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## Inadequate Protection: Examining the Due Process Rights of Individuals in Child Abuse and Neglect Registries

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# Inadequate Protection: Examining the Due Process Rights of Individuals in Child Abuse and Neglect Registries

Amanda S. Sen,\* Stephanie K. Glaberson,\*\* & Aubrey Rose\*\*\*

## *Abstract*

*This Article seeks to advance due process protections for people included in state child abuse and neglect registries. Between states, there are differences in the types of cases included in the state registry and the process required to be placed on or removed from the registry. To obtain judicial due process review, a plaintiff must demonstrate that a protected liberty or property interest is at stake. When federal courts have evaluated the individual liberty interest(s) implicated by placement on state child abuse and neglect registries, they have so far only found such an interest when the plaintiff's employment opportunities were clearly affected. We identify a more principled method by which courts should evaluate challenges to state child abuse and neglect registries. Our proposed method would root the analysis in the core constitutional right of family integrity. We then go on to identify ways in which states could structure their child abuse and neglect registries to better comport with due process requirements.*

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*I. Introduction*

Databases, or “registries,” of individuals who purportedly pose some danger to the public are becoming increasingly common.<sup>1</sup> Many states maintain lists of people convicted of certain categories of crimes, including sex crimes, arson, elder abuse, and methamphetamine-related offenses.<sup>2</sup> The federal government maintains its own databases, including the classified “No Fly List” that requires airlines to deny access to flights to listed individuals,<sup>3</sup> and widely-available databases such as the E-Verify program—also referred to as the “No Work List”—which allows an employer to check whether a job applicant is authorized to work in the United States.<sup>4</sup>

In 1976, the Supreme Court considered the due process rights of an individual whose arrest (not conviction) for shoplifting was advertised to local businesses in a police flyer.<sup>5</sup> The Court determined that harm to reputation, alone, was not a deprivation of a protected liberty interest and did not warrant due process protections.<sup>6</sup> The Court went on to develop the “stigma-plus” test to evaluate whether a state action harmed more than “mere reputation,” and therefore warranted due process protections.<sup>7</sup> Much commentary and scholarship has

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1. See Elizabeth Reiner Platt, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 N.Y.U. REV. L. & SOC. CHANGE 727, 728 (2013) (“Existing registries are expanding and becoming increasingly punitive.”).

2. See *id.* at 738 (“While the most recent wave of registries initially focused exclusively on sex crimes, the use of registries has begun to expand to include a number of additional crimes.”).

3. See Margaret Hu, *Big Data Blacklisting*, 67 FLA. L. REV. 1735, 1775–76 (2015) (“The No Fly List maintained the names of individuals that air carriers were to deny transport.”).

4. See *id.* at 1763–64 (explaining that the E-Verify system attempts to “verify” the identity or citizenship status of a worker based upon complex statistical algorithms and multiple databases).

5. See *Paul v. Davis*, 424 U.S. 693, 693 (1976) (“After [the shoplifting] charge had been dismissed respondent brought this action under 42 U.S.C. § 1983 against petitioner police chiefs, who had distributed the flyer to area merchants, alleging that petitioners’ action under color of law deprived him of his constitutional rights.”).

6. See *id.* at 701 (refusing to recognize reputation as a “candidate for special protection” by the Fourteenth Amendment).

7. See *id.* at 706 (requiring “an accompanying loss of government employment” to raise reputation to a protected status).

criticized the Court's narrowness in its consideration of liberty interests in *Paul v. Davis*<sup>8</sup> and subsequent cases.<sup>9</sup> Eric J. Mitnick recently argued that harm to reputation impacts a person's privacy and liberty interests.<sup>10</sup> Nevertheless, the bar to identifying a private liberty interest in a procedural due process claim remains high.<sup>11</sup> While Professor Mitnick's work has been cited by several litigants, it has not been substantively cited by a court.<sup>12</sup>

There is little jurisprudence subsequent to *Paul* directly addressing the due process rights of individuals affected by being listed in the various state registries and databases. The E-Verify program produces a significant number of errors, impacting economically disadvantaged prospective workers, but it has not been subject to a significant due process challenge.<sup>13</sup> The Supreme Court heard a procedural due process claim regarding Connecticut's sex offender registry in 2003, but the Court explicitly did not reach the question of whether the plaintiff was denied a liberty right, ruling that since Connecticut's law did not imply continued dangerousness, only the fact of a conviction, procedural due process analysis was not

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8. 424 U.S. 693 (1976).

9. See Nat Stern, *Defamed but Retained Public Employees: Addressing a Gap in Due Process Jurisprudence*, 31 HOFSTRA L. REV. 795, 797–99 (2003) (“*Paul* provoked an avalanche of criticism.”).

