ARTICLES

THE POVERTY DEFENSE

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INTRODUCTION

Is stealing a loaf of bread to feed a starving family of eight a crime? Or, is poverty a defense? In Victor Hugo's classic, *Les Misérables*, the protagonist, Jean Valjean, commits this crime and is sentenced to five years of hard labor.[1] Hugo clearly intends the reader to sympathize with Valjean. The punishment not only seems grossly disproportionate to the crime, but Valjean also seemingly had no other choice. While Valjean's crime may inspire sympathy among readers (and musical theater aficionados alike), it is widely assumed and accepted in our American criminal justice system that poverty is not a defense to crime.[2] In 1971, Judge David Bazelon of the United States Court of Appeals for the District of Columbia famously challenged this assumption, arguing, in dissent to a decision upholding a murder conviction, that juries should be allowed to consider a defendant's "rotten social background"—that is, how growing up under circumstances of severe

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1. VICTOR HUGO, LES MISÉRABLES 30 (Charles E. Wilbour trans., Blue Ribbon Books 1943) (1862).

2. *See, e.g.*, United States v. Alexander, 471 F.2d 923, 926 (D.C. Cir. 1973) (rejecting the rotten social background defense).

environmental deprivation can subsequently influence a criminal defendant's mental state and actions.[3]

In turn, Bazelon's dissent spurred a lively academic debate as to whether the law should recognize a poverty defense, what such a defense would look like, and how it would operate. The question is presumed to be the stuff of the ivory tower; one scholar deemed it "entirely the province of intellectuals engaged in scholarly debate."[4] Gone unnoticed in this debate is that one area of law recognizes a poverty defense to wrongful conduct, and this defense is implicated in thousands of cases a year. In both civil and criminal child neglect cases, various states recognize that conduct that would otherwise be considered neglect is excused on account of a parent's poverty.[5] In short, a poverty defense is not hypothetical. The child neglect case law provides evidence about how the poverty defense works in practice and can guide scholars—and more importantly, lawmakers and courts—in considering whether to extend a poverty defense to other areas of the law.

Considering a poverty defense is timely in light of our increasing poverty rate and the correlation between poverty and crime. As of 2010, more than fifteen percent of all Americans live below the federal government's official poverty line,[6] which is $22,314 for a family of four (meaning that a family earning $22,315 is not considered poor).[7] Twenty million Americans, or 6.7 percent of the population, live in extreme poverty, defined as those living at fifty percent or less of the official poverty level.[8] Of people in the labor force, 7.2 percent—or more than ten million people—do not earn enough to be lifted out of poverty.[9] While the link between crime and poverty is complex, statistics show unequivocally that poor

3. *Id*. at 960 (Bazelon, C.J., dissenting).

4. Stephen J. Morse, *Severe Environmental Deprivation (AKA RSB): A Tragedy, Not a Defense*, 2 ALA. C.R. & C.L. L. REV. 147, 170 (2011); *see also* Richard Delgado, *The Wretched of the Earth*, 2 ALA. C.R. & C.L. L. REV. 1, 5 (2011) [hereinafter Delgado, *Wretched of the Earth*] ("I take it as given that the country has not adopted a rotten social background defense and is unlikely to do so anytime soon.").

5. *See, e.g.*, D.C. CODE § 16-2301(9)(A)(ii) (2012); FLA. STAT. ANN. § 39.01(44) (West 2010).

6. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010, at 14 (2011), *available at* http://www.census.gov/prod/2011pubs/p60-239.pdf.

7. U.S. CENSUS BUREAU, POVERTY THRESHOLDS 2010, *available at* http://www.census.gov/hhes/www/poverty/data/threshld/index.html.

8. DENAVAS-WALT ET AL., *supra* note 6, at 19.

9. *Id*. at 15.

people are overrepresented in the criminal justice system.[10] Further, mass incarceration policies have a particularly devastating impact on low-income, African American, urban communities, as one-third of black men in their twenties are under supervision of the criminal justice system.[11] "By reducing parental capacity to parent children, by further weakening already challenged family structures and resources, and by making already disadvantaged families and communities even less economically viable, incarceration helps to reify a social dynamic that is likely to encourage further involvement in crime."[12] This was the cycle that Judge Bazelon hoped to break, or at least expose, when he proposed the "rotten social background" defense.

In addition to these dynamics, poverty is becoming increasingly criminalized. Cities across America are making the daily tasks of living for the homeless a crime, passing laws that forbid sleeping, eating, begging, or sitting in public spaces.[13] In some cities, it is even illegal for groups or individuals to serve food to homeless people.[14] At the same time, at least eighty percent of reporting jurisdictions that criminalize homelessness lack adequate shelter space, public toilets, or storage facilities for the homeless to keep their belongings.[15] Thus, a lack of services creates the very conditions of lawlessness.[16] In addition, states, while intensifying wel-

10. *See* Erica J. Hashimoto, *Class Matters*, 101 J. CRIM. L. & CRIMINOLOGY 31, 55–58 (2011) (making a persuasive case for better data collection about the economic status of persons involved in the criminal justice system); *see also* Stuart P. Green, *Hard Times, Hard Time: Retributive Justice for Unjustly Disadvantaged Offenders*, 2010 U. CHI. LEGAL F. 43, 46–47 (2010) (analyzing Department of Justice figures); Andrew Karmen, *Poverty, Crime, and Criminal Justice*, *in* FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE 25, 29–30 (William C. Heffernan & John Kleinig eds., 2000) (listing theories that explain why poverty leads to crime).

11. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272, 1281–82, 1285, 1291, 1293–94 (2004); *see also* Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97, 100, 102 (2008).

12. Lawrence D. Bobo, *Crime, Urban Poverty, and Social Science*, 6 DU BOIS REV.: SOC. SCI. RES. ON RACE 273, 276 (2009).

13. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, CRIMINALIZING CRISIS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 6–8 (2011), *available at* http://www.nlchp.org/content/pubs/11.14.11%20Criminalization%20Report%20&%20Advocacy%20Manual,%20FINAL1.pdf.

14. *Id.* at 7, 38.

15. *Id.* at 7.

16. *See* Barbara Ehrenreich, *Is It Now a Crime to be Poor?*, N.Y. TIMES, Aug. 9, 2009, at WK9 (describing the arrest and jailing of a person in a homeless shelter for failing to appear in court on a charge of criminal trespassing that arose from sleeping on a sidewalk).

fare fraud prosecutions, increasingly treat poor people who resort to public benefits as criminals, subjecting them to fingerprinting, biometric imaging, ongoing surveillance, and drug testing as a condition for receiving benefits.[17] While debtors' prisons have formally been abolished, the reality is that courts are increasingly jailing poor people who cannot pay off their debts; and, in many cases, these debtors are not even aware that they are being pursued by creditors due to "sloppy, incomplete or even false documentation."[18] A poverty defense has the potential to serve as a corrective to these trends.

Scholars have articulated at least three differing conceptions of a poverty defense, each of which are reflected in the child neglect case law. In some cases, the child neglect 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.[19] Other approaches reflect Judge Bazelon's idea of rotten social background, in which an impoverished upbringing renders a parent unable to fulfill parenting duties.[20] In a third approach, the poverty defense embodies social forfeit theory, in which society's tolerance of severe economic inequality deprives society of the moral authority to blame deprived defendants for their conduct.[21] Regardless of the court's theoretical underpinning, the poverty defense rarely succeeds unless the court has a sophisticated understanding of poverty and how it leads to neglect. Thus, this article argues that not only is the poverty defense an established (albeit overlooked) feature of American law that can be expanded

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17. *See* Michele Estrin Gilman, *The Class Differential in Poverty Law*, 77 BROOK. L. REV. 1389 (2012); Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 659, 674–79 (2009).

18. Jessica Silver-Greenberg, *Welcome to Debtors' Prison, 2011 Edition*, WALL ST. J., Mar. 17, 2011, at C1 (noting that more than a third of states allow borrowers who do not pay their bills to be jailed). In addition, states are increasingly charging criminal justice user fees; defendants are required to pay for "everything from probation supervision, to jail stays, to the use of a constitutionally required public defender. Every stage of the criminal justice process, it seems, has become ripe for a surcharge." ALICIA BANNON ET AL., BRENNAN CENTER FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 4 (2010), *available at* http://brennan.3cdn.net/c610802495d901dac3_76m6vqhpy.pdf.

19. David M. Smith, Note, *A Theoretical and Legal Challenge to Homeless Criminalization as Public Policy,* 12 YALE L. & POL'Y REV. 487, 501–02 (1994).

20. David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 403–04 (1976) [hereinafter Bazelon, *Morality of the Criminal Law*].

21. Green, *supra* note 10, at 54–55.

into other areas, but also that it will not fulfill its potential without a rich conception of poverty.

The article proceeds as follows. Section I explains the major theoretical justifications for excusing poor defendants for committing wrongful conduct and sets forth the objections to a poverty defense. Section II provides the context for the poverty defense in child neglect cases, exploring the link between poverty and child neglect and the scope of the poverty defense. Section III analyzes how courts interpret the poverty defense in child neglect cases, demonstrating that all three theoretical approaches to a poverty defense are found in the case law. As Section III explains, a court's conception of poverty drives its interpretation of the poverty defense. Courts that see poverty as rooted in structural causes are more amenable to the defense than courts that view poverty as a result of behavioral failings. Section IV draws lessons from how the poverty defense is applied in child neglect cases in order to inform other areas of the law. Section IV concludes that the poverty defense is not the impossible pipedream painted by its critics. Nevertheless, the defense has not fulfilled its potential because many courts lack a sophisticated understanding of how poverty is related to neglect. Moreover, courts are often uncomfortable with the implications of the poverty defense and how it conflicts with accepted norms of individual culpability. Accordingly, Section IV provides ideas for strengthening the poverty defense and suggests areas for its expansion.

I. THEORETICAL JUSTIFICATIONS FOR EXCUSING POOR DEFENDANTS

Although the conventional wisdom is that there is no poverty defense, progressive scholars have taken Judge Bazelon's lead and attempted to construct the theoretical scaffolding for building one. Under the first theory, "rotten social background" ("RSB"), also known as "severe environmental deprivation," can cause a defendant to commit a crime, thereby diminishing his responsibility, similar to a defense of diminished capacity or insanity. The RSB defense is also justified with regards to social forfeit theory, which holds society morally responsible for its socio-economic failures. Under the second theory, current economic hardship can create conditions of coercion such that a poor person has no meaningful alternative other than to commit an offense. While

the RSB defense focuses on how a person's *history* of deprivation shapes responses to present stimuli, the economic coercion defense focuses instead on how *current* deprivation impacts decision-making. While theorists assert that the law (either rightly or wrongly) fails to recognize either form of these poverty defenses, in fact, both of these versions of the poverty defense have been recognized within the law of child neglect. The case law suggests that a poverty defense can not only help individual poor defendants but also benefit society more widely through redistributive consequences that can ultimately reduce crime. This section examines the theoretical models for a possible poverty defense, as well as the objections to these proposals.

A. *Rotten Social Background / Severe Environmental Deprivation*

1. The Theory

In 1973, D.C. Circuit Judge David Bazelon introduced the theory of an RSB defense in his dissent in *United States v. Alexander*.[22] In that case, an African American defendant was convicted of killing two unarmed Marines after one of them hurled racial epithets at the defendant and his friends in a hamburger shop.[23] A psychiatrist who examined the defendant testified at trial that the defendant was delusional due to a preoccupation with racial injustice and "the idea that racial war was inevitable."[24] Accordingly, the psychiatrist concluded that the defendant may have had an "irresistible impulse to shoot" after the victim called him a "black bastard."[25] This emotional disorder was rooted in the defendant's childhood, during which time he was raised by a single mother in a low-income neighborhood in the Watts neighborhood of Los Angeles in a crowded home with little money, attention, or love.[26]

Accordingly, defense counsel sought to argue that defendant's "rotten social background" conditioned him to respond to certain stimuli such that he had no meaningful choice when targeted

22. 471 F.2d 923, 960 (D.C. Cir. 1973) (Bazelon, C.J., dissenting).
23. *Id.* at 926.
24. *Id.* at 957.
25. *Id.*
26. *Id.* at 957–58.

with racial insults.[27] However, the trial court instructed the jury to ignore any evidence related to the defendant's RSB.[28] In dissent, Judge Bazelon contended that denying the RSB defense was an error because the denial stripped the jury of the opportunity to consider the "crucial, functional question—did the defendant lack the ability to make any meaningful choice of action[?]"[29] For Judge Bazelon, a RSB could cause an impairment similar to a mental illness, thereby rendering defendants less culpable.[30]

Judge Bazelon acknowledged the difficulty of permitting an RSB defense, especially when dealing with a defendant who has committed a violent crime and may still be dangerous.[31] He identified four possible approaches for dealing with defendants suffering from RSB: (1) confinement, (2) release, (3) therapeutic confinement, and (4) preventative detention.[32] None of these were satisfactory.[33] First, confinement is inconsistent with a lack of responsibility.[34] Second, release would be publicly and politically unpalatable.[35] Third, therapeutic confinement may be pointless for a defendant who is not mentally ill.[36] Fourth, preventative detention could lead to huge swaths of the poor being detained in order to prevent crime.[37] Despite the unsettled ramifications of recognizing an RSB defense, Judge Bazelon argued that permitting the defense would force society to examine the causes of crime and to consider "whether income redistribution and social reconstruction are indispensable first steps toward solving the problem of violent crime."[38]

Professor Richard Delgado subsequently fleshed out the parameters of an RSB defense.[39] Pulling together extensive social

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27. *Id.* at 959; *cf.* Delgado, *Wretched of the Earth*, *supra* note 4, at 7–8 (arguing that the use of the term RSB "is a distancing move" and preferring the term severe environmental deprivation).

28. *Alexander*, 471 F.2d at 959 (Bazelon, C.J., dissenting).

29. *Id.* at 961.

30. *Id.*

31. *Id.* at 961–62.

32. *Id.* at 962–64.

33. *Id.*

34. *Id.* at 962.

35. *Id.* at 963.

36. *See id.*

37. *Id.* at 964.

38. *Id.* at 965.

39. Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9, 11–12 (1985) [hereinaf-

science data, he explored the correlations between poverty and crime, noting that while the vast majority of poor people do not violate the law, most criminal offenders are from poor backgrounds.[40] As he stated, "An environment of extreme poverty and deprivation creates in individuals a propensity to commit crimes," such that punishing the individual is unfair.[41] In other words, "blame is inappropriate when a defendant's criminal behavior is caused by extrinsic factors beyond his or her control."[42] The research relied on by Professor Delgado shows that crime is usually caused by frustration-aggression, which can result from inequality.[43] In turn, inequality is generated and reinforced through poverty, unemployment, poor living conditions, bad schools, police brutality, violent neighborhoods, alternative value systems, single-parent families, and racism.[44] When impoverishment renders a defendant unable to control her conduct, the RSB defense excuses that conduct.[45]

In addition to the idea that RSB impacts behavior, Judge Bazelon also suggested a social forfeit justification for an RSB defense. He contended that society loses its moral justification for punishing poor criminal defendants when it refuses to remedy conditions of inequality.[46] As he stated, "[I]t is simply unjust to place people in dehumanizing social conditions, to do nothing about those conditions, and then to command those who suffer, 'Behave—or else!'"[47] In short, the law should "convict[] only when it can condemn."[48] As Professor Delgado elaborates, society loses

ter Delgado, *Rotten Social Background*]; Delgado, *Wretched of the Earth*, *supra* note 4, at 1, nn.6–7.

40. Delgado, *Rotten Social Background*, *supra* note 39, at 10. The social science data on the connection between crime and poverty has strengthened considerably since the 1970s. *See infra* notes 333–40 and accompanying text (discussing Haney's article).

41. Delgado, *Rotten Social Background*, *supra* note 39, at 54.

42. *Id.* at 55.

43. *Id.* at 23–24.

44. *Id.* at 24.

45. *Id.* at 63–64. Three other categories of excusing conditions are when conduct is involuntary; when the conduct is voluntary, but the actor does not perceive its consequences; or when the conduct is voluntary but the actor does not see it as wrong. *Id.* (citing Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 222 (1982)).

46. *See* Bazelon, *Morality of the Criminal Law*, *supra* note 20, at 401–02.

47. *Id.*

48. David L. Bazelon, *The Morality of the Criminal Law: A Rejoinder to Professor Morse*, 49 S. CAL. L. REV. 1269, 1270 (1976) [hereinafter Bazelon, *Rejoinder*].

its right to punish those who lack "a realistic chance to act in a socially acceptable way."[49]

The idea of social forfeit is a variation on social contract theory. Under this theory, the legal system is part of a larger social contract in which citizens agree to abide by the rules of the state as enforced by the government in return for safety and security.[50] When individuals break this social contract, they gain an unfair advantage and must be punished.[51] Conversely, when the rules of society are unjust, the social contract is broken, and citizens are no longer obliged to follow the rules.[52] Under a Rawlsian interpretation of social contract theory, rules are unjust when they would not be chosen by those in the original position, that is, under a veil of ignorance.[53] In other words, Rawls envisions the rules that people would choose if they did not know their places in society, their social classes, their talents or abilities, or even their personal beliefs as to how they should lead their lives.[54] This veil of ignorance ensures that parties in the original position will agree to principles that will protect those at the bottom of the social ladder.[55] Rawls concludes that the resultant rules would guarantee equal opportunity as well as fair distribution of social and economic resources, among other things.[56] Under social contract theory, if unfair rules contribute to poverty and if society fails to remedy those disparities, then the poor are not bound to follow society's mandates. Accordingly, a poverty defense reinforces the rules of the social contract.

