have recommended development of rule-oriented standards for removal, eliminating the wide discretion currently permitted enforcers of abuse and neglect laws:

Professionals have long wrestled with the problem of developing rule-oriented standards for child removal. Mnookin, Wald and others have argued for a standard that would retain the child at home unless a clear and present danger exists to the child's well-being. Mnookin holds that before removal occurs, evidence of physical harm must be demonstrated by an explanation of why intervention with the child remaining at home would not be possible . . . Wald . . . has proposed that state intervention is legitimate in cases where the child has suffered either serious physical harm, serious and specifically defined emotional damage, or sexual abuse, or where the child is in imminent physical danger . . . [T]he level of proof [would] vary depending upon the harm in question (i.e., physical abuse would require less proof than emotional damage).

Goldstein, Freud, and Solnit . . . advocate limiting the coercive arm of the state to those cases where the child faces "imminent risk of death or serious bodily harm." Advocates of strict legal standards suggest that removal is justified only if the parents' past behavior . . . caused or was capable of causing "serious harm."

LINDSEY, *supra* note 4, at 175; see also Wald, *supra* note 53.

<sup>57</sup> See Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887,888 (1975).

[T]here is little consensus about when a court should find that a particular child is neglected or abused. Parents convicted on neglect in one community might never have

and that poor children are more likely to end up in the foster care system than are children of other classes.<sup>58</sup> Reasons for the disproportionate numbers

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been brought to court in another. Perhaps the most prevalent characteristic of families charged with neglect is poverty; this raises the troubling possibility that class or cultural bias plays a significant role in decisions to label children neglected.

*Id.*; Stanley S. Herr, *Children Without Homes: Rights to Education and to Family Stability*, 45 U. MIAMI L. REV. 337, 366 (1990-91) ("Removal of children from their parents on the basis of homelessness or poverty alone is anathema to . . . constitutional principles and freedoms. Regrettably, such unlawful and unnecessary separations are a common occurrence."); LINDSEY, *supra* note 4, at 153-54.

'Standards and statutes for the removal of a child from his or her parents are broad, vague, and inconsistent. There are no clear definitions of 'neglected' children and 'fit' or 'unfit' parents. Hence, parents, children, and foster parents are subject to a rule of wide discretion and subjective determination.' Our findings suggest that an underlying guideline does exist, although it may not be stated explicitly . . . adequacy of income . . . . The most disturbing aspect of the wide discretionary power that child welfare authorities currently wield in removing children is that the results are unfair and discriminatory. Too often, child removal has been limited to poor families. Less than one fourth of the children removed from their families and placed in foster care are from financially self-supporting families."

*Id.* (citations omitted).

<sup>58</sup> "[F]oster care has been condemned as a class-based intrusion into the family life of the poor. . . [The] disproportionate resort to foster care by the poor and victims of discrimination doubtless reflects in part the greater likelihood of disruption of poverty-stricken families." *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 833 (1977).

A national study conducted in 1986 by the National Center of Child Abuse and Neglect found that children from families of less than \$15,000 were reported to child protective services and other similar agencies as maltreated at five times the rate of other children. See Amy Sinden, *In Search of Affirmative Duties Toward Children Under a Post-DeShaney Constitution*, 139 U. PA. L. REV. 227, 228 n.7 (1990); see also Herr, *supra* note 57, at 340 n.10-13, 342-43.

It has been suggested that the disparate treatment of poor families in the neglect process may be rooted in part in a perspective derived from its early English heritage in the Elizabeth Poor Law, 43 Eliz. 1 (1601). The Poor Law, a comprehensive program of legislation designed to provide relief to the poor, became the model for the next three centuries in America as well as England. It established a dual standard of law for families. State intervention between parent and child in poor families was not only permitted but encouraged as a means to realize other public policy goals, ranging from the provision of welfare relief at moderate public cost to the prevention of crime. For other classes, the state would remove children from parents only in the most extreme situations and then only upon

vary.<sup>59</sup>

One primary reason may be that definitions of neglect encompass many behaviors and circumstances that are direct results of poverty.<sup>60</sup> For example, a child with inadequate nutrition clothing or hygiene may be considered a victim of physical neglect. Neglect cases may include cases of failure to thrive—a condition that often reflects poverty's symptoms, such as a lack of healthy food, parental stress and noisy and distracting living conditions.<sup>61</sup> Delays in getting immunizations or health care for a child—delays which may result from a lack of funds or medical insurance, a lack of transportation, or a lack of opportunity to reach clinics which may only be open during the parents working hours—are by-products of poverty that can result in a finding of neglect.<sup>62</sup>