10. See Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 43 U.C. DAVIS L. REV. 79, 82 (2009) (accusing the court of ignoring the notion that constitutional liberty relates to autonomy).

11. See Stern, *supra* note 9, at 800 (“The principle that the state must harm more than one's reputation alone to violate the liberty shielded by due process is not well-settled.”).

12. See, e.g., Brief for Petitioner at 30, *Lucas v. Office of the Colo. State Pub. Def.*, 70 F. App'x 700 (10th Cir. 2017) (No. 16-1378), 2017 WL 383130, at \*29 (using Mitnick's article to argue that the State “touched upon” the petitioner's constitutional right to pursue intimate human relationships when it restricted his right to pursue relations with a co-worker). The Supreme Court of Vermont cited Mitnick's article, but only to reference the stigma-plus standard. See *Stone v. Town of Irasburg*, 196 A.3d 769, 777 (Vt. 2014) (calling the stigma-plus formulation discussed in Mitnick's article “widely accepted today as a constitutional analog to common law defamation”).

13. See Hu, *supra* note 3, at 1778–83 (2015) (“Experts have concluded that these factors together create a database screening system that is unreliable and inaccurate in its structure, both technologically and programmatically, as well a system that has led to widespread discriminatory results in its application.”).

necessary.<sup>14</sup> The Eighth Circuit followed this reasoning and refused a similar due process claim.<sup>15</sup> The Sixth Circuit addressed the question of whether reduced employment opportunities constituted a deprivation of liberty and concluded, “[a] charge that merely makes a plaintiff less attractive to other employers but leaves open a definite range of opportunity does not constitute a liberty deprivation.”<sup>16</sup>

All states maintain child abuse and neglect registries: centralized databases of people accused of maltreating children.<sup>17</sup> These registries are used to aid child protective investigations and maintain statistical information for federal funding.<sup>18</sup> They also are used in many states for employment

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14. See *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 7–8 (2003) (“We therefore reverse the judgment of the Court of Appeals because due process does not require the opportunity to prove a fact that is not material to the State’s statutory scheme.”).

15. *Doe v. Miller*, 405 F.3d 700, 709 (8th Cir. 2005) (“States ‘are not barred by principles of “procedural due process” from drawing’ classifications among sex offenders and other individuals.” (quoting *Conn. Dep’t of Pub. Safety*, 538 U.S. at 8)).

16. *Cutshall v. Sundquist*, 193 F.3d 466, 479 (6th Cir. 1999) (citing *Gregory v. Hunt*, 24 F.3d 781, 788 (6th Cir. 1994)). Interestingly, in *Cutshall*, the court stated, “Cutshall has not cited, and we have not found, any case recognizing a general right to private employment.” *Id.* at 479. However, at least one appellate court, the Second Circuit, had determined prior to *Cutshall* that a plaintiff’s liberty interests were disrupted by the state when placement on a child abuse and neglect registry impacted her private employment opportunities. See *Valmonte v. Bane*, 18 F.3d 992, 1002 (2d Cir. 1994) (holding that “Valmonte has adequately stated a cause of action for deprivation of a liberty interest” as her placement on a child abuse and neglect registry negatively impacted her employment opportunities). The *Cutshall* court also said that “[t]he Constitution does not provide Cutshall with a right to keep his registry information private, and the Act does not impose any restrictions on his personal rights that are fundamental or implicit in the concept of ordered liberty, such as his procreative or marital rights.” *Cutshall*, 193 F.3d at 481.

17. See CHILD WELFARE INFO. GATEWAY, ESTABLISHMENT AND MAINTENANCE OF CENTRAL REGISTRIES FOR CHILD ABUSE OR NEGLECT REPORTS 1 (2018), <https://perma.cc/3XAP-GN5R> (PDF) [hereinafter CHILD WELFARE INFO. GATEWAY, ESTABLISHMENT, AND MAINTENANCE] (“Every State has procedures for maintaining records related to reports and investigations of child abuse and neglect. The term ‘central registry’ is used . . . to refer to a centralized database for the statewide collection and maintenance of child abuse and neglect investigation records.”).

18. See *id.* (“Central registries and the systematic record keeping of child abuse and neglect reports assist child protective services in the identification and protection of abused and neglected children.”).

screening in the fields involving the care of children.<sup>19</sup> Some states now operate these registries as online websites, which grant access to certain employers who submit screening requests for employees.<sup>20</sup> Employers can conduct background checks on prospective employees and, in some cases, inquire on a regular basis about current employees.<sup>21</sup>

Courts have been more willing to consider due process claims regarding child abuse and neglect registries than other types of registries, and the Courts of Appeals in both the Second and Ninth Circuits have ordered states to improve procedural due process protections for individuals placed on such registries.<sup>22</sup> However, thus far, the courts have couched their decisions in terms of the impact of registration on the registrant's employment rights, which leaves individuals impacted by child abuse and neglect registries but who are not employed in an impacted field without a clear claim to equal due process rights.