As discussed in detail below, courts that use an RSB theory in the child neglect context take into account factors such as the parent's age and background, educational level, employment history, housing options, neighborhood environment, physical and mental health, and family and community support. In this approach, the poverty defense does more than excuse a parent who lacks money to purchase basic necessities such as diapers and food. Indeed, most child neglect cases are far more complicated,

49. Delgado, *Rotten Social Background*, *supra* note 39, at 74.
50. *See* Green, *supra* note 10, at 54.
51. *Id.* at 55.
52. *Id.*
53. JOHN RAWLS, A THEORY OF JUSTICE 15–19 (1999).
54. *See id.* at 17–18.
55. *See id.* at 118.
56. *See id.* at 266–67.

with families facing multiple barriers and deprivations. Further, courts that give the RSB approach a social forfeit gloss also consider what actions the child welfare agency has taken to support the parents and how the parents have responded to any offered assistance. Consistent with Judge Bazelon's vision, the RSB approach in child neglect cases consists of a holistic examination of the family within its larger societal context. Nevertheless, as Bazelon predicted, defendants rarely prevail.[57]

2. Critics of RSB

In the *Alexander* majority opinion, Judge Carl E. McGowan rejected the concept of an RSB defense, while acknowledging that "[t]he tragic and senseless events giving rise to these appeals are a recurring byproduct of a society which, unable as yet to eliminate explosive racial tensions, appears equally paralyzed to deny easy access to guns."[58] Although "[t]he ultimate responsibility for the[] deaths reaches far beyond these appellants[,]" courts "administer a system of justice which is limited in its reach."[59] In short, current law "define[s] criminal accountability narrowly."[60] Like Judge Bazelon, Judge McGowan understood that poverty leads to crime, but he maintained a more constrained view of the court's role in administering justice.

Similarly, several scholars have also argued that the RSB defense should not be adopted because it does not fit within current conceptions of criminal justice. They make four main arguments against the RSB defense: (1) growing up with an RSB does not reduce individual responsibility for criminal acts; (2) an RSB defense is practically impossible to apply; (3) an RSB defense can lessen public safety; and (4) the goals of the RSB defense are outside the bounds of the criminal law.[61] Stephen Morse has argued

57. *See* Bazelon, *Rejoinder*, *supra* note 48, at 1271 (noting that mass acquittals based on an RSB defense are unlikely).

58. United States v. Alexander, 471 F.2d 923, 965 (D.C. Cir. 1973).

59. *Id.*

60. *Id.*

61. *See* Angela P. Harris, *Rotten Social Background and the Temper of the Times*, 2 ALA. C.R. & C.L. L. REV. 131, 138–41 (2011) (explaining that the defense has not been adopted because it conflicts with current cultural norms such as neoliberalism and the culture of crime control); Andrew E. Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado's Rotten Social Background*, 2 ALA. C.R. & C.L. L. REV. 79, 121 (2011) ("[The RSB defense violates] basic precepts of mens rea, entity liability, moral culpability, and duty toward others that violate our whole sense of what defines

against recognizing an RSB defense on the grounds that the poor, like all people, are moral agents responsible for the decisions they make while acting within a world of constrained choices.[62] Unlike children or the insane, people from a RSB have "basic knowledge of the rules and are capable of rational reflection . . . because they have the general capacity to . . . be guided by reason."[63] Morse explains that if causation or determinism were an excuse to crime, no one would be responsible for their behavior, which is a result that society cannot tolerate.[64] "No coherent, workable society can give legal permission to people to act according to their own private or subjective moral code. This would abandon the rule of law and undermine social safety."[65] Moreover, an RSB defense is both over- and under-inclusive because "many [RSB] sufferers do not suffer from [impaired behavioral controls] and many non-[RSB] sufferers may have such difficulties."[66] As a result, "it seems patronizing and demeaning to claim that all victims of [RSB] are impaired human beings."[67]

Second, opponents contend that the RSB defense is practically impossible to prove and apply. Professor Paul Robinson contends that while growing up under an RSB may shape individual behavior, the strength of the link between environment and crime is unclear.[68] Simply put, correlation is not causation. He states, "There is little empirical support for the proposition that a generally impoverished upbringing can itself cause a specific crime so as to render the offender blameless."[69] For instance, the defendant in *Alexander* may have killed the Marine due to his own "selfishness, arrogance, and pride," as much as due to an RSB.[70] Third,

American criminal law."); Jeremy Waldron, *Why Indigence is Not a Justification*, *in* FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE, *supra* note 10, at 98–99 ("The law . . . is not about to recognize a class of defense whose general tendency . . . would be to call into question the legitimacy of the general legal rules of property in a society."). These authors do not address the poverty defense in neglect cases.

62. Stephen J. Morse, *Deprivation and Desert*, *in* FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE, *supra* note 10, at 114, 149.

63. *Id.* at 147.

64. *Id.* at 149–50

65. Morse, *supra* note 4, at 151.

66. *Id.* at 150.

67. *Id.*

68. Paul H. Robinson, *Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and "Rotten Social Background*," 2 ALA. C.R. & C.L. L. REV. 53, 58 (2011).

69. *Id.* at 59.

70. *Id.* at 75.

opponents also query how the criminal justice system would handle RSB defendants, many of whom might be dangerous if released and most of whom have harmed victims sharing RSBs.[71]

Fourth, opponents view the RSB defense as an illegitimate means of advancing redistributive aims.[72] Morse argues that the purpose of the criminal law is to condemn and blame; it is not designed to serve social welfare goals.[73] Social redistribution should come from the political branches; not courts, and it is a "pipedream" to think that an RSB defense would transform society.[74] Moreover, he adds that most people in our democracy would not agree that society is so unjust as to compromise its legitimacy.[75] Thus, he rejects social forfeit justifications, asking: "How is society to be put on trial so that juries understand that society is on trial and they are not simply hearing terribly sad stories of tragic life circumstances?"[76] He points out that many law-abiding jurors may come from similarly disadvantaged backgrounds and thereby reject the defense.[77] In such cases, "[s]hould we abandon the defense, or should we keep trying at great expense fruitlessly to convict society?"[78] In lieu of the RSB defense, Morse argues for criminal justice reforms that fit within traditional notions of the criminal law, but that would lessen the disproportionate impact of criminal law on poor people, such as decriminalizing low-level drug crimes and reforming draconian sentencing policies.[79]

71. *See id*. at 61. For a response to these and other arguments, see generally Morse, *supra* note 4.

72. *See* Morse, *Deprivation and Desert, supra* note 62, at 115; *see also* Morse, *supra* note 4, at 148.

73. Morse, *supra* note 62, at 115.

74. Morse, *supra* note 4, at 158; *see also* William C. Heffernan, *Social Justice /Criminal Justice*, *in* FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE, *supra* note 10, at 47, 55, 58 (arguing that it is inappropriate for judges to make decisions based on their conceptions of social justice since there is no shared conception of social justice in the United States).

75. Morse, *supra* note 62, at 153.

76. Morse, *supra* note 4, at 157.

77. *Id*.

78. *Id*.

79. *See id*. at 171–72.

B. *Coercion Defenses*

Some have also advocated for a poverty defense that mirrors existing defenses, such as necessity or duress.[80] These defenses exculpate an actor due to her blamelessness.[81] A justification defense, such as necessity, exculpates otherwise wrongful actions that benefit society, whereas an excuse defense, such as duress, renders an actor blameless, even if her actions have harmed society.[82] In other words, necessity approves the underlying offense; duress simply excuses it.[83] While the defenses differ in their specifics, they both reflect the idea that constrained choices can have coercive aspects that lessen a person's culpability. The poverty defense similarly acknowledges the coercive effects of deprivation.

Under the necessity defense, a person commits what would otherwise be a crime due to a choice between two evils: he must violate the criminal law or someone will suffer a greater harm.[84] In such circumstances, "the law prefers that he avoid the greater evil by bringing about the lesser evil."[85] Classic scenarios, for instance, include those when a person kills one person in order to save two or more or when a firefighter destroys property to prevent the spread of fire.[86] Courts have been reluctant to recognize economic hardship as creating conditions of necessity, reasoning that poor people usually have some alternatives other than committing a crime.[87] Thus, if Jean Valjean "could find temporary sustenance by, say, attending a soup kitchen, then []he is unlikely to be able to claim the defense" against a charge of stealing food.[88] The necessity defense is a difficult standard to meet, and there

80. *See* Antonia K. Fasanelli, Note, In Re Eichorn: *The Long Awaited Implementation of the Necessity Defense in a Case of the Criminalization of Homelessness*, 50 AM. U. L. REV. 323, 324–25 (2000); Smith, *supra* note 19, at 501.

81. PAUL ROBINSON ET AL., CRIMINAL LAW DEFENSES § 25(a) (2011).

82. *Id.* § 25(d).

83. Smith, *supra* note 19, at 501.

84. WAYNE R. LAFAVE, CRIMINAL LAW § 10.1 (4th ed. 2003).

85. *Id.* § 10.1(a). The defense requires: (1) the defendant acted to avoid serious harm; (2) there were no adequate lawful means to escape the threatened harm; and (3) the harm avoided was greater than that caused by breaking the law. *See id.* §10.1.

86. *See* MODEL PENAL CODE § 3.02 & cmt. 1.

87. *See infra* note 89 and accompanying text.

88. *See* Green, *supra* note 10, at 51.

are no reported cases in which a poor person was acquitted on economic grounds under the necessity defense.[89]

A defense of duress excuses a person who commits a crime because he is subject to such coercion that no reasonable person could be expected to resist.[90] The rationale for excusing the wrongful conduct is that the defendant, facing the threat of harm, "somehow loses his mental capacity to commit the crime in question."[91] In such circumstances, "punishment serves neither the deterrent nor the condemnatory purposes of the criminal justice system."[92] To argue duress, a defendant must establish a reasonable fear of imminent harm.[93] As with the defense of necessity, courts hold that economic hardship is not the sort of imminent harm that justifies crime.[94]

For critics of a poverty defense, this is how it should be. They contend that deprivation alone does not satisfy the predicates for necessity or duress.[95] Consider a person, such as Jean Valjean, who commits larceny because she is threatened with imminent death or starvation as a result of not being able to afford food or medicine. The argument against a necessity defense is that "minimal welfare and medical care is available to virtually anyone in the United States, and our law does not consider it objectively reasonable, for example, to steal to obtain better medical care or food than would be available through the welfare system."[96] As for

89. *Id.* Cases rejecting a necessity defense include: *Harris v. State*, 486 S.W.2d 573, 574 (Tex. Crim. App. 1972) ("Economic necessity is no justification for a positive criminal offense."); *State v. Moe*, 24 P.2d 638, 640 (Wash. 1933) (ruling that hungry, unemployed people were guilty of larceny when they stole groceries) ("[E]conomic necessity has never been accepted as a defense to a criminal charge. The reason is that, were it ever countenanced, it would leave to the individual the right to take the law into his own hands."). *Cf.* Rex v. Holden, (1809) 168 Eng. Rep. 607 (K.B.) 607 (describing the trial, conviction, and execution of seven persons for creating forged bank notes) ("[T]hey were all indigent and, many of them very distressed persons, who were tempted to engage in this criminal practice, by the necessities of the moment.").

90. *See* LAFAVE, *supra* note 84, § 9.7.

91. *Id.* § 9.7(a); *see also* ROBINSON, *supra* note 81, § 177(a); MODEL PENAL CODE § 2.09 cmt. 2 (1985).

92. ROBINSON, *supra* note 81, § 177.

93. LAFAVE, *supra* note 84, § 9.7(b). Several commentators assert that an excuse defense such as duress is a better fit than a necessity defense for poor defendants alleging that poverty lessens their criminal culpability. *See* Delgado, *Rotten Social Background, supra* note 39, at 49; Smith, *supra* note 19, at 501–02 (arguing that the duress defense does not require society to approve the underlying conduct, only to excuse it).

94. ROBINSON, *supra* note 81, § 177(c)(b).

95. *See* Morse, *supra* note 62, at 141–42.

96. *Id.* at 142.

duress, a lack of economic opportunity is not a sufficient threat to compel crime. "A constrained choice . . . is not the equivalent of no choice or a forced choice."[97]

These critics may overstate the strength of our safety net, as at least one court has concluded. A California court has recognized that a necessity defense should be available in cases involving violations of anti-homeless ordinances.[98] The *Eichorn* court held that a homeless person arrested for sleeping in public was entitled to a necessity defense when there were no shelter beds available and economic forces were to blame for the defendant's homelessness.[99] As the court stated, "[R]easonable minds could differ whether [the] defendant acted to prevent a 'significant evil.' Sleep is a physiological need, not an option for humans."[100] Post-*Eichorn*, California courts have rejected a necessity defense in cases involving poor defendants who commit violent crimes, reasoning that poverty does not "constitute a necessity [defense] justifying the commission of burglary" or armed robbery.[101] Although the California courts supposedly remain open to considering the necessity defense for crimes of homelessness, there is no evidence that the defense has ever been used successfully.[102] By contrast, the poverty defense in child neglect cases has been applied far more often, and some courts have recognized that the effects of

97. *Id.* at 143.

98. *In re* Eichorn, 81 Cal. Rptr. 2d 535 (Cal. Ct. App. 1998).

99. *Id.* at 540 (*citing* People v. Slack, 258 Cal. Rptr. 702, 705 (Cal. Ct. App. 1989)).

100. *Id.* at 539. Similarly, the United States Court of Appeals for the Ninth Circuit held that Los Angeles violated the Eighth Amendment's prohibition on cruel and unusual punishment when it forbade sitting, sleeping, or lying on the street at any time of day. Jones v. City of Los Angeles, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated as moot*, 505 F.3d 1006 (9th Cir. 2007) (granting joint motions to dismiss the appeal). The court reasoned that the ordinance punished the status of homelessness, which can be involuntary and leaves the homeless with no choice but to sleep in public. *Id.* at 1136–37.

101. People v. Carter, No. E049455, 2010 WL 5232940, at *8 (Cal. Ct. App. Dec. 23, 2010) (distinguishing *Eichorn* from burglaries committed in the name of necessity); People v. Carrera, No. D035410, 2001 WL 1356993, at *4–5 (Cal. Ct. App. Oct. 6, 2001) (finding that public policy considerations do not support application of the necessity defense to justify armed robbery).

102. *See* Elizabeth M. M. O'Connor, Note, *The Cruel and Unusual Criminalization of Homelessness: Factoring Individual Accountability into the Proportionality Principle*, 12 TEX. J. C.L. & C.R. 233, 260 (2007). Moreover, the Ninth Circuit has pointed out the limitations of a necessity defense to crimes of homelessness, explaining that the practical realities of being homeless make it unlikely that defendants will have the knowledge or resources to raise a necessity defense in court, and that even with counsel, defendants are likely to take a plea rather than to subject themselves to further pre-trial jail time. *Jones*, 444 F.3d at 1130–31 (holding that the availability of a necessity defense does not deprive plaintiffs of standing to raise a constitutional challenge to anti-homeless legislation).

poverty sharply limit the options available to poor parents.[103] These cases show how a coercion-based poverty defense might operate in other contexts.

II. POVERTY AND CHILD MALTREATMENT

In the area of child neglect, the theoretical bases for a poverty defense have moved into practice. At least seven states recognize a poverty defense in criminal child neglect cases, while more than half the states recognize a poverty defense at some point in civil neglect cases.[104] Civil child neglect cases are typically heard in family court and, if in the best interests of the child, the state can move for termination of parental rights; criminal child neglect cases can result in criminal penalties, such as incarceration.[105] Parents can be subject to both types of proceedings simultaneously.[106] Cases interpreting the civil statutes are instructive because child neglect proceedings share many features with criminal law. The ultimate sanction for violating a civil child neglect law can be termination of the parent-child relationship, which has been called the "civil death penalty."[107] Moreover, in these termination cases, which are usually brought and prosecuted by attorneys for the state,[108] parents have a right to an attorney,[109] and the Su-

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103. *See, e.g.*, Commonwealth v. Dee, 110 N.E. 287, 288 (Mass. 1915) (arguing that hailing the indigent into criminal court because they are "unavoidably disabled" from providing support is a "grave injustice"); *In re* Daniels, 953 P.2d 1, 10–11 (Nev. 1998) (Springer, C.J., dissenting) (arguing that welfare proceedings rarely address the root cause of poverty leaving the parents unable to support their child despite their desire to do so); *In re* A.L.B., No. M2004-01808-COA-R3-PT, 2005 WL 1584065, at *14 (Tenn. Ct. App. July 6, 2005) (explaining that poverty, without evidence of harm to the children, does not provide sufficient cause to separate children from their biological parents); Doria v. Tex. Dep't of Human Res., 747 S.W.2d 953, 958 (Tex. App. 1988) (discussing the mother's endeavors to support her children despite her economic situation).