Poverty-related circumstances can put children at increased risk of harm from persons other than their parents which can also serve as the basis of a neglect finding. For example, poor working parents who cannot afford adequate child care may be forced to leave their children unattended or with inexperienced caretakers, or in other unsafe child care arrangements.<sup>63</sup> Similarly, families living in inadequate housing or who are homeless are frequently charged with neglect.<sup>64</sup>

In addition, as a consequence of their greater dependency on public agencies for the provision of social services, the poor are subject to far greater

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privately initiated court action. *See* Areen *supra* note 57, at 894–96, 899. For a modern reflection of similar public policy perspectives with respect to the poor see *infra* text accompanying notes 89–90.

<sup>59</sup> Though most poor parents provide loving, nurturing care for their children, it is true that coping with the stresses caused by poverty can, in the extreme, drive some parents to abuse or neglect their children. While the problems of child abuse and neglect exist in families at all income levels, studies show that such problems occur at a higher rate among poor families.

According to a study of the national incidence and prevalence of child abuse and neglect undertaken by the U.S. Department of Health and Human Services, National Center on Child Abuse and Neglect in 1986, the rate of neglect for children in families with annual incomes below \$15,000 was 36.8 per 1,000—9 times more than in higher income families (4.1 per 1,000). Low-income children were labeled neglected more often for neglect of all types, including physical, educational, and emotional neglect. *See* CHILDREN'S DEFENSE FUND, *supra* note 1, at 85–86; *but see supra* note 57 and *infra* text accompanying notes 61–65.

<sup>60</sup> *See supra* note 50.

<sup>61</sup> CHILDREN'S DEFENSE FUND, *supra* note 1, at 87.

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

<sup>63</sup> *Id.*

<sup>64</sup> *See generally* Herr, *supra* note 57.

scrutiny of their family lives than are wealthier families who have the necessary means to purchase private social services. Therefore, the family problems of the indigent come to the attention of child welfare agencies at a disproportionate rate.<sup>65</sup>

Despite statutory safeguards technically excusing parents who are unable to provide for their children through no fault of their own,<sup>66</sup> distinctions are seldom made in practice. State protective agencies routinely rely on neglect statutes to remove children from the homes of parents who are too poor to support them. Statutes typically define neglect primarily in terms of parental conduct or home environment, with no requirement for a showing of actual harm.<sup>67</sup> Consequently, the inability to provide adequate food and housing can trigger a neglect finding and a court-ordered removal to foster care.<sup>68</sup> And, for lack of any meaningful alternative, many impoverished parents, when faced with unemployment, sudden homelessness, or other economic emergency, voluntarily surrender their children for foster care placement.<sup>69</sup> But whether by court order or voluntary placement, once a child enters foster care the parent relinquishes custody and the concomitant right to play an active role in decisions affecting the child's daily life and care.<sup>70</sup> Further, poor families face particular disadvantage once they become involved in neglect or dependency proceedings in the juvenile court system. Their economic situation can create both practical and political barriers to the reunification of their families. For example, when children are placed in foster care, parents who rely on AFDC or public housing to make ends meet lose their benefits. AFDC allowances are terminated when children are no longer in the home. Without AFDC, a parent may be unable to pay rent. Or, a family that lives in subsidized housing may lose its placement if the children remain out of the home for an extended period. Without safe and stable housing, the children will not be returned to their parents.<sup>71</sup>

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<sup>65</sup> See Sinden, *supra* note 58, at 228 n.7.

<sup>66</sup> See *e.g.*, N.Y. FAM. CT. ACT §1012(f) (1995).

<sup>67</sup> See *e.g.*, Jenkins v. Winchester Social Servs., 409 S.E.2d 16 (Va. Ct. App. 1991); see also Wald, *supra* note 53, at 1000.

<sup>68</sup> *Id.* See generally Herr, *supra* note 57.

<sup>69</sup> See Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977). Some commentators suggest that the "coercive undertones" of so-called voluntary placements may lead parents to believe they have little choice but to surrender custody. See, *e.g.*, Oren, *supra* note 54; Sammann, *supra* note 54.