Scholars have addressed the challenges of due process in the child abuse and neglect registry context, but these articles do not grapple with liberty protections for people whose employment is not clearly affected by placement on the registries, and their recommendations for due process improvements are now dated. In 1993, Michael R. Phillips argued that as states began opening access to registries to employers, stronger due process protections would be needed, and he made several interesting but cursory recommendations as to how to do so, including robust notice, timing, and

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19. *See id.* ("Central registry records also are used to screen persons who will be entrusted with the care of children.").

20. *See, e.g., Agency Request*, DEP'T OF HUMAN SERVS.-CHILD PROTECTIVE SERVS. INFO. SYSTEM (CHILD ABUSE REGISTRY), <https://perma.cc/V2PR-LSST> (last visited Dec. 20, 2019) (allowing certain employers to submit a screening request to the Georgia Department of Human Services) (on file with the Washington and Lee Law Review).

21. *See, e.g., N.Y. SOC. SERV. LAW* § 424-a(1)(b)(i)(A) (McKinney 2019) (stating that employers are required to inquire while hiring and permitted to inquire for current employees every six months).

22. *See Valmonte*, 18 F.3d at 1003–04 (discussing the insufficient due process protections afforded by the "some credible evidence" standard); *Humphries v. Cty. of L.A.*, 554 F.3d 1170, 1188–90 (9th Cir. 2009) (discussing the insufficient due process protections afforded to individuals placed on California's Child Abuse Central Index).

evidentiary standards.<sup>23</sup> Jill D. Moore wrote a fairly exhaustive overview of jurisprudence on due process and child abuse and neglect registries in 1995, but she concluded, we believe prematurely and erroneously, that the cost for individuals erroneously placed on a registry whose employment is not at risk is not high enough to be accorded substantial weight.<sup>24</sup> More recently, Shaudee Navid argued in the *U.C. Davis Law Review* that child abuse and neglect registries are more harmful to registrants than sex offender registries because registrants' statuses on the registries are actively provided to employers by state agencies and some employers are required to check the registries before making employment decisions.<sup>25</sup> Navid took for granted that the only relevant individual liberty interest to be considered was rooted in employment opportunities.<sup>26</sup>

In Part II of this Article, we contend that the protections of the Due Process Clause of the Fourteenth Amendment should not be tied only to an impact on employment. Since the Supreme Court has recognized parenting to be a fundamental right,<sup>27</sup> and child abuse and neglect registries significantly alter that right, the “stigma-plus” standard is met and all parents listed on these registries are entitled to protection.<sup>28</sup>

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23. See Michael R. Phillips, Note, *The Constitutionality of Employer-Accessible Child Abuse Registries: Due Process Implications of Governmental Occupational Blacklisting*, 92 MICH. L. REV. 139, 182–94 (1993) (arguing how states can apply procedural safeguards to create employer-accessible child abuse registries that afford protections in accordance with the Due Process Clause).

24. See Jill D. Moore, *Charting a Course Between Scylla and Charybdis: Child Abuse Registries and Procedural Due Process*, 73 N.C. L. REV. 2063, 2113–14 (2019) (discussing how courts that view registries as protecting children who are current victims of neglect and abuse reduce the costs of a high risk of error as government intrusion into the family is warranted).

25. See Shaudee Navid, *They're Making a List, but Are They Checking It Twice? How Erroneous Placement on Child Offender Databases Offends Due Process*, 44 U.C. DAVIS L. REV. 1641, 1659–66 (2011) (arguing “child abuser databases create everlasting negative and societal effects” as these databases are disseminated to employers and licensing agencies, unlike sex offender registries) (citing *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 6–7 (2003) and *Valmonte*, 18 F.3d at 999–1001).

26. See *id.* at 1662–65 (arguing that inclusion on a child abuse registry forecloses job opportunities, depriving applicable individuals of a liberty interest).