104. *See infra* notes 179, 188 and accompanying text.

105. *See* WILLIAM G. JONES, DEP'T OF HEALTH & HUMAN SERVS., WORKING WITH THE COURTS IN CHILD PROTECTION 37 (2006); Theresa Hughes, *Discovering the Undiscoverable in Child Protective Proceedings: Safety Planning Conferences and the Abuse of the Right to Counsel*, 10 U.C. DAVIS J. JUV. L. & POL'Y 429, 433, 471 (2006).

106. *See* Hughes, *supra* note 105, at 471.

107. *In re* K.A.W., 133 S.W.3d 1, 12 (Mo. 2004) (en banc) (referring to the termination of the parent-child relationship as "tantamount to a 'civil death penalty'"); *In re* P.C., 62 S.W.3d 600, 603 (Mo. Ct. App. 2001); *In re* K.D.L., 58 P.3d 181, 186 (Nev. 2002); *In re* Smith, 601 N.E.2d 45, 55 (Ohio Ct. App. 1991); *In re* N.R.C., 94 S.W.3d 799, 811 (Tex. Ct. App. 2002); *see also In re* J.J.Z., 630 A.2d 186, 191–92 (D.C. Ct. App. 1993) (holding that while neglect and criminal proceedings have different purposes, the protections for parents and children are similar to those made available to criminal defendants).

108. *See* Hughes, *supra* note 105, at 433 (describing role of child welfare agency in pur-

preme Court of the United States has imposed a heightened "clear and convincing evidence" burden of proof.[110] For these reasons, both civil and criminal child neglect cases discussing the poverty defense shed light on whether, when, and how poverty should excuse wrongful conduct. To appreciate the role that the poverty defense plays in family and criminal courts, it is critical to understand how child neglect correlates to poverty. In other words, why would society ever excuse neglectful parents?

A. *The Scope and Concept of Child Neglect*

In 2010, 436,321 children were found to be maltreated, of whom 78.3 percent suffered neglect.[111] Neglect far outranks other forms of child maltreatment, such as physical abuse (17.6 percent), sexual abuse (9.2 percent), or psychological maltreatment (8.1 percent).[112] Under prevailing definitions, abuse results from an affirmative, intentional act, while neglect results from a parent's failure to act.[113] Notably, the poverty defense is not available in child abuse cases, likely because child abuse is considered more volitional.[114]

The social service profession recognizes various forms of neglect, the most common of which is physical neglect (including abandonment or lack of food, clothing, or hygiene).[115] State legal

suing dependency cases); *see also* David Michael Jaros, *Unfettered Discretion: Criminal Orders of Protection and Their Impact on Parent Defendants*, 85 IND. L.J. 1445, 1449 (2010) (arguing that family court procedural protections should be utilized in criminal neglect proceedings).

109. *See* Vivek S. Sankaran, *Protecting a Parent's Right to Counsel in Child Welfare Cases*, 28 CHILD L. PRAC. 97, 103 (2009) ("Although no federal statutory right to parent's counsel exists, fortunately most states have followed the Court's guidance and provide counsel to parents in dependency and termination proceedings."). Children are also appointed an advocate. *See* Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 648 (2006).

110. Santosky v. Kramer, 455 U.S. 745, 748 (1982).

111. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 7, 24 (2010) [hereinafter CHILD MALTREATMENT 2010]. In the same year, there were approximately 3.6 million reports of child maltreatment, involving almost six million children. *Id.* at 20.

112. *Id.* at 24.

113. Peter J. McGovern, *Redefining Child Neglect An American Perspective*, 7 AM. J. FAM. L. 207, 212 (1993).

114. *See* Dorothy Roberts, *The Ethics of Punishing Indigent Parents, in* FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE, *supra* note 10, at 165.

115. *See* DIANE DEPANFILIS, CHILDREN'S BUREAU, DEP'T OF HEALTH & HUMAN SERVS., CHILD NEGLECT: A GUIDE FOR PREVENTION, ASSESSMENT AND INTERVENTION 11–12 [here-

definitions of neglect in the civil context vary.[116] Some definitions of neglect focus on the conduct of the parents; others focus on harm or a risk of harm to the child; while still others combine elements of both. Regardless, because neglect is generally considered a failure to act, the child welfare system examines the culpability of parents in assessing alleged deficiencies.[117] Defining neglect is usually further complicated because there is no consensus on the minimum requirements of caring for children or how certain actions and inactions affect the well-being of children.[118] Furthermore, conceptions of neglect are culturally shaped,[119] and societal expectations of parenting change over place and over time.[120] One hundred years ago, many American children lived in unheated homes with dirt floors alongside insects and rodents, and these conditions were not considered unusual. Today, such conditions would likely trigger an investigation by child protective services.

Despite this lack of definitional consensus, child welfare experts agree that neglect can harm children physically, intellectually, emotionally, and socially.[121] The extent of these injuries depends on a range of factors, such as the frequency, duration, and

inafter CHILD NEGLECT GUIDE]. Other forms of neglect include the following: medical neglect (denial or delay in seeking health care), inadequate supervision (leaving child alone or exposing them to hazards), emotional neglect (inadequate affection, exposure to abuse, drug abuse by child), and educational neglect (truancy or failure to enroll). *Id*. at 11–14.

116. *Id*. at 9. As a condition of receiving federal funds, states must incorporate the standards in the Child Abuse Prevention and Treatment Act ("CAPTA"). 42 U.S.C. § 5106(b) (2006). CAPTA sets the definitional floor for child abuse and neglect as "any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm." 42 U.S.C. § 5106(g). Above this floor, states can devise their own definitions. CHILD NEGLECT GUIDE, *supra* note 115, at 9.

117. *See* CHILD NEGLECT GUIDE, *supra* note 115, at 9.

118. *Id*. The definition of child neglect is widely perceived as vague and leaving too much discretion in the hands of decisionmakers. *See* Janet Weinstein & Ricardo Weinstein, *Before It's Too Late: Neuropsychological Consequences of Child Neglect and Their Implications for Law and Social Policy*, 33 U. MICH. J.L. REF. 561, 565 (2000).

119. *See* Laura Sullivan & Amy Walters, *Incentives and Cultural Bias Fuel Foster System*, NAT'L PUB. RADIO (Oct. 25, 2011), http://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system (describing how Native American children make up half of South Dakota's foster care population despite being less than fifteen percent of the population). Tribal leaders have told NPR that "what social workers call neglect, is often poverty; and sometimes native tradition." *Id.*

120. *See* David Pimentel, *Criminal Child Neglect and the "Free Range Kid": Is Overprotective Parenting the New Standard of Care?* 2012 UTAH L. REV. (forthcoming 2012) (describing changing norms of parenting).

121. CHILD NEGLECT GUIDE, *supra* note 115, at 21.

severity of the neglect; the age and gender of the child; the relationship between the child and the caregiver; and the presence of protective factors, such as the resilience of the child.[122] In the worst case scenario, neglect can lead to death. In 2010, there were 1560 child fatalities resulting from maltreatment, and 32.6 percent of these fatalities resulted solely from neglect.[123] At the same time, removal of children from their homes has financial, emotional, and social costs.[124]

Society pays a cost for the consequences of neglect as well. Millions of dollars are spent annually on maintaining the child welfare and juvenile justice systems, as well as on providing special education and physical and mental health care for maltreated children.[125] Indirectly, society must contend with the consequences of abuse and neglect because maltreated children disproportionately commit crimes as juveniles; grow up to engage in adult criminal activity; and suffer higher rates of mental illness, substance abuse, and domestic violence.[126] The child welfare and juvenile offender populations overlap significantly.[127] In short, neglect has serious costs for children, families, and society.

B. *The Link Between Poverty and Child Neglect*

Although many poor families do not maltreat their children,[128] poor people, and particularly poor mothers of color, are disproportionately involved with the child welfare system.[129] A state's level

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122. *Id.*

123. CHILD MALTREATMENT 2010, *supra* note 111, at x.

124. *See infra* note 372 and accompanying text (discussing the harms associated with foster care).

125. CHILD NEGLECT GUIDE, *supra* note 115, at 27. Direct public expenditures for the child welfare system are estimated to be over $23 billion annually. *See* CYNTHIA ANDREWS SCARCELLA ET AL., THE *COST* OF PROTECTING VULNERABLE CHILDREN *V*: UNDERSTANDING STATE VARIATION IN CHILD WELFARE FINANCING 6 (2006), *available at* http://www.urban.org/UploadedPDF/311314_vulnerable_children.pdf.

126. CHILD NEGLECT GUIDE, *supra* note 115, at 27.

127. *See* Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53, 70–71 (2012).

128. CHILD NEGLECT GUIDE, *supra* note 115, at 31.

129. *See* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE vi, 8 (2002) [hereinafter ROBERTS, SHATTERED BONDS]; Cynthia R. Mabry, *Second Chances: Insuring that Poor Families Remain Intact by Minimizing Socioeconomic Ramifications of Poverty*, 102 W. VA. L. REV. 607, 615 (2000); Kristen Shook Slack et al., *Understanding the Risks of Child Neglect: An Exploration of Poverty and Parenting Characteristics*, 9 CHILD MALTREATMENT 395, 396–97 (2004) (noting it has long been known that children from

of child well-being is statistically related to its poverty rate.[130] Neglect in particular is more directly associated with poverty than other types of child maltreatment.[131] Recent studies show that the children of unemployed parents experience two to three times higher rates of neglect than children of employed parents.[132] Moreover, children from very low-income families, that is, families either with incomes of less than $15,000 a year or receiving public benefits, are seven times more likely to be neglected than children from other families.[133] Homelessness and receipt of public benefits such as welfare and Medicaid are also strongly associated with involvement in the child welfare system.[134]

Researchers are working to understand the relationship between poverty and neglect, although the complexity of the variables makes it difficult to isolate cause and effect.[135] As a result, researchers focus on risk factors within families that heighten the likelihood of neglect.[136] One explanation for the link between poverty and neglect is that poor families are more involved with state agencies and thus more likely to be identified.[137] As a condition of

poor families are overrepresented in the CPS); Roberts, *supra* note 114, at 163–64.

130. *See* CHILD NEGLECT GUIDE, *supra* note 115, at 29; Christina Paxson & Jane Waldfogel, *Work, Welfare, and Child Maltreatment*, 20 J. OF LAB. ECON. 435, 460 (2002) ("About half of families referred to CPS are receiving welfare at the time of the referral, and more than half have received welfare in the past.").

131. *See* CHILD NEGLECT GUIDE, *supra* note 115, at 29.

132. *See* ANDREA J. SEDLAK ET AL., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT: REPORT TO CONGRESS 11 (2010), *available at* http://www.acf.hhs.gov/sites/default/files/opre/nis4_report_congress_full_pdf_jan2010.pdf. Data was derived from investigated cases reported by child protective services, as well as other community professionals who work with children and families. *Id.* at 2.

133. *Id.* at 12.

134. *See* Huntington, *supra* note 109, at 668–69. At the same time, receipt of WIC food support and food stamps lowered the risk of substantiated CAN reports, probably because they enhance economic security. *See* Bong Joo Lee et al., *Effects of WIC and Food Stamp Participation on Child Outcomes*, USDA ERS REP. 27, 34–35 (Dec. 2006), *available at* http://digitalcorpora.org/corp/nps/files/govdocs1/014/014721.pdf.

135. Maria Cancian et al., *The Effect of Family Income on Risk of Child Maltreatment*, Discussion Paper 1385-10 Inst. For Research on Poverty 1 (2010), http://www.irp.wisc.edu/publications/dps/pdfs/dp138510.pdf.

136. *See* JILL GOLDMAN ET AL., CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., A COORDINATED RESPONSE TO CHILD ABUSE AND NEGLECT: THE FOUNDATION FOR PRACTICE 27–34 (2003), *available at* http://www.childwelfare.gov/pubs/usermanuals/foundation/foundatione.cfm.

137. *See* ROBERTS, SHATTERED BONDS, *supra* note 129, at 168–71; Diana Baumrind, *The Social Context of Child Maltreatment*, 43 FAM. REL. 360, 360 (1994); Daan Braveman & Sarah Ramsey, *When Welfare Ends: Removing Children from the Home for Poverty Alone*, 70 TEMP. L. REV. 447, 461–62 (1997).

receiving public benefits, poor families are subject to intense scrutiny by the state, ranging from home visits to elaborate verification requirements to drug testing.[138] In addition, there is underreporting of maltreatment in middle- and upper-income households, where mandatory reporters are more likely to conclude that child injuries are accidental rather than intentional.[139] Yet these class biases are not the entire explanation; rather, living in a poor household appears to raise the risks of neglect[140]—although, as this article explains, many findings of "neglect" are really findings of poverty.[141]

Studies suggest five main reasons for why poverty is correlated with neglect. First, and most obvious, a lack of economic resources can result in conditions—such as hunger, inadequate housing, and homelessness—which are harmful to children.[142] Notably, the working poor struggle to maintain jobs despite obstacles that can include irregular hours as well as a lack of transportation, child care, living wage, or health insurance.[143] In turn, these obstacles can result in neglect, particularly when children are left alone in the home.[144] Poor families also live in more dangerous housing structures and neighborhoods, making the rate of accidental deaths far higher than for middle-class children.[145]

Second, poverty causes stress, which in turn, can make it hard to parent effectively. "The stress of living in harsh, deprived conditions can have a disabling effect on parenting capacities, result-

138. *See* Gilman, *supra* note 17, at 1391.

139. *See* Braveman & Ramsey, *supra* note 137, at 462 & n.118.

140. *See* Baumrind, *supra* note 137, at 360–61; Leroy H. Pelton, *The Role of Material Factors in Child Abuse and Neglect*, *in* PROTECTING CHILDREN FROM ABUSE AND NEGLECT 132–33 (Gary B. Melton & Frank D. Barry eds., 1994).

141. *See* Laura Frame, *Parent-Child Relationships in Conditions of Urban Poverty: Protection, Care, and Neglect of Infants and Toddlers*, Policy Brief, Center for Soc. Servs. Research 3–4 (Sept. 2001), http://cssr.berkeley.edu/childwelfare/pdfs/parent child.pdf.

142. *See* Mabry, *supra* note 129, at 616; Cancian et al., *supra* note 135, at 3.

143. *See, e.g.*, Mabry, *supra* note 129, at 616; Patricia A. Shin, *Work and Family: Policies for the Working Poor*, 26 HARV. J. ON LEGIS. 349, 349–51 (1989).

144. *See* Mabry, *supra* note 129, at 611–12. There appears to be an association between a family's ability to purchase child care, as a result of workforce attachment, and lower rates of maltreatment. *See* Mark E. Courtney, Steven L. McMurtry & Andrew Zinn, *Housing Problems Experienced by Recipients of Child Welfare Services,* 83 CHILD WELFARE 393, 393–94 (2004); Cancian et al., *supra* note 135, at 1304.

145. LEROY H. PELTON, FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES 146 (1989). Poor families face hazards such as increased rates of fires, broken stairs, frayed electrical wiring, lack of heat, rodents, lead paint, and unsecured windows. *Id.* at 145–49.

ing in inconsistent discipline, failure to respond to a child's emotional needs, or failure to prevent or address a potential risk to safety."[146] Third, poverty compounds the vulnerability of low-income parents and is related to increased levels of drug and alcohol abuse, as well as mental and physical illness.[147] In turn, these disabling conditions can lead to neglect.[148] Fourth, poor parents are more likely to be isolated from support networks, such as relatives, neighbors, and religious and community groups.[149] This isolation compounds the lack of economic resources, stress, and vulnerability of poor parents.[150] Fifth, there is an intergenerational component to child neglect. "Parents who neglect often come from neglecting families; their parenting styles are learned behaviors, and they themselves might not have the capabilities to do much better than they are doing."[151] Overlaying all these factors is the reality that poor parents lack the buffer that financial resources provide. For instance, there are middle-class parents who abuse drugs and alcohol and suffer from depression, but they have the economic wherewithal to seek professional help and to pay for child care to replace their own supervision.[152] In sum, poverty is connected to neglect through a variety of mechanisms that both create and reinforce parenting challenges. The poverty defense alone does not remove these challenges; at most, it places them into a broader context.

C. *Child Neglect Proceedings*

Civil cases involving child maltreatment are often called dependency cases and, depending on the state, are heard in family

146. Joy Duva & Sania Metzger, *Addressing Poverty as a Major Risk Factor in Child Neglect: Promising Policy and Practice*, 25 PROTECTING CHILD. 63, 65 (2010); *see also* ROBERTS, SHATTERED BONDS, *supra* note 129, at 164–65; Baumrind, *supra* note 137, at 361; Pelton, *supra* note 140, at 151–53.

147. Duva & Metzger, *supra* note 146, at 66.

148. *See* GOLDMAN ET AL., *supra* note 136, at 28–29, 33.

149. CHILD NEGLECT GUIDE, *supra* note 115, at 32.

150. *See id.*; Baumrind, *supra* note 137, at 361–62.