<sup>70</sup> Smith, 431 U.S. at 827.

<sup>71</sup> See generally Randal E. Steckel, 14 ABA JUV. & CHILD WELFARE L. REP. 138 (1995).



### III. THE INTERSECTION OF PRINCIPLES AS A BASIS FOR AN ASSISTANCE ENTITLEMENT?

As the foregoing discussion illustrates, the manner in which the state exercises its *parens patriae* power with respect to poor children has resulted in the construction of policies and practices that inevitably undermine family ties and ultimately work to the detriment of children of impoverished families. Notwithstanding the importance to a child's emotional and psychological development derived from being raised in a stable family,<sup>72</sup> and irrespective of research documenting serious problems with the foster care system,<sup>73</sup> state child services agencies and the juvenile courts routinely rely on neglect statutes to remove children from the homes of impoverished parents.<sup>74</sup> The state continually intrudes on the privacy of poor families without enhancing the poor child's welfare.<sup>75</sup>

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<sup>72</sup> See generally A. LEON HIGGINBOTHAM, JR., *AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION*, A.B.A. PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN AND THEIR FAMILIES (1993) (describing children's problems in poverty, child care, housing, education, health care, child support, legal representation, and the juvenile justice system).

Studies have shown that the denial of parental love and compassion can diminish the capacity for development of those qualities in children raised in foster care. LINDSEY, *supra* note 4, at 58.

<sup>73</sup> See *supra* notes 54-55; see also LINDSEY, *supra* note 4, at 47-60.

<sup>74</sup> Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives in Law*, 36 ARIZ. L. REV. 11, 46 (1994). The average estimated monthly number of children in foster care more than doubled from 97,000 in 1982 to 197,000 in 1991. Sammann, *supra* note 54, at 2; see HOUSE COMM. ON WAYS AND MEANS, *supra* note 54, at 17-24.

<sup>75</sup> Continued reliance on foster care is likely attributable to two factors. First, a child's stay in foster care is in theory a temporary measure until the child can be returned to live with his or her biological parents. See *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977). In reality, short term foster care is the exception, rather than the rule. Children regularly remain in foster care for years at a time, often moved multiple times from one foster care family to another. See HIGGINBOTHAM, *supra* note 72, at 50-51; Areen, *supra* note 57, at 912-14. Dispositions in neglect cases tend to overlook the fact that foster care frequently is not superior to family care, even in a problem family environment, and that many children who enter the foster care system do not eventually return to their parents' home. See generally LINDSEY, *supra* note 4, at 48-59.

Second, public funding policies have discouraged keeping children and their natural parents together, at a high cost to children and their families as well as to taxpayers. As Judge Justine Polier described:

[M]others in the aid to families with dependent children (AFDC) program receive

The intrusion on family privacy in neglect cases is constitutionally justified by the state's compelling interest in protecting the welfare of children. But when the typical method of intervention is the removal of the child from the parents' care, and the effect of that intervention habitually puts the child at greater risk of harm, the state's action does not further its avowed purpose—protecting the safety and well-being of children. It cannot be said to be acting in the child's best interest, nor to be properly fulfilling its *parens patriae* role. And, *a priori*, if the state's action does not protect children, but in fact increases the likelihood of their harm, the extent of its intrusion on family privacy is unwarranted.

This is not to suggest that the state does not have a continuing responsibility to protect the well-being of poor children. To the contrary, since the state has traditionally defined its role as *parens patriae* as one of ultimate protectors of children's welfare, it is obliged in the proper exercise of that role to devise constructive alternatives for the protection of all children including, perhaps especially, those children whose parents are economically unable to provide for their proper care. But it is constrained in the proper discharge of that duty by the right of family privacy. It must develop alternative means of intervention that will protect the child without undermining family ties any further than necessary to accomplish that goal.<sup>76</sup> It is this duty to protect the child when coupled with the right of family integrity that forms the basis for a limited theory of assistance entitlement.