27. See *infra* Part II.C.

28. See *infra* Part II.A–C.

Because all parents listed on these registries must be given due process protections, in Part III of this Article, we apply the balancing test laid out in *Mathews v. Eldridge*<sup>29</sup> to abuse and neglect registries.<sup>30</sup> We lay out the private interest and the risk of erroneous deprivation under procedures used by various states and discuss the states' interests and burdens.<sup>31</sup> We conclude by proposing best practices under the *Mathews v. Eldridge* framework.<sup>32</sup>

## II. Registries and the Challenge of the “Stigma-Plus” Test

### A. Abuse and Neglect Registries

All fifty states have registries of people investigated and deemed potentially responsible for child abuse or neglect.<sup>33</sup> Federal law requires states to maintain a central hotline where the public can make reports of suspected child abuse and neglect.<sup>34</sup> Federal law also requires child protective agencies to conduct an immediate investigation of these reports and to promptly determine whether the report is substantiated.<sup>35</sup>

Outside of these federal guidelines, states establish their own procedures for agency investigations.<sup>36</sup> State statutes often mandate a brief timeline for investigation. For example, in New York, the agency must make a determination in sixty days.<sup>37</sup> There are not always clear requirements for the brief agency

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29. 424 U.S. 319 (1976).

30. See *id.* at 335 (describing the three distinct factors to be considered in analyzing the appropriate due process required).

31. See *infra* Part III.A.

32. See *infra* Part III.B.

33. See, e.g., John Sherman, *Procedural Fairness for State Abuse Registries: The Case for the Clear and Convincing Evidence Standard*, 14 J. GENDER, RACE & JUST. 867, 868 (2011) (“In response to growing awareness of child abuse in the United States, every state has adopted procedures for maintaining child abuse and neglect records.”).

34. 42 U.S.C. § 5106(a) (2018).

35. *Id.*

36. See, e.g., N.Y. SOC. SERV. LAW § 424 (McKinney 2019) (providing an example of a state establishing its own procedure for agency investigations).

37. See *id.* § 424(7) (mandating agencies “determine, within sixty days, whether the report is ‘indicated’ or ‘unfounded’”).

investigation.<sup>38</sup> The agency investigation may simply include an interview with the child and the suspected parent, or may include additional interviews with household members, neighbors, or school professionals.<sup>39</sup> During these investigations, parents do not have the same protections in their interactions with child protective agency workers as they would with law enforcement in a criminal investigation, such as *Miranda* rights.<sup>40</sup>

At the end of the child protective investigation, the agency will make a preliminary determination about whether there is enough evidence that the allegations occurred to “substantiate” the report.<sup>41</sup> A few consequences flow from a report being “substantiated:” first, the agency may decide that intervention into the family is warranted.<sup>42</sup> The agency may do so informally, offering services or referrals for the family, or the agency may bring an action in court seeking a court order placing the family under supervision, mandating participation in services, or, where the agency deems necessary, removing the child or children from the care of the parent(s).<sup>43</sup> Because the agency may decide against going to court, many substantiated reports are never litigated in a court of law.<sup>44</sup> Nevertheless, whenever a

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38. See, e.g., *id.* § 424 (lacking a description of steps for investigation).

39. See, e.g., N.Y.C. ADMIN. FOR CHILDREN’S SERVS., A PARENT’S GUIDE TO CHILD PROTECTIVE SERVICES IN NEW YORK CITY, <https://perma.cc/5AMD-L6CT> (PDF) (answering frequently asked questions about Child Protective Service in New York City).

40. See Donald Dickson, *When Law and Ethics Collide: Social Control in Child Protective Services*, 3 ETHICS & SOC. WELFARE 264, 268–69 (2009) (“[M]any of the constitutional protections available in a criminal setting, namely the right to a ‘*Miranda* warning’, the right to counsel, the right to know one’s accuser, and protections against self-incrimination, among others, are not automatically available to parents or guardians in civil child abuse actions.”).

41. See N.Y. SOC. SERV. LAW § 424(6)(a)–(7) (describing the requirements of child protective investigations and requiring the resulting report to be “indicated” or “unfounded” within sixty days).

42. See *id.* § 424(10)–(13) (outlining possible agency courses of action when it deems intervention into the family is warranted).

43. See *id.* (describing potential agency courses of action in detail).

44. See Hon. Leonard P. Edwards & Steven Baron, *Alternatives to Contested Litigation in Child Abuse and Neglect Cases*, 33 FAM. CT. REV. 275, 275 (1995) (“Child abuse and neglect cases are usually resolved without contested hearings by agreement of the parties.”).

report is substantiated and regardless of whether the report has been the subject of a court case, a second consequence also arises: the agencies must place a copy of any substantiated report in the child abuse and neglect registry.<sup>45</sup>

The standards for being listed on and removed from these registries vary substantially from state to state.<sup>46</sup> Perhaps the most significant differences are the standards for being placed on the registries.<sup>47</sup> Some states, such as New York, require only “some credible evidence” or “probable cause,” as determined by a caseworker, to place individuals on the registry.<sup>48</sup> About a third of states require “substantial evidence” or a “preponderance of the evidence.”<sup>49</sup> Some states do not list individuals on registries until an appeal is unsuccessfully exhausted<sup>50</sup> or until a court has made a finding against the

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45. See, e.g., N.Y. SOC. SERV. LAW § 424(3) (requiring the agency to “transmit, forthwith, a copy [of the report] thereof to the state central register of child abuse and maltreatment”); 23 PA. STAT. AND CONS. STAT. ANN. § 6334(g) (2019) (requiring the department to “maintain a record of the complaint of suspected child abuse in the Statewide database”).