151. Weinstein & Weinstein, *supra* note 118, at 570 (arguing that child welfare system needs to provide services to children and not just parents because effects of neglect on children can be devastating to healthy brain development); *see also* Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485, 1490 (2007) ("[T]he system is self-perpetuating. Research has begun to show the intergenerational cycle of foster care.").

152. Courtney et al., *supra* note 144, at 66.

or juvenile court.[153] The goal of the civil child welfare system is protection of children.[154] Accordingly, when allegations of neglect are substantiated, the child welfare system will often respond to neglect by removing children from their parents, placing them in foster care, requiring the parents to comply with a case plan to lessen the risk of future maltreatment, and then determining what to do with the children long-term.[155] If the parents are unable to comply with their case plan, and if the children have been in foster care for fifteen out of twenty-two months, the state will move for termination of parental rights.[156] Termination of parental rights permanently severs the legal relationship between parent and child, and if the rights of both parents are terminated, the child may be considered available for adoption.[157] Before terminating parental rights, courts must find, by clear and convincing evidence that the parent is unfit and that severing the parent-child relationship is in the child's best interests.[158] This heightened standard of proof is imposed because parents have a fundamental liberty interest under the Fourteenth Amendment in the companionship, care, custody, and management of their children.[159] This right is not absolute; the state also has a parens patriae interest in protecting children.[160] Reflecting on this pro-

153. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., UNDERSTANDING CHILD WELFARE AND THE COURTS (2011) [hereinafter UNDERSTANDING CHILD WELFARE], *available at* http://www.childwelfare.gov/pubs/factsheets/cwandcourts.pdf; *see also* JAN MCCARTHY ET AL., A FAMILY'S GUIDE TO THE CHILD WELFARE SYSTEM 47–52 (2003), *available at* http://www.cwla.org/childwelfare/fg.pdf; Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 582 (1997).

154. MCCARTHY ET AL., *supra* note 153, at 12.

155. *See* Huntington, *supra* note 151, at 1490; Jessica E. Marcus, *The Neglectful* Parens Patriae: *Using Child Protective Laws to Defend the Safety Net*, 30 N.Y.U. REV. L. & SOC. CHANGE 255, 257 (2006).

156. UNDERSTANDING CHILD WELFARE, *supra* note 153, at 3–4. State processes can vary from this general framework, and they also have different terms for these various phases. *Id.* at 4. There are some exceptions to this mandate. *See id*. Parents can also consent to voluntary termination of parental rights. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 1–2 (2010) [hereinafter TERMINATION OF PARENTAL RIGHTS], *available at* http://childwelfare.gov/systemwide/laws_policies/statutes/groundtermin.pdf.

157. UNDERSTANDING CHILD WELFARE , *supra* note 153, at 4.

158. *See* TERMINATION OF PARENTAL RIGHTS, *supra* note 156, at 2.

159. Santosky v. Kramer, 455 U.S. 745, 753 (1982); *see also* Troxel v. Granville, 530 U.S. 57, 66 (2000); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Prince v. Massachusetts, 321 U.S. 158, 165 (1944); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–45 (1925); Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923).

160. *See generally* Vivek S. Sankaran, Parens Patriae *Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents*, 82 TEMP. L.

cess, one state supreme court justice described what he saw as the depressing sameness of child neglect cases that he saw:

> The pattern is familiar: Hungry children, dirty children, unkempt children, and improperly attended children come to the attention of welfare officials. The children are, without the parents' having the benefit of legal counsel, "temporarily" removed from their homes. The poor parents are forced into submitting to some kind of "plan" devised by welfare officials. Frequently, the poverty-stricken parents are not able to cope with the State's demands; and legal proceedings are instituted to deprive the poor parents of their children permanently, and more importantly, to deprive the poor children of their parents.[161]

This is the civil framework within which the poverty defense operates.

Child neglect can also be prosecuted criminally.[162] As with civil statutes, states vary in how they define criminal neglect, which is often called child endangerment in the criminal context.[163] Jurisdictions also vary in how vigorously they pursue criminal neglect charges. In New York City, for instance, prosecutors aggressively seek criminal protective orders against parents suspected of neglect and charge parents with criminal neglect.[164] Other jurisdictions prefer to leave neglect cases within the juvenile or family courts to avoid further traumatizing children or interfering with rehabilitative efforts.[165] The goals of criminal proceedings are os-

REV. 55, 59–64 (2009) (discussing common law development of the parens patriae doctrine).

161. Kidwell v. Dep't of Human Res., Div. of Child & Family Servs., 953 P.2d 1, 10–11 (Nev. 1998) (Springer, C.J., dissenting).

162. The stages in this process are the same as other criminal proceedings, typically arrest and bail (or conditions of release), preliminary hearings, discovery, plea bargaining, and trial. *See* WILLIAM G. JONES, OFFICE ON CHILD ABUSE & NEGLECT, WORKING WITH THE COURTS IN CHILD PROTECTION 41–43 (2006), *available at* http://www.childwelfare.gov/pubs/usermanuals/courts/courts.pdf. Child neglect can also be prosecuted under criminal statutes of general applicability, such as assault statutes. *See* Roberts, *supra* note 11, at 161.

163. *See* Eric C. Shedlosky, Comment, *Protecting Children from the Harmful Behavior of Adults,* 98 J. CRIM. L. & CRIMINOLOGY 299, 321–22 (2007) ("The various statutory approaches also differ according to the potential harm to a minor required to establish a violation and the degree of punishment dispensed to offenders.").

164. *See* Jaros, *supra* note 108, at 1460–61. "The last two decades have witnessed an astonishing increase in the use of the criminal justice system to police neglectful parents." *Id.* at 1447. Jaros explains that this increase is due to the recasting of home as a public space through domestic violence cases, criminal law's propensity to expand into new substantive areas of law, and the broken windows approach to crime prevention and highly publicized failures of the civil child welfare system. *Id.* at 1461–62.

165. JONES, *supra* note 162, at 41. Tragic cases of child neglect that result in death,

tensibly punishment and deterrence, while the goals of the child welfare system are protection of children and treatment for parents.[166] However, this distinction may be overstated in the realm of child neglect. As Professor Douglas Besharov points out, "A criminal prosecution can provide important rehabilitative services. Conversely, a civil child protection proceeding, which can involve the child's forced removal from the parents' custody and the parents' involuntary treatment, has indisputably punitive aspects."[167] Moreover, for some parents, the civil penalty of termination of parental rights is worse than the criminal penalty of incarceration. In short, whether a neglect case is civil, criminal, or both is largely a matter of jurisdictional preferences. Regardless, the sanctions for parents under each regime can be severe.

D. *The Poverty Defense*

In 1915, at the height of the family preservation movement, a Massachusetts court was faced with deciding whether a mother should lose her three-year-old son because she was a pauper.[168] Unable to find work, the mother sought relief from the local overseer of the poor, who placed her and her children in the almshouse.[169] This apparently led the state to claim that the child was neglected because his mother could not support him on her own.[170] This was not an unusual situation. Poor, single mothers faced an especially high risk of involuntary child removal at this time be-

such as children accidentally left alone in locked cars, are often, but not always, criminally prosecuted. *See* Jennifer M. Collins, *Crime and Parenthood: The Uneasy Case for Prosecuting Negligent Parents*, 100 NW. U. L. REV. 807, 808–09 (2006). Poor parents are prosecuted in negligent homicide cases at higher rates than middle and upper income parents. *Id.* at 811 (arguing that parents who commit involuntary manslaughter should be prosecuted as prosecution serves deterrent and expressive effects). Her empirical study of cases of children dying of hypothermia as a result of being left unattended in a parent's care found that middle or upper class parents were prosecuted at a rate of 23.3%, while parents with lower socioeconomic status had prosecution rates of 85.7%. *Id.* at 831–32. "A multiple regression analysis confirmed that socioeconomic status was an independently significant factor in prosecutorial decision making." *Id.* at 832.

166. Meghan Scahill, *Prosecuting Attorneys in Dependency Proceedings in Juvenile Court: Defining and Assessing a Critical Role in Child Abuse and Neglect Cases*, 1 J. CENTER FOR CHILD. & CTS. 73, 77 (1999).

167. Douglas J. Besharov, *Child Abuse: Arrest and Prosecution Decision-Making*, 24 AM. CRIM. L. REV. 315, 318 (1986).

168. Commonwealth v. Dee, 110 N.E. 287 (Mass. 1915).

169. *Id.*

170. *Id.*

cause they were deemed immoral.[171] The court rejected the state's argument.[172] The court reasoned that "the Legislature used the word [neglect] in the sense which imports some kind of culpability in the conduct of, or at least an intentional nonperformance of duty by, the parent from whose custody the child is to be taken."[173] In this case, the mother was merely poor, but not undesirable or unfit.[174] Thus, the court linked neglect—but not poverty—with parental culpability.[175] As the court commented, "a grave injustice would be done to such innocent victims of poverty by bringing them into court with its stigma of criminality."[176] Parental culpability remains a factor in child neglect case law. For the Massachusetts court, at least, poverty and culpability were not coextensive.[177]

This reasoning appears to underlie the poverty defense contained in the statutes of at least twenty-five states,[178] as well as the District of Columbia, which consider economic hardship at some stage of dependency cases.[179] In many of these states, the definition of neglect that triggers removal excludes a failure to provide for a child's needs that is caused by financial hardship. As

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171. *See* MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT 168–69 (1988).

172. *Dee*, 110 N.E. at 288.

173. *Id*. "As early as 1887, the Massachusetts Society for the Prevention of Cruelty to Children stated . . . that 'we never take neglected children by law from their parents, where then neglect arises from honest poverty alone.'" Pelton, *supra* note 145, at 4.

174. *Dee*, 110 N.E. at 287.

175. *See id*. at 288.

176. *Id*.

177. *See id*.

178. Legislative history of these provisions is lacking; as one court stated: "Clear answers to the [interpretation of the poverty defense] are not to be found, so far as we are aware, in the legislative history of the law or past opinions of this court." *In re* A.H. 842 A.2d 674, 687 (D.C. Ct. App. 2004).

179. ALASKA STAT. § 47.10.014 (1998); ARK. CODE ANN. § 12-18-103(13)(A) (Supp. 2011); CONN. GEN. STAT. ANN. § 46b-120(6) (West 2012); DEL. CODE ANN. tit. 10, § 901(18) (Cum. Supp. 2010); D.C. CODE § 16-2301(9)(A)(ii) (Supp. 2012); FLA. STAT. ANN. § 39.01(32)(f) (West 2012); IOWA CODE § 232.68(2)(4)(a) (2011); KAN. STAT. ANN. § 38-2202(t) (2011); KY. REV. STAT. ANN. § 625.090(3)(f) (LexisNexis Cum. Supp. 2012); LA. CHILD. CODE ANN. art. 603(16) (2012); MINN. STAT. ANN. § 260C.301(b)(2) (West 2012); MONT. CODE ANN. § 41-3-102(21)(a)(4) (2009); NEB. REV. STAT. § 43-292(3) (2009); N.H. REV. STAT. ANN. § 169-C:3(XIX) (Cum. Supp. 2012); N.J. REV. STAT. § 9:6-8.21(c)(4)(a) (2012); N.Y. SOC. SERV. LAW § 371(4-a) (Consol. 2011); N.C. GEN. STAT. § 7B-1111(a)(3) (2011); N.D. CENT. CODE § 27-20-02(8) (2011); 23 PA. CONS. STAT. ANN. § 6303(b)(2) (West 2010); R.I. GEN. LAWS § 40-11-2(1)(iv) (2011); S.C. CODE ANN. § 63-7-20(4)(c) (2010); TEX. FAM. CODE ANN. § 261.001(4)(b)(iii) (West 2012); WASH. REV. CODE ANN. § 26.44.020(14) (West 2012); W. VA. CODE ANN. § 49-1-3(11) (LexisNexis Supp. 2012); WIS. STAT. ANN. § 48.02(12g) (West 2011); 110 MASS. CODE REGS. 2.00 (2012).

an example, the District of Columbia defines a neglected child as one who does not experience "proper parental care or control, subsistence, education as required by law, or other care or control necessary for his . . . health, and the deprivation is *not due to the lack of financial means* of" the parent or custodian.[180] Alternatively, some states recognize the poverty defense as a matter of common law. For instance, the Georgia courts have stated that "[w]hile the state may not sit blindly idle as a child suffers unconscionable hardship, neither may it blithely intercede simply because the child's lot is substandard."[181]

Other state statutes excuse poverty-related child neglect only after considering whether the state has offered services to poor parents and how the parents have responded.[182] Florida's statue is an example of this approach, providing that it "shall not be considered neglect if [failure to provide for the child is] caused primarily by financial inability *unless actual services for relief have been offered to and rejected [by the parent].*"[183] The National Child Abuse and Neglect Data System, a federally funded national data collection effort, similarly defines neglect as "the failure by the caregiver to provide needed, age-appropriate care although financially able to do so or offered financial or other means to do so."[184] These statutes oblige both the state and parents to improve a

180. D.C. CODE § 16-2301(9)(A)(ii) (Supp. 2012) (emphasis added).

181. R.C.N. v. Georgia, 233 S.E.2d 866, 867 (Ga. Ct. App. 1977); *cf. In re* J.E., 711 S.E.2d 5, 15–16 (Ga. Ct. App. 2011) (Dillard, J., dissenting) (criticizing the majority for terminating parental rights on the basis of the mother's poverty).

182. The Model Juvenile Court Act and federal law also exclude poverty from neglect. *See* UNIF. MODEL JUVENILE CT. ACT § 47 (1968); 45 C.F.R. § 1340.2(d) (1990).

183. FLA. STAT. ANN. § 39.01(44) (West 2012); *see also* ARK. CODE ANN. § 9-27-303(36)(A)(ii) (2011) ("and no services for relief have been offered"); IOWA CODE § 232.68 (2011) ("or when offered financial or other reasonable means to do so"); MONT. CODE ANN. § 41-3-102(21)(a)(iv) (2009) ("or offered financial or other reasonable means to do so"); N.J. REV. STAT. § 9:6-8.21 (2002) ("or though offered financial or other reasonable means to do so"); N.Y. SOC. SERV. LAW § 371(4-a)(i)(A) (Consol. 2011) ("or offered financial or other reasonable means to do so"); R.I. GEN. LAWS § 40-11-2(1)(iv) (2006) ("or offered financial or other reasonable means to do so"); S.C. CODE ANN. § 63-7-20(4)(c) (1976) ("or offered financial or other reasonable means to do so"); TEX. FAM. CODE ANN. § 261.001(40(B)(iii) (West 2011) ("unless relief services had been offered and refused").

184. *See* PETER J. PECORA ET AL., THE CHILD WELFARE CHALLENGE 126 (2010). NCANDS notes that reporting is impacted by state definitions: "When conducting analyses with NCANDS data, it is important to keep in mind that state-to-state variation in child maltreatment laws and information systems may affect the interpretation of the data." *See* NAT'L CHILD ABUSE & NEGLECT DATA SYS., http://aspe.hhs.gov/hsp/06/catalog-ai-an-na/NCANDS.htm (last visited Dec. 10, 2012).

family's economic situation before parental rights are terminated.[185]

At least four states do not consider poverty in their definitions of neglect, but they do exclude poverty as a ground for termination of parental rights.[186] This means that children can be removed from their homes for poverty-related neglect, but the parents' rights cannot subsequently be terminated on this basis. Kentucky is an example of this approach; there, it is grounds for termination if "the parent, *for reasons other than poverty alone*, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's wellbeing."[187] The poverty defense is less common in the criminal context; it is recognized in seven states, including New York.[188] In short, about half the states recognize a poverty defense in civil proceedings, while a handful permit the defense in criminal cases.[189]

It should be noted that in both the civil and criminal contexts, the "poverty defense" is not technically a separate defense. Because it is part of the definition of child neglect, a parent arguing

185. A related poverty defense arises in child support contempt cases; this is not surprising as failure to pay child support is a form of economic neglect. *See* Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 125–26 (2008) (discussing the "defense of inability to pay"). When parents fail to pay child support, they can be charged with contempt; however, incarceration is not supposed to be imposed if the contemnor lacks the ability to pay arrears. *See id*. at 102, 104. Yet, as Patterson explains, the reality is that indigent parents are regularly incarcerated, due to a lack of procedural protections for litigants. *See id*. at 116–25. In other words, the poverty defense in child support enforcement cases is usually a failure, with dismal consequences for families and society. *Id*. at 126.

186. *See infra* note 187.

187. K.Y. REV. STAT. ANN. § 625.090(2)(g) (LexisNexis Cum. Supp. 2012). Similar statutes are found in Minnesota, North Carolina, and Nebraska. *See* MINN. STAT. ANN. § 260C.301 (West 2012); N.C. GEN. STAT. § 7B-1111(a) (2007); NEB. REV. STAT. § 43-292 (2009).

188. *See* DEL. CODE ANN. tit. 11, § 615 (1999); D.C. CODE § 22-1102 (2012); FLA. STAT. ANN. § 827.03 (West 2003) (amended 2012); MD. CODE ANN., CRIM. LAW § 3-602.1 (West 2011); WASH. REV. CODE ANN. § 9A.42.020 (West 2006); W. VA. CODE ANN. § 61-8D-4 (LexisNexis 1996); WIS. STAT. ANN. § 948.21 (West 2011).