If a child is receiving inadequate food, clothing, shelter, medical care and the like—if the child is neglected—the state, as it has defined its *parens patriae* power, has an affirmative obligation to intervene in the family on the child's behalf. Interference in the family is justified if it protects the child from harm. Thus, the form of intervention must be based on a determination of what would be in the child's best interest. However, it must also be narrowly tailored so as to accomplish the state's objective with the least intrusion on the fundamental privacy right of the family unit. This balancing of competing interests requires

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on average less than \$1 a day for each child. If we find the home is inadequate, that the mother is unable to cope with the problems of so many children, we remove the child to the home of a stranger or a series of strangers, paying from public funds up to \$7 a day for the child's care. If the child is removed to an institution, the institution is paid up to \$14 a day. Finally, if the child becomes emotionally disturbed, payments from public funds may range from \$10 to \$25 a day. Thus, the further the child is removed from his family, the more we are ready to pay for his support.

Justine Polier, *The Invisible Legal Rights of the Poor*, 12 CHILDREN 215, 218 (1965); see also Areen, *supra* note 57, at 915.

<sup>76</sup> Removal of a child from parental custody may be necessary in some cases, but it ought not be routinely employed without consideration of other forms of intervention.

consideration of the available alternatives. The state ought not continually interfere with the integrity of poor families, ostensibly for the purpose of protecting children from harm, by imposing an action that routinely puts such children at greater jeopardy.

Since the child's interest is, presumably, best served in the care and custody of his or her parents, and alternatives available outside the family do not better protect the child from harm,<sup>77</sup> the state may best succeed in safeguarding the child's welfare by preserving the family intact and assisting it in achieving some measure of economic security. By so doing, the state meets its obligation as *parens patriae* in a manner that causes only minimal intrusion on family bonds. Thus, in the absence of a redefinition of the state's traditional *parens patriae* role, I would argue that the state has, at the very least, an affirmative obligation to provide some minimal assistance to poor families with children prior to removal of the children from their parents. For the child who is receiving inadequate food, clothing, shelter and medical care because of parental poverty, the state is compelled to intervene on its behalf, but the most effective and least intrusive form of intervention is likely to be economic assistance to the child *within* the family, i.e., to the family unit.

I would argue further that since the obligation to provide assistance arises from the state's common law duty toward children, it indeed exists at a point prior to the point of removal. Other forms of intercession in the family, though short of removal, are nonetheless intrusive on family privacy.<sup>78</sup> Yet, as *parens patriae* the state is obliged to intervene to protect the neglected child. The method employed in satisfaction of the common law duty must be tempered by the constitutional constraint. The state should apply the least intrusive manner of intervention available that will enable it to effectively accomplish its objective. Arguably, in cases of neglect, the state, therefore, may be similarly obliged to provide some minimal economic assistance to the child *within the family unit* prior to the imposition of other more intrusive forms of intervention short of removal, such as in-home supervision.

#### IV. *PARENS PATRIAE*, FAMILY INTEGRITY, AND WELFARE REFORM

What impact might consideration of the intersection of the common law *parens patriae* doctrine and the constitutional family privacy doctrine have on current efforts at welfare reform? Although the social welfare system has, over the last three decades, all but eliminated poverty among the elderly, children

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<sup>77</sup> Studies have shown that foster care is often more dangerous than the home the children are removed from. LINDSEY, *supra* note 4, at 58.

<sup>78</sup> See *supra* note 55.

have not fared as well. Child poverty rates have remained consistently at high levels and have continued to escalate over time.<sup>79</sup> At this writing, welfare reform legislation is currently under consideration in both the U.S. House and Senate which contain as a central component the discontinuation of the federal guarantee of assistance to all eligible Americans.<sup>80</sup> Preliminary studies indicate that millions of additional children could be pushed into poverty if these legislative initiatives are enacted in their current form.<sup>81</sup> Some states have begun a similar process of substantially curtailing state aid to poor families, likely with similar long-term effects.<sup>82</sup>

The prevailing view of the constitutionally protected right to family integrity is that it is a right to noninterference by the state in family matters

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<sup>79</sup> See *supra* note 74; see also Daniel Patrick Moynihan, *Towards a Post Industrial Social Policy*, 71 FAM. IN SOC'Y 51-56 (1990); LINDSEY, *supra* note 4, at 189-228.