46. See CHILD WELFARE INFO. GATEWAY, ESTABLISHMENT, AND MAINTENANCE, *supra* note 17, at 3–26 (providing a consolidation of all states’ laws in relation to the establishment and maintenance of central registries for child abuse or neglect reports).

47. See *id.* (capturing various state purposes for their respective child abuse and neglect registries).

48. See, e.g., N.Y. SOC. SERV. LAW § 424-a(e)(ii)–(v) (McKinney 2019) (describing the proper protocols if there is or is not “some credible evidence” of abuse or maltreatment); ALA. CODE § 26-14-8(a) (2019) (stating an “indicated” report occurs “when credible evidence and professional judgment substantiates that an alleged perpetrator is responsible for child abuse or neglect”).

49. See, e.g., N.C. GEN. STAT. ANN. §§ 7b-101, 7B-311 (2019) (defining substantial evidence as “relevant evidence a reasonable mind would accept as adequate to support a conclusion”); NEB. REV. STAT. ANN. § 28-720 (2019) (stating a case will be entered into the central registry if “the subject of the report of child abuse or neglect was supported by a preponderance of the evidence”).

50. See, e.g., MD. CODE ANN., FAM. LAW § 5-714(d) (West 2020) (stating an individual will only be entered into the central registry if found guilty of a criminal abuse or neglect charge or has been found responsible for the abuse or neglect and has exhausted his or her appeals or failed to timely file an appeal); LA. CHILD. CODE ANN. art. 616 (2019) (capturing the requirements for an individual to be placed on the central registry).

parent or caregiver.<sup>51</sup> Other significant differences in state laws regarding child abuse and neglect registries include who can access the registry and the procedures and standards to be removed from the registry.<sup>52</sup>

Having one's name on such registries often prevents individuals from being hired by employers in any field involving children. In many states, these registries can or must be accessed by agencies that provide services to children, particularly childcare.<sup>53</sup> Pennsylvania explicitly requires certain employers to deny an applicant or immediately fire an employee if there is a founded report in the registry within five years.<sup>54</sup> Other states, such as New York, allow employers to hire an individual whose name appears in the registry, but require the employer to generate a written report in the individual's employment file stating the specific reasons why the person was hired despite the indicated report.<sup>55</sup>

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51. See, e.g., S.C. CODE ANN. § 63-7-1930 (2019) (requiring a petition for placement of a perpetrator on the central registry to have a "written case summary stating facts sufficient to establish [the perpetrator's abuse or neglect] by a preponderance of evidence"); MISS. CODE ANN. § 43-21-257 (2019) ("A name is to be added to the registry only based upon a criminal conviction or an adjudication by a youth court judge or court of competent jurisdiction, ordering that the name of the perpetrator be listed on the central registry.").

52. See CHILD WELFARE INFO. GATEWAY, ESTABLISHMENT, AND MAINTENANCE, *supra* note 17, at 2 ("Who has access to information maintained in registries and department records also varies among States. In addition, the length of time the information is held and the condition for expunction vary from State to State.").

53. See, e.g., N.J. STAT. ANN. § 9:6-8:10a(b)(13) (West 2019) (specifying to whom and in what situations records of child abuse reports may be released); NEV. REV. STAT. ANN. § 432.100(3)(b) (2019) (same). Only two states, New York and Pennsylvania, require employers to check the registry prior to hiring employees. See N.Y. SOC. SERV. LAW § 424-a(3) (requiring specified employers to check the registry prior to hiring applicants); 23 PA. STAT. AND CONST. STAT. ANN. § 6344(c)(1) (requiring specified employers to deny applicant employment if he or she is named in the statewide database). Other states simply permit access to the registry.

54. See 23 PA. STAT. AND CONST. STAT. ANN. § 6344(c) (requiring specified employers to deny applicant employment if he or she "is named in the Statewide database as the perpetrator of a founded report committed within the five-year period immediately preceding verification").

55. See N.Y. SOC. SERV. LAW § 424-a(2) (requiring specified employers to maintain a record "of the specific reasons why such person was determined to be appropriate" for the applicable role in question).