189. There are states that affirmatively reject a poverty defense. For instance, in Virginia, courts have ruled that poverty is irrelevant to determining neglect. City of Campbell v. Woodruff, 2004 WL 3391872, at *7 (Va. App. Oct 12, 2004). Further, in at least three states, statutes provide that homelessness is a ground for removal, thus equating poverty with neglect. COLO. REV. STAT. § 19-3-102 (2009); 720 ILL. COMP. STAT. ANN. 130/1 (West 1993); S.D. CODIFIED LAWS § 26-8A-2 (2009). Ohio includes homelessness in its dependency definition. *See* OHIO REV. CODE ANN. § 2151.04 (LexisNexis 1996).

poverty is making a failure of proof defense, or "negation of an element required by the definition of the offense."[190] However, the reality is that in proving child neglect, states are not required to prove a parent's availability of financial resources as part of their prima facie case. Instead, the parents have to raise poverty in their own defense.[191] Based on available written decisions, many parents do raise the poverty defense, sometimes successfully.[192] Nevertheless, each year, thousands of children are removed from their parents for conditions caused by poverty. Indeed, "inadequacy of income, *more than any factor*, constitutes the reason that children are removed."[193]

III. THE POVERTY DEFENSE: THEORY IN PRACTICE

Cases that interpret the child neglect poverty defense reflect the various theories that scholars have put forward to justify a broad-based poverty defense for all criminal cases. Accordingly, we can consider these theories in a real-life setting to consider how a poverty defense might operate in other contexts. There are sharp disagreements on the proper balance between parents' rights and children's rights in child welfare law.[194] Despite these debates, there is near unanimity that most children who are removed from their parents are poor.[195] This section examines written decisions that consider the poverty defense; most of them arise in the civil context of termination of parental rights.[196] As this section demonstrates, the poverty defense rarely succeeds unless the court has a nuanced understanding of how poverty is related to neglect, which in turn is sometimes influenced by a judge's personal ideology.

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190. Robinson, *supra* note 45, at 204.

191. *See, e.g.*, Wright v. Florida, 409 So. 2d 1183, 1185 (Fla. Dist. Ct. App. 1982) ("[T]he burden is on the parent . . . to come forward with evidence that the condition was unavoidable because of poverty.").

192. *See, e.g.*, *In re* A.S.C., 671 A.2d 942, 947–48 (D.C. 1996).

193. ROBERTS, SHATTERED BONDS, *supra* note 129, at 35.

194. Huntington, *supra* note 109, at 638 (arguing against a rights based model in child welfare).

195. *See supra* text accompanying notes 128–52 (discussing the connection between poverty and neglect).

196. *E.g.*, *In re* A.H., 842 A.2d 674, 686–87 (D.C. Ct. App. 2004). There are far fewer reported criminal cases involving the poverty defense, probably because the defense is less common in the criminal context; most criminal cases result in plea bargaining; and parents may lack the resources to appeal adverse decisions.

A. *The Poverty Defense as an Excuse of Coercion*

In many decisions that consider the poverty defense, courts address the present economic circumstances of the parents, but do not delve into the parents' personal backgrounds or psychological histories as explanations for the alleged neglect.[197] Thus, the defense most often resembles a coercion defense rather than an RSB defense. The precise terminology of the statutory poverty defense does not seem to make a difference in the courts' analyses. Statutes containing the poverty defense use varying terms, such as "poverty" or "lack of financial means[;]" however, the statutes do not define these terms, and courts use them interchangeably.[198]

So what does poverty mean? Poverty is a relative concept influenced by time and place,[199] but it generally refers to economic deprivation.[200] While the official poverty line set by the federal government measures *who* is poor, it does not define what it *means* to be poor. According to the most recent data, the poverty line is $23,021 for a family of four.[201] Based on this measurement, minorities and female-headed families are disproportionately poor, and growing up poor is associated with higher poverty rates as an adult.[202] At any given time, more than half of all poor people are in a long-term poverty spell of ten years or more.[203] "While poverty in general refers to material deprivation, it is a multifaceted experience with many different effects on those who are struggling to get by."[204] These effects are apparent in the child neglect case law, which is rife with stories of families facing difficulty paying bills and affording rent, food, and clothes; living in substandard housing; lacking medical care; suffering with mental health problems; wrestling with substance abuse problems; and

197. *See, e.g.*, *id.*; MP v. Wyoming *ex rel.* CP, 965 P.2d 1155, 1158 (Wyo. 1998).

198. *Compare In re A.H.*, 842 A.2d at 686–87 (citing D.C. CODE § 16-2301(9)(15) (Supp. 2000)), *with* V.S. v. Kentucky, 194 S.W.3d 331, 335 (Ky. Ct. App. 2006) (citing KY. REV. STAT. ANN. § 625.090(2)(g) (LexisNexis 1998)).

199. *See* JOHN ICELAND, POVERTY IN AMERICA 10 (2d ed. 2006).

200. *Id.* at 21.

201. U.S. CENSUS BUREAU, POVERTY THRESHOLDS (2011), *available at* http://www.census.gov/hhes/www/poverty/data/threshld/index.html.

202. *See* ICELAND, *supra* note 199, at 41, 51, 68.

203. *Id.* at 49.

204. *Id.* at 144.

living in neighborhoods with high rates of crime.[205] Many written opinions involve neglect caused by poverty-induced stress.[206]

When courts consider a multi-faceted view of poverty, the poverty defense can be successful in keeping families intact.[207] For instance, in *In re S.M.W.*,[208] the state sought to terminate the parental rights of a single mother of four children, all born before she was twenty-one.[209] At the time of the abuse report triggering the child welfare investigation, the mother was incarcerated for theft, burglary, and marijuana possession, and the children were in the care of her family members.[210] However, the family members soon relinquished the children to the state because they were unable to afford their care.[211] When the mother was released from incarceration, the children remained in foster care, and the state developed a series of case plans in order to reunify the family.[212] These plans required the mother to support her children's foster care placements, visit her children, complete parenting classes, secure stable employment and adequate housing, submit to periodic psychiatric evaluations and counseling, and comply with the conditions of her probation.[213] The child welfare department eventually decided to seek termination of the mother's parental rights, charging that she failed to comply with the case plans.[214]

The appellate court rejected the state's arguments, concluding that the mother diligently worked to comply with her case plans, while the department offered the mother only "nebulous case plans, vacillating goals and misdirected assistance" as well as

205. *See, e.g.*, Watson v. Div. of Family Servs., 813 A.2d 1101, 1103 (Del. 2002).

206. *See, e.g.*, *id.*; *In re* Mack, 2000 WL 681648, at *1–*2 (Ohio Ct. App. May 26, 2000). Dorothy Roberts defines neglect caused by poverty-induced stress as a "crime *caused* by poverty," while financial inability to provide for children is a "crime *defined* by poverty." Roberts, *supra* note 116, at 172. It is likely that cases involving a failure to provide are resolved at the agency level or at an earlier stage of the process than the termination of parental rights, and thus not reflected in appellate decisions.

207. Janet L. Wallace & Lisa R. Pruitt, *Judging Parents, Judging Place: Poverty, Rurality, and Termination of Parental Rights*, 77 MO. L. REV. 95, 142 (2012) ("Doing justice for rural families also may require an understanding of cultural differences and of the particular spatial and social challenges these families face.").

208. 771 So. 2d 160 (La. Ct. App. 2000).

209. *Id.* at 163.

210. *Id.*

211. *Id.*

212. *Id.* at 164, 166.

213. *Id.* at 166–67.

214. *Id.* at 167, 169, 171–72.

denying her support in obtaining housing or employment.[215] The court commented on the catch-22 facing the mother as the department imposed "antithetical requirements."[216] When the mother worked multiple jobs to secure an adequate income, department workers found her supervision of her children lacking.[217] When she cut back on her work hours to spend more time with her children, she had to move to a smaller home, which led the workers to deem her living situation unstable.[218] The court recognized that in the low-wage labor market and with a dearth of affordable housing, a parent's choice is between more work or less comfortable living conditions.[219] In its decision, the court commended the mother for her persistence despite these odds and commented bitterly, "[W]hile the Department is powerless to mandate the sterilization of poor, uneducated single women, its insidious plan of terminating the parental rights of these women, largely because of their financial, educational and marital status, compels essentially the same result."[220] The court thus viewed child neglect as rooted in poverty, and poverty as rooted in structural causes with multi-faceted effects.[221] The family was reunited.[222]

The idea that poverty is not a crime is also occasionally reflected in criminal child neglect case law. In *State v. Chavez*, the court considered whether a filthy home environment was enough to support a child endangerment conviction.[223] There, an infant child died when she was put to sleep in a dresser drawer and apparently suffocated on the bedding in the drawer.[224] The father was charged with child endangerment with respect to the infant and

215. *Id*. at 167, 169, 175.

216. *Id*. at 170; *see also* S.K. v. Madison Cnty. Dep't of Human Res., 990 So. 2d 887, 903 (Ala. Civ. App. 2008) (noting that a father should not be penalized for working too hard and that the state had put him in a catch-22 because if he were not working the state would fault him for lack of employment stability).

217. *In re S.M.W.*, 771 So. 2d at 169.

218. *Id*. at 169–70.

219. *See id*. at 170.

220. *Id*. at 168; *see also* Doria v. Tex. Dep't of Human Res., 747 S.W.2d 953, 958 (Tex. App. 1988). In that case, the appellate court reversed a termination order, stating that the mother had made significant improvements under her case plan, which were "difficult milestones considering appellant's economic situation." *Id*.

221. *See In re S.M.W.*, 771 So. 2d. at 170.

222. *See id*. at 175.

223. 211 P.3d 891, 893 (N.M. 2009).

224. *Id*.

her two older brothers.[225] The evidence at trial showed that the house was unsanitary, was filled with rodent droppings, had a lack of gas or hot water, had piles of dirty clothes, and had glass and rusty nails in the yard.[226] At the same time, the surviving children were physically healthy and well-nourished, and there was no evidence of drugs or alcohol in the home.[227] The father was convicted of child abuse by endangerment and argued on appeal that the home's conditions were caused by poverty and did not endanger his children.[228] The court agreed, finding that the state failed to provide evidence of a connection between the home's conditions and "a substantial and foreseeable risk of harm."[229] The court noted that the family had been investigated by the New Mexico Children, Youth, and Families Department, but the civil child welfare system had not taken any further action.[230] The court strongly suggested that the use of the civil process would be more appropriate, as "this is a case where the family struggled with poverty, and our ultimate goal should be to assist, rather than to punish, that status."[231] This approach severs poverty from culpability.

By contrast, most courts in child neglect cases generally take a narrower view of poverty, which allows them to easily find non-economic—that is, behavioral—grounds for terminating parental rights.[232] For instance, in *Division of Youth & Family Services v.*

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225. *Id.*

226. *Id.* at 894.

227. *Id.*

228. *Id.* at 895.

229. *Id.* at 901.

230. *Id.* at 901–02.

231. *Id.* A similar analysis was made by the dissenting judge in *Commonwealth v. O'Conner* which the majority upheld a first-degree criminal abuse charge against a father who locked his children in their rooms on a hot day while he napped, the children were found with urine soaked clothes, and a three-year old had eaten his own feces. 372 S.W.3d 855, 856–58 (Ky. 2012). The dissenting judge stated that the case should have been handled as a civil action for neglect and commented that given the father's fifteen-year sentence, state taxpayers may spend up to almost half a million dollars to incarcerate someone who is guilty only of "poor parental judgment and keeping a filthy house." *Id.* at 862–63 (Scott, J., dissenting).

232. *See, e.g.*, *In re* A.A.M.B., 62 So. 3d 813, 814, 816 (La. Ct. App. 2011) (terminating a father's parental rights not because he was poor, but because he failed to comply with case plan requirements); *In re* R.L.T., No. COA11-163, 2011 WL 2848793 (N.C. App. July 19, 2011) (removing children because of father's substance abuse, not due to poverty); A.L.M. v. A.M., No. E049686, 2010 WL 2769805, at *6 (Cal. Ct. App. July 14, 2010) (terminating parental rights not due to poverty, but for risk of neglect) ("[P]overty placed the children at risk for neglect and Mother showed little interest in protecting her children from that risk

K.C., New Jersey Child Protective Services removed children from their home due to extreme filthiness.[233] The trial court found that the house was crawling with roaches, was littered with trash bags, smelled of urine and feces, and contained a bucket of urine in a bedroom.[234] Nevertheless, a medical exam revealed the children had no major medical problems.[235] The trial judge terminated the mother's parental rights focusing on the mother's conduct and divorcing it from her income level.[236] The judge stated, "[y]ou do not have to be rich, you don't have to earn a lot of money to keep a clean house and this was not just a dirty house . . . , [t]his was a disgusting, deplorable, filthy, dangerous condition."[237] The appellate court agreed with this reasoning, concluding that the case did not hinge on poverty but rather on "an apparent indifference to the potential harm that such filthy conditions could create."[238] Thus, the court linked the filthy conditions solely to parental culpability, rather than to any environmental or structural factors linked to poverty.

From the decision, it is hard to know whether termination was warranted in the *K.C.* case, that is, whether it was in the children's best interests. Nevertheless, in focusing solely on the

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of neglect."); D.N. v. State, No. 49A04-0910-JV-597, 2010 WL 2020290, at *9 (Ind. Ct. App. May 21, 2010) (finding termination not based on poverty but father's "lack of initiative"); *In re* M.N.N.G., No. COA09-697, 2009 WL 3353014, at *2, *5 (N.C. Ct. App. Oct. 20, 2009) (holding that mother's rights were not terminated due to poverty, but because she turned down housing and continued an abusive relationship); D.J. v. Marion Cnty. Dep't of Child Servs., No. 49A05-0803-JV-180, 2008 WL 4149822, at *8 (Ind. Ct. App. Sept. 10, 2008) (removing children not for poverty but because home was unsanitary and cluttered); A.R. v. Marion Cnty. Dep't of Child Servs., No. 49A02-0604-JV-360, 2007 WL 582876, at *9 (Ind. Ct. App. Feb. 27, 2007) ("We agree that poverty alone does not show unfitness. That does not mean, however, that poverty which causes a parent to neglect a child or expose the child to danger cannot be considered by a trial court in determining whether to terminate parental rights."); Michael M.S. v. Kathy S., Nos. 99-2384, 99-2385, 1999 WL 1221230, at *6 (Wis. Ct. App. Dec. 21, 1999) (terminating parental rights not due to poverty, but due to "personal choice and responsibility"); *In re* R.M., 431 N.W.2d 196, 199 (Iowa Ct. App. 1988) ("Economic considerations were not paramount. Stability and control of her behavior and responsibility for her children were more clearly at issue."); V.S. v. Commonwealth, 706 S.W.2d 420, 424 (Ky. Ct. App. 1986) ("This is more than just a poverty case.").

233. 2006 WL 3328348 (N.J. Super. Ct. App. Div. Nov. 17, 2006).

234. *Id.* at *2.

235. *Id.*

236. *Id.* at *3–4.

237. *Id.* at *3.

238. *Id.* at *5; *see also* Wisconsin v. Lynn Co., 268 Wis. 2d 847, *2 (Wis. Ct. App. 2003) ("[C]leanliness is a matter of effort, not poverty."); N.J. Div. of Youth & Family Servs. v. S.A., No. A-2499-07T4, 2009 WL 77969, *5 (N.J. Super. Ct. App. Div. Jan. 14, 2009) (finding that poverty is not an excuse for a dirty home).

mother's conduct, the trial and appellate courts failed to consider the proven link between poor housing conditions and poverty. For instance, it is possible that the family was using a bucket as a toilet because the plumbing was not working, because they could not afford a plumber, or because a landlord refused to make needed repairs. Moreover, the court never addressed the state's apparent failure to provide the mother with any services, resources, or equipment to help her clean the home, even though federal law requires that states make "reasonable efforts" to support family reunification,[239] and even though cleanliness is a far cheaper fix than many deep-rooted problems facing poor families, such as homelessness or mental illness.[240] Instead, the court took a narrow view of poverty, while assuming that the mother had a broad range of voluntary choices in shaping her own conduct.[241] Thus, the mother could not satisfy the poverty defense in its necessity or duress form.[242]

This approach abounds in the case law.[243] Many courts focus intensely on parenting deficiencies, ignoring the economic hardship facing families in the child welfare system and lacking understanding of how structural inequalities impact poor families. Another particularly common proxy for poverty is rurality, as many courts fail to recognize the spatial and fiscal obstacles facing rural parents.[244] Other euphemisms for poverty include immaturity, nonchalance, poor decision-making, inattentiveness, instability, and the like.[245] The courts criticize parents who deemed seeking

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239. *See generally* Kathleen S. Bean, *Reasonable Efforts: What State Courts Think,* 36 U. TOL. L. REV. 321 (2005) (assessing how courts have interpreted the reasonable efforts requirement).