<sup>80</sup> Current House and Senate versions of welfare reform legislation replace the Aid to Families with Dependent Children program with a block grant, or direct cash payment, of federal funds to the states, thereby ending the present system under which the federal government matches state spending on welfare and any eligible poor person is guaranteed benefits. The federal government estimates that nearly a fifth of the children receiving benefits in 1994, or 157,000 children, would eventually be ineligible. States could deny cash benefits to unwed teen mothers and deny additional benefits for children born to women already on welfare. See Barbara Vobejda, *Senate Passes Welfare Overhaul; Clinton Urges House to Go Along*, WASH. POST, Sept. 20, 1995, at A1, A4; *How Congress Plans to Balance the Budget*, WASH. POST, Nov. 21, 1995, at A15.

The U.S. Department of Health and Human Services estimates that the Senate bill, which also substantially restricts benefits to the elderly and disabled under the Supplemental Security Income (SSI) program, would increase by 25% the "poverty gap" i.e., the qualitative and quantitative extent of poverty in the nation. If enacted Congress' budget bill would permit only 35% of the 900,000 disabled children who currently draw full SSI benefits to continue to do so; 15% would be cut off entirely. See *How Congress Plans to Balance the Budget*, WASH. POST, Nov. 21, 1995, at A15.

There are also proposals in Congress significantly decreasing funding to the food stamp program. Unlike the AFDC Program or SSI, for which one must be a single mother or elderly or disabled, respectively, to qualify, the food stamp program is open to anyone whose income is low enough. It acts, in effect, as a national income floor of sorts. See *Food Stamps*, WASH. POST, Nov. 9, 1995, at A22; Ann Devroy, *As Effect of Welfare Reform Bills Emerge, So Do Critics*, WASH. POST, Nov. 9, 1995, at A1, A10-A11.

<sup>81</sup> The child poverty rate is estimated to increase from 14.6% to 16.1%, resulting in an additional 1 million children below the poverty line if current versions of federal welfare reform bills are enacted. See Judith Havemann & Ann Devroy, *Clinton Agrees to New Welfare Study*, WASH. POST, Oct. 28, 1995, at A4.

<sup>82</sup> See, e.g., Spencer S. Hsu, *All Eyes on Virginia's Welfare Guinea Pig: Culpeper Officials Optimistic as Region Begins Governor's Effort to Overhaul the System*, WASH. POST, June 4, 1995, at B1.

absent a compelling state interest in preventing criminal behavior<sup>83</sup> or protecting children from harm.<sup>84</sup> It is a fundamental right that may not be abridged by the state without a compelling reason, even when the intent is well-meaning.<sup>85</sup> But as *parens patriae* the government can, despite the importance of the rights of family privacy and parental autonomy, impinge upon those rights in order to protect children. It can require parents to feed, clothe, shelter and otherwise properly care for their children.<sup>86</sup> *A fortiori*, the responsibility of the parents notwithstanding, because government has traditionally defined its role as that of the ultimate protector of children's welfare, the state owes a duty to the child who, by virtue of parental poverty, receives inadequate food, clothing, shelter and medical care. Under current social welfare policy the state has offered modest assistance to some needy children through public assistance programs such as AFDC. But, the state has typically sought to satisfy its responsibility to the neglected child through intervention in the family to remove the child from the care of his or her impoverished parents, and to place him or her into foster care. Significant increases in the number of poor families will, undoubtedly, have a direct impact on the ability of child welfare and social services systems to respond to the needs of neglected children. As a practical matter, with nearly a half million children in an already overburdened and inadequate foster care system, most for reasons of poverty, and with the number of poor children increasing, removal of neglected children from parental custody to foster care can no longer be the state's primary response to poverty-induced child neglect.<sup>87</sup> From a constitutional perspective, unless removal of neglected children can be shown, as a general matter, to accomplish its purpose of enhancing the well-being of such children, such continued intrusion into poor families can no longer be justified. *A priori*, if the state is to effectively satisfy its traditional obligation as *parens patriae* in a way that comports with existing family privacy doctrine, a qualitative change is called for in the way in which society understands and responds to poverty and in the way it seeks to satisfy its obligation to its children.

The current societal approach to the needs of the poor is an outgrowth of

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<sup>83</sup> See *Reynolds v. United States*, 98 U.S. 145 (1878).

<sup>84</sup> See *Quilloin v. Walcott*, 434 U.S. 246 (1978).

<sup>85</sup> See *supra* notes 15-16.

<sup>86</sup> See *supra* note 54.