Depending on the state statute, child abuse and neglect registries often provide access to a variety of employers, as long as the services the employer provides involve any significant contact with children. Some states maintain a narrow, specific list of child-care employers who have access to the registry.<sup>56</sup> However, many states, like New York, permit broad access to any employer “who provides goods or services who has the potential for regular and substantial contact with children.”<sup>57</sup> In these states, individuals whose names appear in the registry may be precluded from employment in a wide range of industries beyond childcare, including education, healthcare, and transportation.<sup>58</sup>

Employment is not the only aspect of one’s life that can be affected by being listed on a child abuse and neglect registry. In all states, including the District of Columbia, a person on the registry may be disqualified as a kinship foster care or adoptive parent.<sup>59</sup> Child abuse and neglect registry information often is made available to individuals and entities with an interest in a specific report, such as reporting physicians, police, judges, and

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56. See, e.g., IOWA CODE § 235A.15(c) (West 2020) (permitting use of registry for employment screening only at a psychiatric medical institution for children, child foster care facility, licensed child care facility, school professionals working with disabled children, state program providing direct services to children, hospital, early intervention education services, or nursing program).

57. See N.Y. SOC. SERV. LAW § 424-a(1)(b)(i) (outlining inquiries employers who provide such services or goods must make prior to hiring an applicant). See also, e.g., MICH. COMP. LAWS ANN. § 722.627(3) (West 2019) (permitting access to any employer if employment or volunteer work “will include contact with children”); MONT. CODE ANN. § 41-3-205 (3)(o) (2019) (permitting access to any employer who “may have unsupervised contact with children”).

58. See N.Y. SOC. SERV. LAW § 424-a(1)(b)(i) (McKinney 2019) (requiring employers to inquire whether any applicant “who provides goods or services who has the potential for regular and substantial contact with children,” an inherently broad description, is in the registry).

59. See CHILD WELFARE INFO. GATEWAY, BACKGROUND CHECKS FOR PROSPECTIVE FOSTER, ADOPTIVE AND KINSHIP CAREGIVERS 1 (2016), <https://perma.cc/92MQ-4A8G> (PDF) (requiring states, under federal law, to check any child abuse and neglect registry maintained by the State for information on prospective foster or adoptive parents and any adult residing in the home).

court personnel.<sup>60</sup> The existence of a report can negatively impact a parent in custody determinations.<sup>61</sup> It can also prevent parents from volunteering in their children's schools or extracurricular programs.<sup>62</sup>

When conducting investigations, child welfare personnel routinely check a person's prior reports on the registry and use information on the registry about prior investigations to justify additional state scrutiny of the parent.<sup>63</sup> In many states, child protective agencies also are instituting predictive analytics: automated prediction tools that use historical data to "score" children's risk of future harm.<sup>64</sup> Prior substantiated cases or inclusion in registries may act as one of the "inputs" into these models, causing families whose names appear on these registries to have higher "risk scores."<sup>65</sup>

Federal statutory law requires minimal due process procedures for registries for child abuse and neglect.<sup>66</sup> The Child Abuse Prevention and Treatment Act (CAPTA) requires that

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60. See CHILD WELFARE INFO. GATEWAY, DISCLOSURE OF CONFIDENTIAL CHILD ABUSE AND NEGLECT RECORDS 2 (2017), <https://perma.cc/CB8N-UVAZ> (PDF) ("In general, individuals and entities are granted access to a case because they have a direct interest in the case, direct interest in the child's welfare, or have an interest in providing protective or treatment services.").

61. See *infra* Part II.C.

62. See *infra* Part II.C.

63. For example, child protective personnel use prior reports in the registry to decide whether to refer a new report to law enforcement. See, e.g., N.Y. SOC. SERV. LAW § 424-a (requiring child protective personnel to consider contacting local law enforcement if there are two prior reports within six months). Child protective personnel use prior reports in the registry to make assessments about whether a child should be removed from their home. See, e.g., N.Y.C. ADMIN. FOR CHILDREN'S SERVS., SAFETY AND RISK ASSESSMENT RESOURCE GUIDE 8–9 (2013), <https://perma.cc/S9S7-BQ52> (PDF) (instructing caseworkers to assess whether there has been prior abuse or maltreatment).

64. See, e.g., Stephanie K. Glaberson, *Coding Over the Cracks: Predictive Analytics and Child Protection*, 46 FORDHAM URB. L.J. 307, 331–36 (2019) (discussing the use of predictive analytic tools in states' child protective efforts).