240. One dissenting judge in a termination case commented that if the mother had been wealthier, "she could hire a cleaning service." *In re* N.M.W., 461 N.W.2d 478, 483 (Iowa Ct. App. 1990) (Sackett, J., dissenting). In fact, if the state had hired a cleaning service for the family, it

> would have cost the state less than the judicial time and court appointed attorney fees spent to litigate the adequacy of this woman's housekeeping skills through the state's appellate courts. And most importantly, the child would not have suffered the trauma of removal and the insecurities that come in foster care.

Id.

241. *See K.C.*, 2006 WL 3328348, at *3–5.

242. *Id.* at *4–5.

243. *See generally id.*; Wallace & Pruitt, *supra* note 207, at 114.

244. *See* Wallace & Pruitt, *supra* note 207, at 99, 117.

245. *See* Daniels v. Dep't of Human Res., 953 P.2d 1, 10 (Nev. 1998) (Springer, C.J., dissenting) (arguing that courts are taking poor children for reasons of poverty but calling poverty by other names).

state aid "not worth the effort,"[246] who "displayed no motivation to be a parent,"[247] and who refused "to take advantage of the opportunities available to her for her children."[248]

Due to a range of disabling conditions, some of these parents may be unable to parent at acceptable, safe levels no matter how much support the state provides. Yet some of the unflattering qualities described above stem from the stresses and realities of living in extreme poverty while trying to meet escalating state demands. It is difficult to know, however, because courts generally do not explore the larger community, demographic, or social context surrounding the family. As one dissenting judge stated, "[P]arents are almost always required to submit to demeaning, and often unproductive, 'counseling,' 'parent training,' and 'family therapy[;]' however, the results are "almost always the same[,] the parents remain poor; their poverty cannot be 'counseled' away."[249] Moreover, while child prevention services often include various forms of counseling, they rarely provide parents with services designed to increase their economic well-being.[250] In other words, parents are typically ordered not to be poor, that is, to obtain a job and housing, but they receive inadequate assistance to meet that goal.

B. *The Poverty Defense as RSB*

In child neglect cases in which courts examine the parents' impoverished backgrounds as part of the analysis, the poverty defense resembles an RSB defense. An RSB-style defense has been successful when courts view intergenerational poverty as the primary barrier facing the family. For instance, in *In re A.L.B.*,[251]

246. *In re* M.B., 288 N.W. 2d 773, 775 (S.D. 1980).

247. *In re* C.L.B., No. C5-88-1016, 1989 WL 460, at *1 (Minn. App. Jan. 10, 1989).

248. *In re* Bell, 421 S.E.2d 590, 592 (N.C. Ct. App.). The dissenting judge in the case found no evidence of neglect, and even the attorney for the child welfare agency conceded at the hearing, "we would certainly admit that this is not one of the worse neglect cases that we have ever brought, it is a marginal case—its [sic] a case where the mother has worked with Social Services to some extent to try [to] improve conditions in the home." *Id.* at 594 (Hendrick, C.J., dissenting).

249. *Daniels*, 953 P.2d at 12.

250. *See* Mary Keegan Eamon & Sandra Kopels, *'For Reasons of Poverty': Court Challenges to Child Welfare Practices and Mandated Programs*, 26 CHILD. & YOUTH SERVS. REV. 821, 823 (2004).

251. No. M2004-01808-COA-R3-PT, 2005 WL 1584065, at *1 (Tenn. Ct. App. July 6, 2005).

the state removed three children from their home due to "the extreme poverty of the family, very little food in the house, dog feces on the floors, and general filth and clutter everywhere."[252] While the children were in foster care, the parents struggled to obtain stable housing; they moved from an apartment to public housing, were evicted, lived with their preacher, rented a house, and moved in with family members.[253] In light of the filth and unstable living conditions, the trial judge terminated parental rights.[254]

The appellate court reversed, concluding, "We are dealing with an unbelievably poor family with two generations of unsanitary and messy living habits."[255] Despite this RSB, the appellate court found that the parents were making slow, but steady, improvements in cleaning up the home and obtaining employment.[256] The court reflected, "In preparing this opinion, the Court has read through many termination cases, and we are struck by the absence of any other factors besides the poverty of the family and poor living conditions in the home."[257] By contrast,

> In most cases we also see prevalent physical or sexual abuse, drug and alcohol abuse, severe neglect and unconcern for the children's welfare, lack of medical care, lack of supervision, extreme physical and emotional delays in development of the children, mental illness of the parent, prostitution, severe mental incapacity of parent, criminal activity, incarceration, or other equally egregious factor[s].[258]

This case was about extreme poverty in a family that had known no other way of life. Thus, the parents' RSB was a frame by which to better understand the family.

Yet in most RSB cases, courts are willing to view RSB as an explanation, but not as an excuse, for many of the same reasons identified by RSB defense opponents—namely, the practical and conceptual difficulties of excusing harmful conduct, especially when poverty is entangled with a variety of other disabilities. In these cases, the risk to children is simply too great. In *In re A.H.*, the children were removed from their home in a public housing project in the District of Columbia due to filth, including feces on

252. *Id.*
253. *Id.* at *2.
254. *Id.* at *1.
255. *Id.* at *12.
256. *Id.*
257. *Id.* at *14.
258. *Id.*

the floor and roaches crawling over open food left on the counters, as well as an oven turned on with the door open and a bathtub used as a toilet.[259] According to testimony at the trial, the mother seemed desensitized to these surroundings and apathetic to her social worker.[260] The mother lacked a high school degree, had not worked since high school, and lived on welfare.[261]

At trial, the social workers testified that the children "did not appear sick or malnourished; they had the required immunizations; they had clothing to wear; and the two children of school age were attending school."[262] Moreover, the trial judge found that the District of Columbia was responsible for some of the atrocious conditions in the home by failing to repair them.[263] However, the judge found that the mother also bore responsibility for allowing her children to live in such conditions, and he was "both troubled and perplexed by the 'strange nonchalance' that [the mother] displayed when confronted about the unsafe and unsanitary environment in the home."[264] The trial judge concluded that the mother could have resolved the problems in the household despite her limited financial means.[265]

On appeal, the court affirmed.[266] The appellate court noted that "we cannot ignore or minimize the extent to which D.H.'s poverty and forces beyond her control helped create the circumstances in which she and her children lived."[267] Yet the court was troubled that the poverty defense could subject the children to a risk of harm, stating that the poverty defense "has proved to be nettlesome in both theory and practice," because of the tension between the defense and the statute's remedial purposes.[268] The court forthrightly expressed its concerns by asking the following: "If a child is deprived of parental care 'necessary' for his physical health—for example, if the child is malnourished, not properly clothed, or denied medical care—why should the reason for the

259. 842 A.2d 674, 677–80 (D.C. 2004).
260. *Id.* at 680.
261. *Id.* at 681.
262. *Id.* at 680 n.9.
263. *Id.* at 681.
264. *Id.* at 682.
265. *Id.* at 683.
266. *Id.* at 690.
267. *Id.* at 684.
268. *Id.* at 686–87.

deprivation matter in deciding whether the state should be allowed to intervene and protect the child?"[269] Similarly, RSB opponents charge that such a defense in criminal cases ignores the rights of the victims, most of whom share similarly deprived backgrounds.[270]

For the D.C. court, "it should be enough if the evidence shows that parental poverty was not the only or the 'but for' cause."[271] Reviewing the evidence, the appellate court concluded that the conditions in the home were not due to a lack of money.[272] Instead,

> it is clear to us that the judge could find that D.H.'s long-term failures to exert herself to keep feces off the floor, to dispose of rotten food and other trash, to clean the kitchen, and to complain and demand that maintenance and repairs and exterminations be performed properly were not caused by D.H's lack of money.[273]

Thus, as is common in child neglect cases, poverty—even within an RSB context—was narrowed to income. For this court at least, the poverty defense could result in harm to children, a result the court was unwilling to countenance.

Nevertheless, as another commentator has noted, it is possible that this family could have been reunited if the mother had been provided greater services, particularly mental health services, especially since the children in the case were not suffering any harm.[274] Moreover, the court fails to acknowledge that two months after the children were removed, the District of Columbia accepted more than $30 million from the federal government to demolish the public housing complex where the family lived, with the mayor stating that "[t]he homes here . . . represent the largest

269. *Id*. at 687.
270. *See, e.g.*, Morse, *supra* note 4, at 158.
271. *In re A.H.*, 842 A.2d at 688.
272. *Id*. at 689.
273. *Id*.
274. Jesse Lubin, Note, *Are We Really Looking Out for the Best Interests of the Child? Applying the New Zealand Model of Family Group Conferences to Cases of Child Neglect in the United States*, 47 FAM. CT. REV. 129, 138 (2009) ("[T]he mothers could have been paired with service providers who could have helped with possible job training, better housing, proper medical services for the children, and anything else the mothers would need to quickly get their children back and into a safe home.").

and last of our severely distressed housing."[275] Nevertheless, D.H. lost her children largely due to the conditions of her home.[276]

An RSB-style poverty defense is also challenging because the worse the RSB, the less likely it seems the parents can overcome their difficult backgrounds. For example, in *In re A.G.*, the court described the parents' wrenching personal histories rooted in poverty.[277] The father had been orphaned at six months and lived in fifty-two foster homes, some of which were abusive.[278] After attacking a fellow student at age fifteen, he was institutionalized; then, upon returning from military service in Vietnam, he struggled with substance abuse.[279] For her part, the mother had been repeatedly sexually abused as a child by a male cousin over a ten-year period, experienced blackouts and delusions, and was unable to hold a job for more than a month.[280] The mother initially turned her newborn child over to foster care.[281] While the child was in foster care, the parents' housing was unstable; however, the parents attended parenting classes, improved their visitation regularity, and submitted to psychological testing, which showed them to have a variety of mental health problems.[282] Although the trial court found that the parents were making slow improvements pursuant to the social services case plan, the improvements were not enough to permit unsupervised visitation, let alone reunification of the family.[283] The appellate court commented that, while poverty and mental illness alone are not grounds for terminating the rights of parents, if they render a parent unable to perform as a parent, then termination is warranted.[284]

275. Robert E. Pierre, *Pr. George's Says it Pays Price for D.C. HUD Project*, WASH. POST, Aug. 5, 2000, at B2.

276. *In re A.H.*, 842 A.2d at 690.

277. *In re* A.G., No. C7-97-1977, 1998 WL 202779, at *1 (Minn. App. Ct. Apr. 28, 1998).

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* at *5, *8. Many commentators have criticized the short timelines within AFSA for a permanency decision. *See* Richard P. Barth et al., *From Anticipation to Evidence: Research on the Adoption and Safe Families Act*, 12 VA. J. SOC. POL'Y & L. 371, 377 (2005); Jim Moye & Roberta Rinker, *It's a Hard-Knock Life: Does the Adoption and Safe Families Act of 1977 Adequately Address Problems in the Child Welfare System?*, 38 HARV. J. ON LEGIS. 375, 388–89 (2002).

284. *In re A.G.*, 1998 WL 202779, at *4.

In this case, the RSB was simply too great. In criminal cases, commentators have noted that RSB not only does not excuse crimes, but rather, it usually increases punishment.[285] Likewise, an RSB-style poverty defense in child neglect cases seems to worsen the odds for family reunification. While states are obliged to use reasonable efforts to reunify families, parenting support programs face limited funding and courts thus usually interpret the reasonable efforts requirement to mean "available services."[286] To a court, a case that presents evidence of an RSB probably looks even more expensive and less likely to succeed than other cases. Moreover, hanging over every juvenile judge's head is the fear that she will reunite a family with disastrous and media-publicized results.[287] A parent with an RSB can only enhance this fear. Accordingly, an RSB defense is as difficult in practice as its critics predict. While RSB helps explain the challenges facing some low-income parents, courts are usually reluctant to let it serve as a defense.

C. *The Poverty Defense as Social Forfeit*

The concept of social forfeit also emerges in child neglect cases involving the poverty defense and holds the most promise not only for families, but also for an expanded poverty defense. Social forfeit norms are enshrined in at least nine state statutes, which excuse child neglect caused by poverty, unless the parents have been offered and refused state services.[288] This type of definition imposes rights and responsibilities on both parents and the state and thus requires courts to examine the actions of both entities.[289]

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285. *See* Delgado*, Wretched of the Earth, supra* note 4, at 6 (noting that courts not only have not recognized RSB, they sometimes enhance punishment based on RSB); *cf*. Robinson, *supra* note 68, at 61–62 (arguing that the stronger the RSB, the stronger the case for preventative detention).

286. *See* Bean, *supra* note 239, at 365.

287. *See* Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1, 41 (2010) (explaining how the media's master narratives about child welfare that focus on monstrous and deviant parents make judges fearful of leaving children with their families).

288. *See supra* notes 182–83 and accompanying text.

289. *See, e.g.*, S.H. v. Dep't of Children & Families, 949 So. 2d 356, 357 (Fla. Dist. Ct. App. 2007) (overturning adjudication of dependency based on father's financial inability to provide for his children) ("[T]he evidence at bar does not disclose any offer of services which were rejected by the father"); Brown v. Feaver, 726 So. 2d 322, 324 (Fla. Dist. Ct. App. 1999) ("Homelessness, derived solely from a custodian's financial inability, does not constitute abuse, neglect, or abandonment unless the Department offers services to the

As discussed earlier, social forfeit theory holds that society cannot condemn a person that society has failed to support.[290] In the child neglect context, it means that the state cannot strip a poor parent of her rights without first offering some material aid or services; at the same time, the parent must be amenable to assistance and use such aid appropriately.[291] Under this theory, the child neglect defense arises when both the state and the parent have failed to meet their mutual responsibilities. Professor Clare Huntington has described the parent-state relationship as one of mutual dependency. Poor parents need support from the state, while the state needs supportive parents due to its "interest in ensuring a child develops into a citizen capable of participating in a deliberative democracy, or, more basically, as an interest in the child growing up to be an adult who requires minimal state spending."[292]

The concept of social forfeit arises even when state neglect statutes do not directly impose duties on the state to provide, and the parents to accept, services. This is because the federal law that provides foster care funding requires state agencies to demonstrate that they have made reasonable efforts to provide assistance and services to preserve and reunify families.[293] Both Congress and the state legislatures, however, failed to further define "reasonable efforts."[294] Moreover, courts are generally tentative in interpreting the reasonable efforts requirement, in part because states can lose federal foster care funding if the requirement is not met.[295]

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homeless custodian and those services are rejected.").

290. *See supra* text accompanying notes 46–56.

291. *Id.*

292. Huntington, *supra* note 151, at 1486–87.

293. Adoption and Safe Families Act of 1997, 42 U.S.C. § 671(a)(15)(B)(ii) (2006).

294. In turn, state statutes generally define reasonable efforts to require child welfare agencies to provide accessible, available, and culturally appropriate services designed to improve the capacity of parents to provide safe and stable homes for their children. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., REASONABLE EFFORTS TO PRESERVE AND REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN: SUMMARY OF STATE LAWS (2009), *available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/reunifyall.pdf (providing a survey of state law definitions of "reasonable efforts.); *see also* Bean, *supra* note 239 at 329–31 (describing state differences).

295. Bean, *supra* note 239, at 333–34. "[C]ourts are fairly resolute that agencies need not do everything conceivable or be perfect in practice." *Id.* at 358; *see* Deborah Paruch, *The Orphaning of Underprivileged Children: America's Failed Child Welfare Law and Policy*, 8 J.L. & FAM. STUD. 119, 138–39 (2006) (noting that funding for reasonable efforts to reunify and preserve families is "subject to the arrival appropriation process" and can be

Nevertheless, there are still cases in which courts impose a strong view of social forfeit, and thus this theory is worth exploring. For instance, in *In re S.M.W.* discussed above, the court went to great lengths to highlight the efforts and the resilience of the mother in the face of inconsistent case plans and a lack of services by the state.[296] Another example is *New Jersey Division of Youth & Family Services v. S.R.*, which involved a single mother in her early twenties without a high school degree and who lived on welfare.[297] Her newborn baby needed a heart transplant, and the doctors became convinced that the mother did not have the wherewithal to maintain the baby's post-operative care routine.[298] The mother could not afford transportation between her home in New Jersey and the hospital in New York, and the Division of Youth and Family Services provided her with only a portion of the transportation costs.[299] Due to the mother's lack of regular hospital visits, the Division removed the baby and placed her with a foster mother.[300]

In approving a permanency plan to terminate the mother's parental rights, the trial judge wrestled with the poverty defense, stating, "With regard to [defendant's] financial situation, on the one hand, one might say, well, you shouldn't hold that against her. Well, what is the paramount importance? The safety of the child."[301] The judge went on to criticize the mother's failures to overcome her poverty, asking, "[W]hat have you done to improve [your financial circumstances]? It's no different [now then [sic] it was before] and you are perilously close to be[ing] evicted, and not even being able to get a cab ride, to Fed. Ex. back a Halter monitor, with dire consequences for the child."[302] Thus, the trial

inadequate while foster care funds remain uncapped under Title IV-E of the Social Security Act); *see also* Zuzana Murarova & Elizabeth Thornton, *Federal Funding for Child Welfare: What You Should Know*, 29 CHILD L. PRAC. 33, 39 (2010) ("[S]tates receive federal funding to support foster care placements, but receive little money to provide services to keep children out of foster care or safely reunify their families after a removal to foster care. Thus, placing children in foster care costs states less than providing services to prevent state placements or maintain families.").