<sup>87</sup> Nearly half of all foster children move from one foster home to another in the same year; most foster children remain in foster care until they are adults and are never returned to their biological parents' homes; 3% of foster children experience abuse or neglect in their foster families; although the number of foster care placements has been increasing, the number of qualified foster parents has been decreasing. CHILDREN'S DEFENSE FUND, *THE STATE OF AMERICA'S CHILDREN* 62-63 (1992).

various, often inaccurate or incomplete, assumptions including a view of poverty as largely a private matter—the consequence of the individual shortcomings of the poor.<sup>88</sup> This perception has allowed us to condemn the poor for their plight and to ignore the impact of parental poverty on children.<sup>89</sup> But when millions of poor children continue to exist in an affluent society, society must begin to alter its view from one of poverty as a private matter to poverty as a civic concern. To be truly effective, any reform of the public welfare system must leave more children better off than under the existing system. Welfare policies should be designed to ensure that families, both single and two-parent families, possess the minimal income necessary to adequately care for their children.<sup>90</sup> Economic support for poor children cannot be conditioned entirely upon the actions of their parents over which they have no control. Though encouraging greater work force participation and self sufficiency are laudatory goals, public assistance programs designed to address

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<sup>88</sup> For an interesting discussion of the conceptualization of the poor into categories of “deserving poor” versus “undeserving poor” for purposes of the development of public assistance policies and programs, see CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY* 120–203; *see also supra* notes 53–54.

<sup>89</sup> *See generally* LINDSEY, *supra* note 4, at 208–28; CHILDREN’S DEFENSE FUND, *supra* note 1, at xx–xxiv. This perception underlies current reform proposals in Congress that condition a child’s benefit on increased labor force participation, self-sufficiency, and other modified parental behaviors, which has the net effect of trying to motivate the parent’s actions by denying adequate support to the child.

<sup>90</sup> Christopher Jencks has suggested that a reasonable way to go about this would be through creation of a system of government financed “fringe benefits” in lieu of the existing welfare system. This system would concentrate on helping all parents, in both single and two-parent families, who work in low-wage jobs. He suggests that such a program might include support in the form of: extra cash to parents who work at low-income jobs through the Earned Income Credit, with a large credit available for families with more children; tax credits for childcare expenses when the parents work; universal health care insurance with premiums tied to income; a tax credit for housing for working parents; and, mortgage subsidies for working parents who buy homes in low-income neighborhoods, in order to stabilize those neighborhoods. JENCKS, *supra* note 88, at 232–35.

A second commentator, Duncan Lindsey, has suggested a universal “guaranteed child exemption,” available to working parents, both lone parents and couples. Working parents would declare the number of dependent children in their households. Based on that declaration, the parent, whether working full or part time, would be paid the value of the exemption through reduced payroll deductions. Parents who were unemployed would receive regular cash payments up to the value of the exemption. *See* LINDSEY, *supra* note 4, at 245–51.

It is not the intent of this Article to formulate a proposal for welfare reform and it does not attempt to do so. Further, it neither endorses nor rejects the suggested reform measures of the commentators described herein, but merely recounts their suggestions for the reader.

those objectives must not undermine efforts to alleviate child poverty in the attempt to promote parental self responsibility.

#### V. CONCLUSION: WHY "ASSISTANCE ENTITLEMENT" TALK NOW?

At the outset of this Article I noted that debate about a right to minimum assistance is not new.<sup>91</sup> The twenty-five years since the U.S. Supreme Court's decision in *Dandridge v. Williams*,<sup>92</sup> have seen such notions largely dismissed as counter to traditional constitutional doctrine and philosophy. Given present social attitudes and the conservative makeup of the current Supreme Court one might reasonably doubt whether that view is likely to change in the near future. So, one might ask, why revisit the issue of assistance entitlements for the poor now and what does this Article add to the deliberations?

To address the second part of the question first, this Article presents a new theoretical dimension, grounded in substantive due process and traditional common law doctrine, to arguments for a limited assistance entitlement. Still, why reconsider the entitlement issue at all?