65. See, e.g., RHEMA VAITHIANATHAN ET AL., CENTRE FOR SOCIAL DATA ANALYTICS, DEVELOPING PREDICTIVE RISK MODELS TO SUPPORT CHILD MALTREATMENT HOTLINE SCREENING DECISIONS: ALLEGHENY COUNTY METHODOLOGY AND IMPLEMENTATION 38 (2017), <https://perma.cc/JJV4-VRBS> (PDF) (showing that prior referrals are included as variables in both Allegheny county's "placement" and "re-referral" predictive models).

66. See 42 U.S.C. § 5106a (2018) (detailing the provisions and procedures that states must implement for prevention of child abuse or neglect).

state applications for federal grants include assurances that the state has an enforced law that includes procedures for reporting, responding to, and maintaining records of alleged child abuse and neglect.<sup>67</sup> CAPTA also requires a procedure for removing or expunging records that are “unsubstantiated or false,” but it allows even such false records to be retained by and available to child protective agencies.<sup>68</sup>

### *B. Procedural Due Process and the Stigma-Plus Test*

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that certain steps must be taken before the state can deprive a person of rights accorded to them by the state.<sup>69</sup> A state cannot deprive a person of a liberty or property interest without providing an appropriate opportunity for review.<sup>70</sup> When a plaintiff claims that a state has violated the Due Process Clause, she first must demonstrate that she has a liberty or property interest with which the state has interfered.<sup>71</sup> Only then does a court proceed with an analysis of whether the state provided due process.<sup>72</sup> When considering

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67. *See id.* § 5106a(b)(2)(B) (requiring numerous assurances for states to receive grants for their child protection programs).

68. *See id.* § 5106a(b)(2)(B)(xii) (requiring state protocols “that facilitate the prompt expungement of any records that are accessible to the general public or are used for purposes of employment or other background checks in cases determined to be unsubstantiated or false,” although state child protective services may keep the information on file). Another provision of CAPTA requires that the Secretary of Health and Human Services maintain a clearinghouse of data and information regarding child abuse and neglect. *See id.* § 5104 (establishing a national clearinghouse “for information relating to child abuse and neglect”). That clearinghouse, the Child Welfare Information Gateway, provides little to no guidance on state child abuse and neglect registries. *See generally Child Welfare Info. Gateway*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <https://perma.cc/M4W8-U9KA> (last visited Jan. 4, 2019) (providing information on child welfare topics) (on file with the Washington and Lee Law Review).

69. *See* U.S. CONST. amend. XIV, § 1 (requiring states to afford individuals due process before depriving them of a property or liberty interest).

70. *See id.* (requiring an opportunity for review prior to deprivation of a property or liberty interest).

71. *See Humphries v. Cty. of L.A.*, 554 F.3d 1170, 1184–85 (9th Cir. 2009) (stating that the litigant must show “the conduct violated a right secured by the Constitution and laws of the United States”).

72. *See id.* (stating that deprivation of a liberty or property interest is a threshold a litigant must overcome to have a due process claim).

the constitutional sufficiency of the procedures states provide for individuals listed in child maltreatment registries, we therefore first must consider what liberty or property interests are at stake, and how they may be infringed by a person's inclusion in such a registry.<sup>73</sup>

The United States Supreme Court's decision in *Paul v. Davis* set out the dominant paradigm courts use to conceptualize the rights infringement wrought by registry inclusion: the "stigma-plus" test.<sup>74</sup> In *Paul*, the plaintiff brought a § 1983 action after police distributed a flyer to local merchants purporting to contain information on "active shoplifters," which included the plaintiff's name and photograph.<sup>75</sup> The plaintiff's employer discovered his inclusion in the flyer, and although Paul was not fired, he was instructed that "he 'had best not find himself in a similar situation' in the future."<sup>76</sup> The Court determined that "the procedural guarantees of the *Fourteenth Amendment* apply" only when, "as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished."<sup>77</sup> The Court conceived of the rights deprivation caused by being listed on a registry as a reputational injury.<sup>78</sup> Though the Supreme Court previously had implied that a person's liberty interests could be

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73. Compare *Cutshall v. Sundquist*, 193 F.3d 466, 479 (6th Cir. 1999) (determining "[a] charge that merely makes plaintiff less attractive to other employers but leaves open a definite range of opportunity does not constitute a liberty deprivation"), with *Valmonte v. Bane*, 18 F.3d 992, 1002 (2d Cir. 1994) (determining a plaintiff's liberty interests were disrupted by the state when placement on a child abuse and neglect registry impacted her private employment opportunities).

74. See *Paul v. Davis*, 424 U.S. 693, 701–13 (1976) (discussing, in detail, how harm to an individual's reputation and arising stigma, alone, is insufficient to constitute deprivation of a liberty or property interest).