296. State *ex rel.* S.M.W., 771 So. 2d 160, 169–70 (La. Ct. App. 2000).

297. 2011 WL 1045131, *1–2 (N.J. Super. App. Div. Mar. 24, 2011).

298. *Id.* at *1.

299. *Id.* at *2, *4.

300. *Id.* at *1, *3.

301. *Id.* at *11 n.12 (alteration in original).

302. *Id.* (alterations in original).

judge concluded that the foster home was a better setting for the child than the mother's home.[303]

The appellate court reversed, holding that the trial court improperly censured the mother for being poor, while failing to examine the actions of the Division.[304] The court stated that "the evidence supported the judge's conclusion that defendant's efforts left much to be desired, but the efforts of the Division in this difficult situation were hardly reasonable."[305] For example, the Division did little more than provide the mother with part of her train fare, provided bus fare only pursuant to a court order, and required the mother to "get the money" for the subway leg of her journey and seek reimbursement later.[306] "Considering defendant's extreme impoverished state-exacerbated by the loss of [Social Security disability] income with the removal of [the baby] from her care and repeated eviction proceedings-the Division's 'efforts' were hardly reasonable."[307] The division expected extraordinary efforts on the part of the mother, but "evinced a studied indifference to its own obligations."[308] In short, "[t]he Division should have done more; in expecting defendant to move mountains, it only handed her a shovel."[309]

According to the appellate court, the Division early on preferred the foster mother and "provided only the barest of efforts in making it appear that it had assisted defendant, while essentially ordaining defendant's failure."[310] Whereas the mother struggled to visit her daughter in the hospital on $322 in monthly welfare benefits, the foster mother was paid $1100 a month to care for the child and thus could quit her job.[311] If the mother had gotten these foster care funds, she would likely have been able to comply with the case plan. Thus, comparing their situations was unfair, "otherwise, as has been recognized, such determinations would result in 'mass transfers of children from ghettos and dis-

303. *Id.* at *11.
304. *Id.* at *10, *11 & n.12.
305. *Id.* at *9.
306. *Id.*
307. *Id.*
308. *Id.* at *10.
309. *Id.*
310. *Id.* at *9.
311. *Id.* at *3.

advantaged areas into more luxurious living accommodations but with resultant destruction of the natural parental bond.'"[312]

While this opinion presents a strong view of social forfeit, it is important to note that the caseworkers and the trial judges hearing the case below did not share this view. Every parental victory on appeal pulls back the curtain on the challenges facing poor families as they move through the child welfare system and, of course, only a small number of those parents have the resources and wherewithal to press their cases on appeal.[313] Nevertheless, cases such as *S.R.* reflect a robust vision of mutual rights and responsibilities between the state and parents. In this vision, culpability for poverty and responsibility for children's welfare is shared by both parents and the state. This approach thus moves beyond a rights-based framework to incorporate a notion of mutual responsibilities.

IV. LESSONS OF THE POVERTY DEFENSE

The poverty defense in civil and criminal child neglect cases proves that a poverty defense is not the impracticable pipedream charged by critics. In fact, the poverty defense has made a difference by keeping some families intact that would otherwise have their parent-child bonds permanently severed. Its consequences are concrete. Accordingly, a poverty defense may hold promise for other areas of the law and cannot be as easily dismissed as its critics assume. Although the statutes do not define the scope of the child neglect poverty defense, at least three theoretical approaches emerge from the case law: (1) coercion; (2) RSB; and (3) social forfeit. The cases demonstrate that, regardless of the form of the defense, it will not succeed unless courts have a rich understanding of the causes and consequences of poverty. Success does not mean that parents always win; there are some cases in which no amount of services or support will lead to acceptable levels of parenting. The safety and security of children must be paramount. Accordingly, success can result when poor families are not

312. *Id.* at *11 (quoting Doe v. G.D., 370 A.2d 27, 33 (N.J. Super. Ct. App. Div. 1976), *aff'd sub nom*. Doe v. Downey, 377 A.2d 626 (N.J. 1977)).

313. *See* Eamon & Kopels, *supra* note 250, at 824 (noting that there is no way to identify all the cases involving removals of children for reasons of poverty due to that fact that most legal disputes do not proceed to trial and of those that do, only small percentages are appealed).

judged in isolation for their failings, but rather have their challenges and barriers taken into account within a larger societal context. Positive outcomes can include more reasonable treatment plans, greater commitment of state resources for families, and a more careful assessment of whether parental failings are sufficiently harmful to justify removal.

A. *Understanding Poverty*

As the cases reveal, many courts simply do not understand or delve into the causes of poverty and its multi-dimensional effects, and thereby conflate poverty with culpability.[314] The prevailing explanation for poverty in the United States is that behavioral choices cause poverty.[315] In this "culture of poverty" perspective, the poor make deficient choices that trap them in poverty.[316] This "culture of poverty" theory meshes well with the American myth of the meritocracy, which holds that anyone can pull themselves up by their bootstraps with hard work and determination.[317] The flipside of this myth is that a failure to thrive in a capitalist economy is equated with moral failings.[318] A neglectful parent is thus doubly to blame—she has failed both to succeed economically in a merit-based system and as a parent. As Martin Guggenheim has

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314. *See supra* notes 22–38, 58–60, 89, 98–110, 159, 161, 168–70, 172–78, 181 and accompanying text.

315. *See* JOEL F. HANDLER & YEHESKEL HASENFELD, BLAME WELFARE, IGNORE POVERTY AND INEQUALITY 70 (2007); James Jennings, *Persistent Poverty in the United States: Review of Theories and Explanations*, *in* A NEW INTRODUCTION TO POVERTY: THE ROLE OF RACE, POWER, AND POLITICS 14, 18–19 (Louis Kushnick & James Jennings eds., 1999) (summarizing behavioral theories); Frank Munger*, Identity as a Weapon in the Moral Politics of Work and Poverty*, *in* LABORING BELOW THE LINE: THE NEW ETHNOGRAPHY OF POVERTY, LOW-WAGE WORK, AND SURVIVAL IN THE GLOBAL ECONOMY 3 (Frank Munger ed., 2002) ("More strictly than other industrialized societies, we measure the worthiness of all our citizens by the level of their commitment to the labor market. . . .").

316. Oscar Lewis first articulated this theory within social science scholarship, concluding that poor people develop their own value system, which perpetuates itself over generations and is nearly impossible to escape—even if structural conditions change. Oscar Lewis, *The Culture of Poverty*, 35 TRANSACTION SOC. SCI. & MODERN SOC'Y 7, 7 (1998). The people in this culture share a "strong feeling of marginality, of helplessness, of dependency, of not belonging. . . . Along with this feeling of powerlessness is a widespread feeling of inferiority, of personal unworthiness." *Id.*

317. *See* STEPHEN J. MCNAMEE & ROBERT K. MILLER, JR., THE MERITOCRACY MYTH 1–2 (2d ed. 2009); Mark R. Rank, *Toward a New Understanding of American Poverty*, 20 WASH. U. J.L. & POL'Y 17, 25 (2006).

318. *See* GEORGE GILDER, WEALTH AND POVERTY 68 (1981) ("The only dependable route from poverty is always work, family, and faith . . . the current poor . . . are refusing to work hard").

stated, most observers see child neglect as a family defect, "with limited or nonexistent societal roots," rather than a problem with societal roots.[319] In light of this paradigm's focus on the individual, there is little call for collective responsibility or action to reduce poverty.[320] Rather, this perspective "provides a justification for doing so little."[321]

A countervailing narrative of poverty is that structural forces cause poverty. This structural explanation for poverty holds that the poor are subject to forces that limit their economic opportunities and trap them in the underclass.[322] For instance, globalization, the weakening of unions, and economic shifts from a manufacturing base to a service economy have left people lacking advanced degrees behind.[323] Likewise, the lack of a living wage, affordable housing, or child care, keeps even working adults trapped below the poverty line.[324] In addition, a legacy of race discrimination in housing and the workplace, as well as the criminal justice system, keeps poor people of color isolated from the mainstream economy.[325] Purely structural responses to poverty are few and far between, making the "poverty defense" in child neglect cases unique. Yet, structural explanations do not capture how individuals, living real lives, respond to and cope with these larger social and economic forces. For instance, a judge presiding over a child neglect case cannot ignore a hungry child because the local steel mill that formerly employed the parent has outsourced its work to China. The court must deal with the family before it.

Accordingly, a more accurate conception of poverty places individual choices within a framework of structural factors. Sociologist William Julius Wilson, who focuses on low-income, urban,

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319. Martin Guggenheim, *Issues Surrounding Initial Intervention*, 3 CARDOZO PUB. L. & POL'Y & ETHICS J. 359, 361 (2005).

320. Rank, *supra* note 317, at 24.

321. *Id*. at 25.

322. *See* ICELAND, *supra* note 199, at 96; HANDLER & HASENFELD, *supra* note 315, at 18; Jennings, *supra* note 315, at 1–2, 21–26.

323. *See* HANDLER & HASENFELD, *supra* note 315, at 49; ICELAND, *supra* note 199, at 76; DOUGLAS S. MASSEY, CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM 31–33 (2007).

324. *See* HANDLER & HASENFELD, *supra* note 315, at 151; MASSEY, *supra* note 323, at 140, 166–68.

325. MASSEY, *supra* note 323, at 109; MCNAMEE & MILLER, *supra* note 317, at 192. "Discrimination arises out of competition for scarce resources and serves to protect group solidarity." ICELAND, *supra* note 199, at 80.

African American communities, first advanced this perspective.[326] He acknowledges various social pathologies and dislocations within the underclass, such as crime, teenage pregnancy, and a rise in single-mother families; however, he places these trends within a broader social context.[327] People who grow up in racially segregated, poor neighborhoods develop coping mechanisms and responses that "emerge[] from patterns of racial exclusion" and that ultimately limit social mobility.[328] While conservative theorists blame the poor for making bad choices, Wilson explains that "structural factors are likely to play a far greater role than cultural factors in bringing about rapid neighborhood change."[329] For instance, when the economy is strong, concentrated poverty and its associated pathologies decrease and vice versa.[330] If culture were as determinative as conservative theorists posit, increased economic opportunity would not have such a great impact in transforming poor communities.[331] In short, "[c]ulture *mediates* the impact of structural forces such as racial segregation and poverty," and the resultant behavior "often reinforces the very conditions that have emerged from structural inequities."[332] Of course, structural factors combined with personal choices determine economic status for everyone, not simply the poor.

In the years since Bazelon proposed the RSB defense, there has been extensive new psychological and social science research about how poverty influences behavior.[333] Psychologist Craig Haney surveys this research and concludes that "crime is often committed by persons whose early lives have been pervaded by a great many of . . . potentially damaging risk factors and whose present circumstances include numerous environmental stress-

326. *See* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 12 (1987).

327. *Id*. at 21–22.

328. WILLIAM JULIUS WILSON, MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY 43, 134 (2009).

329. *Id*. at 57, 61. Wilson is widely acknowledged as making it acceptable within academic circles to discuss cultural factors that contribute to poverty. *See* Patricia Cohen, *"Culture of Poverty" Makes a Comeback*, N.Y. TIMES, Oct. 17, 2010, at A1.

330. *See* WILSON, *supra* note 328, at 57.

331. *Id*. (citing PAUL JARGOWSKY, POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY 145 (1997)).

332. *Id*. at 133–34.

333. *See* Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 856–57, 861–62 (2008) (describing advances in psychological research since the 1970s). Haney uses this research to recommend strategies for defense lawyers to use in the mitigation phase of capital cases.

ors."[334] Poverty is both a major risk factor and an immediate stressor.[335] As Haney summarizes, poverty has negative effects on childhood development, including "lowered levels of self esteem, high levels of frustration, poor impulse control, and problematic intellectual performance and achievement."[336]

Poor children are also exposed to "social toxins," such as violent neighborhoods and negative role models that skew them toward delinquency and crime and result in dysfunctional coping mechanisms, such as drug addiction and gang membership.[337] Faced with these risk factors, many poor children grow up to be poor adults mired in disadvantaged neighborhoods, where there are high rates of unemployment, transience, and inadequate housing.[338] In turn, these environments can change the way people think about themselves, make them more likely to give into feelings of desperation, and exert pressure on people to engage in illegal conduct.[339] In sum, "[r]isk factors have a direct impact on individual development, increase the likelihood that someone will be exposed to other potentially debilitating risk factors, and make it more likely they will be exposed to problematic social contexts later in life."[340]

This research suggests that with regard to a poverty defense there is a role for both the RSB emphasis on social history, as well as the necessity/duress approach to how financial hardship can severely restrict the options available to poor parents. To separate poverty from culpability, actors involved in the child welfare system will need to better understand this emerging research, and lawyers for parents and children will need to educate child welfare workers and courts on how structural economic forces constrain parenting conduct.[341] This is not an easy task. To begin with, child welfare workers are often overworked and over-

334. *Id.* at 858.

335. *See id*. at 864–65.

336. *Id*. at 865.

337. *See id*. at 871–73.

338. *See id*. at 873–74.

339. *See id*. at 874–75.

340. *Id*. at 875.

341. *See* TALIA GURSKY ET AL., POVERTY AND CHILD NEGLECT: EXPLORING SOLUTIONS THROUGH DIFFERENTIAL RESPONSE 61 (2007), *available at* http://ase.tufts.edu/uep/degrees/field_project_reports/2007/Team3_CFS_Report.pdf ("A poverty exemption explicitly stated in the state's legal code has the potential to disentangle poverty and neglect, but without specific training or practice to support it, the statute is ineffective.").

whelmed and have to make difficult decisions about child safety under pressure.[342] Likewise, even though parents are generally entitled to representation in child dependency hearings and criminal neglect hearings, those lawyers are similarly overburdened and may not have the time or resources to delve into larger social issues surrounding poverty and neglect. This is also true for counsel or guardians ad litem appointed to represent children,[343] as well as judges.[344] Moreover, child neglect hearings usually do not involve experts testifying on issues such as the availability of jobs in the local economy, the lack of affordable housing, or the accessibility of mental health resources.[345] While the child welfare agency may have experts at its disposal, low-income parents cannot afford their own psychiatrists, therapists, and social workers to testify on their behalf.[346] Further, participants within the child welfare system, including caseworkers, lawyers, and judges, carry their own implicit race, gender, and class biases and impose them on parents, who are disproportionately female, minority, and poor.[347]

Despite these obstacles, the poverty defense in child neglect law can be effective. As the case law exhibits, some judges have noticed the economic realities facing poor parents or have taken an inquisitorial role by scrutinizing the findings of the state's experts. Lawyers for parents, and even some parents themselves,

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342. *See generally* Marcia Robinson Lowry & Sara Bartosz, *Why Children Still Need a Lawyer*, 41 U. MICH. J. L. REFORM 199, 199–200 (2007).

343. *Id.* at 207 ("Dependency court lawyers for children are as overburdened as are the case workers who are responsible for supervising the children's care on a day-to-day basis.").

344. *Id.* at 209. ("Family court judges carry enormous case dockets of their own and must do so with limited administrative support. These judges, therefore, must be able to rely on the competency and diligent preparation of the social workers and attorneys who appear before them to advocate for particular case services and permanency goals.").

345. *See generally* Santosky v. Kramer, 455 U.S. 745, 763 (1982) (discussing the state's ability to assemble its case as compared to parents).

346. *See id.* ("The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents.").

347. *See* Amy Sinden, *"Why Won't Mom Cooperate?": A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 352 (1999) ("The professionals in the system are by and large well-educated, middle-class, and predominantly white. Meanwhile, many of the accused parents and their children are members of racial minority groups and virtually all are extremely poor with little formal education."); *see also* Roberts, *supra* note 14, at 161, 174 ("Judges and juries also import biases against the poor in applying the reasonable person standard used to determine neglect.").

have made compelling arguments about the difficult situations facing poor parents and the lack of state support. The challenge is to expand this sort of reasoning and advocacy throughout the child welfare system, preferably before these cases get to the litigation stage. Possible strategies include increased training for case workers and other actors within the child welfare system about the nexus between poverty and neglect and the causes of poverty.[348] The research is constantly emerging; however, it needs to be disseminated. Advocates for the poor and legal clinics can work together to distill localized economic data and to recruit interdisciplinary experts who can translate structural information for case workers and courts. The child welfare system should also take better account of strengths within families, rather than focusing solely on pathologies.[349]

Beyond individual cases, there have been multiple child welfare class actions that have successfully presented evidence about structural factors in order to reform child welfare process and to obtain increased services for low-income children and parents.[350]

348. *See, e.g.*, Paul Knepper & Shannon M. Barton, *Statewide Cross-Training as a Means of Court Reform in Child Protection Proceedings*, 36 BRANDEIS J. FAM. L. 511, 512 (1997) (describing training sessions for judges, social workers, attorneys, prosecutors, and other decision-makers designed to improve the child protection court process); *see also Recommendations of the Conference on Achieving Justice: Parents and the Child Welfare System*, 70 FORDHAM L. REV. 337, 359 (2001). The working group recommended that:

> Ongoing mandatory training should be provided by each agency/organization in the child welfare system for all players in the system, including, but not limited to, law enforcement, judges, lawyers, social workers, psychologists, medical professionals, and mandatory reporters, on how racial and ethnic stereotypes and sexism can impact decision-making. Training should include research and information on the unique situation created for parents raising children with extremely limited financial and limited local services. Training should include information and discussion on how to distinguish parents struggling because of poverty from parents who are neglecting their children.