One answer is that the number of poor families continues to rise and no downturn in the numbers seems imminent.<sup>93</sup> Child poverty rates in this country are particularly alarming.<sup>94</sup> The costs of child poverty to society is measurable in terms of both human potential and real dollars.<sup>95</sup> It is ironic that the United States, with one of the largest and most expensive child welfare systems in the industrialized world, also has one of the highest rates of child poverty.<sup>96</sup> If

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<sup>91</sup> See *supra* text accompanying notes 13–33.

<sup>92</sup> 397 U.S. 471 (1970).

<sup>93</sup> See *supra* note 81.

<sup>94</sup> Families with children are nearly 3 times more likely to be poor than families without children. And younger families with children (i.e., families headed by someone under 30) are nearly 6 times more likely to be poor than childless families overall. See CHILDREN'S DEFENSE FUND, *supra* note 1, at xx.

<sup>95</sup> Poverty stacks the odds against children before birth; it decreases their chances of being born healthy and of normal birthweight or of surviving. Low-income children are two times more likely to die from birth defects; three times more likely to die from all causes combined; four times more likely to die in fires; five times more likely to die from infectious diseases and parasites; and, six times more likely to die of other diseases.

Future losses to the economy resulting from the effects of just one year of poverty for 14.6 million children (the current estimate of the number of children living in poverty) reach as high as \$177 billion. If the costs associated with higher rates of unemployment, poor worker health, and inadequate academic skills are eliminated, the estimated annual costs of child poverty is still between \$36 billion and \$99 billion. CHILDREN'S DEFENSE FUND, *supra* note 1, at xvii, xix, 99–116; see *supra* note 72.

<sup>96</sup> The United States and Canada have the costliest and most extensive child welfare

child poverty continues unabated at its current rate, the wealth, the very future of this country as represented by its children, will be decimated. Thus, this may be a particularly propitious time to seriously reconsider our choices and priorities as a society.

Perhaps another answer is one suggested by Professor Erwin Chemerinsky.<sup>97</sup> It is particularly important that scholars and others continue to make a case for an entitlement to survival resources, especially now, because those views are almost entirely absent from the current Supreme Court. Our constitutional history demonstrates that academic writing of one era can influence constitutional doctrines in the next.<sup>98</sup> And, as Professor Daan Braveman suggests, apart from responses of the federal judiciary, state courts might be persuaded to independently find these rights under state constitutions.<sup>99</sup>

But perhaps the best rationale for reconsidering this issue is suggested by recalling the words of Franklin Roosevelt, "The test of our progress is not whether we add to the abundance of those who have much; it is whether we provide enough for those who have too little."<sup>100</sup>

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systems and the highest rate of children in poverty among the industrialized nations. See LINDSEY, *supra* note 4, at 189-228. Such high poverty rates are not an inevitable result of modern industrialized society. Other industrialized nations with fewer resources and similar economic and social problems as those of the United States have lower child poverty rates. American children are three times as likely to be poor as British children, four times more likely to be poor than French children and seven to thirteen times more likely to be poor than German, Dutch or Swedish children. See CHILDREN'S DEFENSE FUND, *supra* note 1, at xx.

<sup>97</sup> See Erwin Chemerinsky, *Making the Case for a Constitutional Right to Minimum Entitlements*, 44 MERCER L. REV. 525 (1993).

<sup>98</sup> *Id.* at 526.

<sup>99</sup> See Braveman, *supra* note 3.

<sup>100</sup>

But here is the challenge to our democracy:—In this nation I see tens of millions of its citizens—a substantial part of its whole population—who at this very moment are denied the greater part of what the very lowest standards of today call necessities of life.

I see millions of families trying to live on incomes so meager that the pall of family disaster hangs over them day by day.

I see millions whose daily lives in city and on farm continue under conditions labeled indecent by a so-called polite society half a century ago.

I see millions denied education, recreation, and the opportunity to better their lot and the lot of their children.

I see millions lacking the means to buy the products of farm and factory and by their poverty denying work and productiveness to many other millions.

I see one-third of a nation ill-housed, ill-clad, ill-nourished.



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It is not in despair that I paint you this picture. I paint it for you in hope—because the nation, seeing and understanding the injustice in it, proposes to paint it out . . . *The test of our progress is not whether we add to the abundance of those who have much; it is whether we provide enough for those who have too little.*

Franklin D. Roosevelt, Second Inaugural Address, (Jan. 20, 1937) in VITAL SPEECHES OF THE DAY (1936-37), at 227 (emphasis added).