Id.

349. *See* Matthew I. Fraidin, *Changing the Narrative of Child Welfare*, 19 GEO. J. ON POV. L. & POL'Y 97, 105 (2002) ("[W]ith assets, wealth, power, and strength, we see [the mother] differently[; w]e learn from her, we admire her, we grow from knowing her.").

350. *See, e.g.*, Hansen v. Dep't of Soc. Servs., 238 Cal. Rptr. 232 (Cal. Ct. App. 1987). In *Hansen*, the court held that the state welfare agency must assist all homeless families to obtain housing regardless of whether or not children were in the foster care system. *Id*. at 240. The court considered evidence from a variety of experts and research reports about the causes and effects of homelessness on children. *Id*. at 240–41. *See generally* CHILD WELFARE LEAGUE OF AM., CHILD WELFARE CONSENT DECREES: ANALYSIS OF THIRTY-FIVE COURT ACTIONS FROM 1995 TO 2005 (2005) (analyzing child welfare class action litigation in thirty-two states); Lowery & Bartosz, *supra* note 342, at 210 ("Class actions have a proven track record of producing measurable positive results in reforming large child welfare systems.").

Class action litigation can typically harness greater advocacy resources than individual cases.[351] The dynamics of poverty and neglect can also be discussed among participants in non-adversarial child welfare settings, such as family group conferencing and other fora that are increasingly being set up to address child neglect.[352] In addition, legislators can be responsive to the effects of poverty by increasing funding for family support services; after all, it has been legislatures, not courts, that have largely created the poverty defense and the right to counsel in child welfare cases.[353] For the poverty defense to realize its full potential, advocates will need to think creatively and expand their notions of relevant evidence regarding both parental and state culpability. Similar strategies would be needed wherever the poverty defense expands.

B. *Expanding the Poverty Defense*

Some critics may find child neglect cases an ill-suited foundation for expanding the poverty defense to other areas of the law. Perhaps child neglect is just too different from other crimes. Then again, each type of crime has its own definition, required mental state, pathologies, and causes, and each criminal act arises within its own social context. For these reasons, Professor Stuart Green has argued that "a proper analysis of the relationship between distributive and redistributive justice should proceed on a case-by-case basis."[354] He would consider the appropriateness of a poverty defense by examining the offense at issue, the precise form of the offender's disadvantage, and the economic and social circumstances of the victim.[355] Given that the poverty defense has thus far emerged in response to only one type of wrongful conduct, a case-by-case approach based on particular crimes might

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351. Class actions can be controversial. *See* Peter Margulies, *The New Class Action Jurisprudence and Public Interest Law*, 25 N.Y.U. REV. L. & SOC. CHANGE 487, 489–90 (1999) ("Class remedies in this area can, however, create additional inequities. Subgroups of children within each class action each have needs for resources that in a finite world will be met only through sacrifices by other subgroups.").

352. *See, e.g.*, Joan Pennell, *Mainstreaming Family Group Conferencing: Building and Sustaining Partnerships*, INT'L INST. RESTORATIVE PRAC. (Aug. 7, 1999), http://www.iirp.edu/article_detail.php?article_id=NDky.

353. *See, e.g.*, Virek S. Sankaran, *Protecting a Parent's Right to counsel in Child Welfare Cases*, 13 MICH. CHILD WELFARE L.J. 2, 4 (2009).

354. Green, *supra* note 10, at 44.

355. *Id.* at 59, 70.

be more achievable than the generalized RSB defense advocated by Judge Bazelon and Professor Delgado.

Under Professor Green's analysis, it is difficult to excuse or justify intentionally violent offenses against other people because the moral underpinnings of these offenses "do not depend on background considerations of social justice."[356] This reasoning may explain why negligent conduct is sometimes excused in child welfare law, but intentional acts of abuse are not (even though many abusive acts are also rooted in RSB backgrounds). For its part, in 2012, the Supreme Court acknowledged the correlation between growing up in an environment of severe deprivation and crime in *Miller v. Alabama* but would not go as far to excuse the crime.[357] In *Miller*, the Court held that life sentences for juvenile homicide offenders without the possibility of parole violated the Eighth Amendment's proscription on cruel and unusual punishment.[358] The Court stated that a sentence of mandatory life without parole not only ignores scientific research on juvenile brain development, but also "prevents taking into account the family and home environment that surrounds [the defendant]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional."[359] The Court pointed out that the defendants whose cases were on appeal came from deprived backgrounds, commenting with regard to one of them,

> if ever a pathological background might have contributed to a 14-year-old's commission of a crime, it is here. Miller's stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten.[360]

Still, the Court demonstrated no willingness to excuse liability with regard to homicide, stating, "[t]hat Miller deserved severe punishment for killing [the victim] is beyond question."[361] The Court did not explain why the RSB that supports mitigation of punishment does not also lessen liability. Others have argued

356. *Id.* at 63.
357. No. 10-9646, slip op. at 1, 16 (U.S. June 25, 2012).
358. *Id.* at 16.
359. *Id.* at 15.
360. *Id.* at 16.
361. *Id.*

that mitigation of punishment fits more comfortably within our legal system than does amelioration of liability.[362]

Yet punishment is not the only option for dealing with wrongful conduct. Depending on the crime, there may be creative options for excusing defendants while serving retributive and deterrence functions of the criminal law. For instance, in the child welfare system, greater resources and services for poor parents can often eliminate the "crime" altogether and ensure safety and security for children.[363] For those parents whose RSB makes them unable to meet their children's needs even with state support, a variety of options can excuse their conduct while keeping children safe. Parents with an RSB defense could lose physical custody of their children while retaining visitation rights, so that family ties are not permanently severed.[364] Alternatively, RSB parents could have the opportunity to petition to reinstate their parental rights in the future as their circumstances improve.[365] Accordingly, in considering potential poverty defenses across the legal spectrum, it is important to remember that not all offenses pose the quandary facing Judge Bazelon. In some cases, flexible and just solutions may be available to excuse and support defendants while protecting the interests of victims and society.

A poverty defense to non-violent crimes, in particular, avoids the public safety quandary. Starting with these crimes, a poverty defense may help to sharpen our assessment of individual and societal culpability and thereby produce more accurate judicial de-

362. *See, e.g.*, Hefferman, *supra* note 74, at 70–72.

363. *See, e.g.*, *Public Awareness & Creating Supportive Communities,* CHILD WELFARE INFO. GATEWAY, http://www.childwelfare-gov/preventing/communities (last visited Dec. 10, 2012).

364. Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 425 (1983) ("[P]ermanent placement that permits continued contact is better than adoption or any other placement that entails a total loss of contact with the natural parent.").

365. Nine states have statutes that permit parents to petition for reinstatement of parental rights following a termination. *See Reinstatement of Parental Rights*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/issues-research/human-services/reinstatement-of-parental-rights-state-statute-sum.aspx (last visited Dec. 10, 2012). In relevant part, the NCSL has stated:

> If a permanent placement has not been achieved within a specific timeframe, a petition may be filed with the court requesting reinstatement of the parent's rights. If the court determines that the parent is now able to provide a safe home for the child, the request may be granted. The laws were developed in response to children who were aging out of the foster care system and reestablishing ties with parents and family members.

Id.

cisions, more generous crime prevention strategies, and more effective interventions. The poverty defense could eliminate the inequity that arises in a system that punishes the wrongdoing of the poor with incarceration, while imposing lenient fines and regulatory controls on more affluent wrongdoers.[367] Of course, a poverty defense is not the only way to avoid criminalizing poverty. Alternatives include mitigating punishments based on a defendant's poverty or decriminalizing certain conduct altogether. The possible advantages of the poverty defense are that it allows defendants to avoid the collateral consequences that accompany convictions, such as barriers to future employment and housing, as well as loss of certain public benefits and voting rights. A poverty defense also retains the law's expressive effect of declaring certain conduct undesirable. The ideal solution is the elimination of poverty, which would make the poverty defense unnecessary. Until then, the poverty defense can break the assumed link between poverty and culpability.

Crimes appropriate for a poverty defense might include "victimless" crimes committed almost exclusively by the poor, including the crimes related to homelessness, drug use, truancy, and turnstile jumping. These crimes are different from child neglect (in which the justice system is moving to protect a victim), but they are similarly rooted in poverty. In addition, the defense could extend to crimes of poverty—that is, crimes that people engage in for economic survival—such as public benefits fraud, low-level drug dealing, panhandling, prostitution and minor thefts.[368] The defense might also cover crimes poor people commit in order to survive in a dangerous community, such as unlawful possession of a weapon. In addition, the poverty defense in child neglect cases should be adopted in the twenty-five states that currently lack the defense or, better yet, incorporated into Title 42 of the United States Code, the federal law that funds the foster care system.[369] As the justice system gains more experience with the poverty defense and becomes more sophisticated in understanding poverty, the defense can be expanded to other forms of wrongful conduct.

367. Barbara Hudson, *Punishing the Poor: Dilemmas of Justice and Difference*, *in* FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE, *supra* note 10.

368. *Id.* at 212 n.3 (defining crimes of poverty as those "whose rates are particularly sensitive to changes in employment and other economic indicators").

369. 42 U.S.C. § 674 (2006).

The social forfeit strain in child neglect law is particularly helpful in conceptualizing an expanded poverty defense. Courts using a social forfeit model examine the conduct and choices of both parents and the state in determining the causes and solutions for alleged neglect. This model does not absolve individual wrongful conduct but rather apportions it in a context in which it can be better understood and hopefully ameliorated. It provides a theoretical basis for moving beyond individual responsibility toward a model of mutual dependency, in which citizens and the state not only claim rights but also owe each other responsibilities. Criminal justice scholars assume that such a "thick" view of citizen-state relationships is normatively impossible and/or theoretically undesirable.[370] But they have failed to notice the social forfeit strain in child neglect case law and how this approach could provide a framework for similarly thick approaches to other areas of the law. Judge Bazelon and Professor Delgado argue that society *should* be put on trial; the child neglect case law shows that this is possible without absolving individual responsibility.[371]

While some courts are concerned about letting poor parents off the hook for conduct that would penalize richer parents, it is hard to conclude that the poverty defense gives poor parents a free pass to neglect their children. The child welfare system scrutinizes allegedly neglectful poor parents, removes their children from their homes, and mandates parental compliance with extensive case plans.[372] Even with a poverty defense, these parents must demonstrate the capacity, initiative, and responsibility to improve their parenting.

The alternative to the poverty defense is removal of children and termination of parental rights, and sometimes incarceration of parents. Yet foster care is no panacea, as there is ample evidence that remaining in a setting of parental neglect is usually more beneficial for children than foster care.[373] Similarly, while

370. *See, e.g.*, Morse, *supra* note 62, at 152–53 (discussing problems with both the application and theoretical underpinnings at social forfeit theory); Taslitz, *supra* note 61, at 81–82 (arguing that society cannot be held responsible for individual crimes).

371. Bazelon, *Morality of the Criminal Law*, *supra* note 20, at 388–89, 401–02; Delgado, *Rotten Social Background*, *supra* note 39, at 75, 77–78.

372. *See supra* Section II.

373. *See* Fraidin, *supra* note 287, at 25–30 (explaining why many maltreated children would fare better if left at home than if placed in foster care); *see also* Theo Liebmann, *What's Missing from Foster Care Reform? The Need for Comprehensive, Realistic, and Compassionate Removal Standards*, 28 HAMLINE J. PUB. L. & POL'Y 141, 141–43 (2006).

incarceration is an easy, albeit expensive, way to punish criminals, it has proven devastating to families and communities.[374] A poverty defense can lead to more preventative programs by forcing decision makers to confront the paucity of alternatives available to defendants.[375] When poor Americans lack viable alternatives for avoiding wrongful conduct, individual culpability lessens.

There is no evidence that the poverty defense has stigmatized individuals or communities by denying the poor moral agency. It does not presume that poor parents are *culturally* incapable of raising their children. Rather, the poverty defense recognizes that *structural* features within our society create financial hardship that sometimes leads to inadequate parenting. Furthermore, the defense is not applied in a blanket fashion; each defendant must show how her unique RSB or current economic condition excuses her specific conduct.[376] Most poor parents are not charged with neglect, and the poverty defense indirectly acknowledges the resilience of these families in the face of economic inequality. As Thomas Ross has written, "Against all odds, facing social stigma and working through maddening systems of public assistance, the

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Professor Liebmann states:

> The 520,000 children in foster care often live in unsafe and unsanitary conditions, with poorly trained foster parents and without crucial mental health, medical, and education services. Even worse, children in foster care are abused and neglected at a greater rate than other children, and have an increased risk of delinquency and other behavioral problems. The longer-term statistics are equally bleak. In a recent broad survey, foster alumni had disproportionately more mental health disorders, significantly lower employment rates, less health insurance coverage, and a higher rate of homelessness when compared with the general population.

Id.

374. *See* Roberts, *supra* note 11, at 1281 (discussing how mass incarceration harms African American communities); *cf.* Fraidin, *supra* note 287, at 25–26 (discussing how children removed from families because of suspected neglect are worse off in foster care). For a discussion of the costs of incarceration see JOHN SCHMITT ET AL., CTR. FOR ECON. & POL'Y RES., THE HIGH BUDGETARY COST OF INCARCERATION 10 (2010), *available at* http://www.cepr.net/documents/publications/incarceration-2010-06.pdf ("In 2008, federal, state, and local governments spent nearly $75 billion on corrections, with the large majority on incarceration.").

375. One emerging preventative approach is called differential response, which is a voluntary system for families where there is no immediate risk to children. GURSKY ET AL., *supra* note 341, at 9. In differential response programs, families are diverted from the child welfare system into preventative programs run by community, non-profit organizations. *Id.* These programs have proven to be cost-effective. *Id.* at 10.

376. *See* Delgado, *Rotten Social Background*, *supra* note 39, at 66 ("[T]he theory requires that a jury determine whether, in this *particular* defendant's case, a rotten social background amounts to a disability falling within a *particular* excusing condition.").

poor have survived. Many poor women and men have kept their families together and maintained safe and decent lives in the midst of conditions that would seem to make family disintegration inescapable."[377] There is already a stigma to being poor in our society, but the stigma of being a neglectful parent is even worse.[378] Thus far, the poverty defense has proven more helpful than harmful, not only keeping families together, but also giving some parents increased services and support.

For some critics, this is simply too much—a poverty defense cannot and should not bear the weight of redistributive aims. This critique, however, is diminished in the context of child neglect, where the poverty defense has been primarily a legislative creation. This limits condemnation of unelected jurists run amuck, and suggests a political avenue for expansion of the poverty defense to other realms. At bottom, however, the critics are correct in that the poverty defense has not worked "a massive transformation of our social structure" and is unlikely to do so.[379] A poverty defense does not reduce poverty, and parents in the child welfare system remain poor. However, the poverty defense shines a light on poverty, its effects, and the constrained choices it imposes. Understanding the problem is the first step towards fixing it. The ultimate goal is a shift from retributive penal policies to redistributive social policies, and greater safety and security for all. As Judge Bazelon stated, "[R]ather than conceding the inevitability of social injustice and seeking the serenity to accept it, we must recognize its intolerability and search for the strength to change it."[380]

CONCLUSION

A poverty defense is not merely a hypothetical exercise, as is often assumed. Rather, there is a widespread poverty defense within the law of civil and criminal child neglect, and some families have remained together as a result of the defense. The pov-

377. Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L. J. 1499, 1543 (1991).

378. In addition, there is the stigma and collateral consequences of being listed permanently on a child abuse and neglect registry. *See* W. Todd Miller, *The Central Registry Statute for Abuse and Neglect Matters is Constitutionally Flawed*, 8 RUTGERS J. L. & PUB. POL'Y 651, 652 (2011).

379. Morse, *supra* note 4, at 158.

380. Bazelon, *Rejoinder*, *supra* note 48, at 1273.

erty defense can make a difference. However, the poverty defense only fulfills its potential when actors in the child welfare system have a rich understanding of the causes and consequences of poverty. When the child welfare system conflates poverty with culpability and ignores the structural realities of our economy, families are torn apart, children suffer, and society pays social and economic costs. By contrast, when the child welfare system views poverty as structurally rooted, the poverty defense not only assists individual poor defendants, but also benefits society more widely through redistributive consequences that can ultimately reduce crime.

At its worst, the poverty defense fools us into thinking that we are compassionate about the challenges facing poor parents, when, in fact, we remove thousands of poor children from their parents each year. At its best, the poverty defense forces the child welfare system to confront the link between poverty and child neglect and to consider societal responsibility for that link. In short, the poverty defense in child neglect cases reveals that such a defense is neither as radically subversive of American law as its critics contend, nor as revolutionary as its proponents pronounce. It is, however, remarkable in American law.