75. See *id.* at 695 (describing the flyer the police distributed, which displayed the plaintiff's name and photograph and depicted him as a shoplifter).

76. *Id.* at 696.

77. *Id.* at 711 (emphasis in original).

78. See *id.* ("But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the 'liberty' or 'property' recognized . . .").

implicated when her reputation was at stake,<sup>79</sup> in *Paul*, the Court made clear that an individual's "interest in reputation alone [] is quite different from the 'liberty' or 'property' recognized [in the Fourteenth Amendment]." <sup>80</sup> For this reason, the *Paul* Court found that an allegation of pure reputational injury—without more—does not state a claim under § 1983.<sup>81</sup> This holding has become known as the "stigma-plus" test. Following *Paul*, courts engage in the process of determining if the claimed reputational injury—the stigma—is accompanied by a denial of a "more tangible" interest—the "plus"—when analyzing claims that implicate one's reputation rather than another clear liberty or property interest recognized under state law.<sup>82</sup>

Child abuse and neglect registries have been the subject of due process litigation in several federal courts, though there have not been a great number of cases.<sup>83</sup> When plaintiffs have brought claims that a state actor violated their due process rights by placing them on a child abuse and neglect registry, federal courts have used the "stigma-plus" test to determine if the alleged harm to reputation rises to a level that implicates the Fourteenth Amendment's due process clause.<sup>84</sup>

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79. See *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.").

80. *Paul*, 424 U.S. at 711.

81. See *id.* at 711–12 (finding reputational injury alone to be insufficient to state a due process claim).

82. See *Humphries v. Cty. of L.A.*, 554 F.3d 1170, 1185 (9th Cir. 2009) (citing *Paul*, 424 U.S. at 711) ("The Supreme Court clarified that procedural due process protections apply to reputational harm only when a plaintiff suffers stigma from governmental actions plus alteration or extinguishment of 'a right or status previously recognized by state law.'").

83. One commentator has speculated that the lack of cases in this area is due to lack of funds for representation on the part of many potential litigants. 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) ("It has been my experience that many of the litigants are not sufficiently funded to retain counsel. For these reasons, these cases do not ordinarily find their way to the appellate courts.").

84. See, e.g., *Humphries*, 554 F.3d at 1185 (citing *Hart v. Parks*, 450 F.3d 1059, 1070 (9th Cir. 2006)) (applying the "stigma-plus test").

When the plaintiff's inclusion on the registry has had consequences for his or her employment, federal appellate courts, including the Second, Seventh, and Ninth Circuits, have found those plaintiffs to have demonstrated harm to a liberty interest and that the Due Process Clause was implicated.<sup>85</sup> For example, *Humphries v. County of Los Angeles*<sup>86</sup> involved a challenge brought to a California registry in which the state law and county practice failed to provide any mechanism to allow listed individuals to challenge the placement of their name on the registry.<sup>87</sup> The plaintiffs were parents accused of abuse who were determined to be factually innocent by a court, but could not cause their names to be removed from the child abuse and neglect registry.<sup>88</sup> The court found that the plaintiffs' claims met the "stigma-plus" standard because placement on the state registry altered their rights due to the impact on employment opportunities.<sup>89</sup>

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85. See, e.g., *Valmonte v. Bane*, 18 F.3d 992, 1002 (2d Cir. 1994) (holding that defamation in conjunction with a statutory impediment to employment constitutes deprivation of a liberty interest); *Dupuy v. Samuels*, 397 F.3d 493, 503 (7th Cir. 2005) (stating that findings of abuse or neglect against a child care worker which effectively bar that person from future employment in the child care field "squarely implicate a protected liberty interest"); *Humphries*, 554 F.3d at 1185 (identifying being listed on California's Child Abuse Central Index (CACI) as a deprivation of a liberty interest that implicates due process).

86. 554 F.3d 1170 (9th Cir. 2009).

87. See *id.* at 1182 (describing the *Humphries*' discovery that there was no available procedure to challenge the CACI listing).

88. See *id.* at 1175 (offering factual history of the *Humphries*' case).

89. See *id.* at 1188 (internal citations omitted)

The *Humphries* allege more than mere reputational harm—being listed on the CACI alters their rights in two general ways. First, state statutes mandate that licensing agencies search the CACI and conduct an additional investigation prior to granting a number of rights and benefits. These rights include gaining approval to care for children in a day care center or home, obtaining a license or employment in child care, volunteering in a crisis nursery, receiving placement or custody of a relative's child, or qualifying as a resource family. These benefits are explicitly conditioned on the agency checking the CACI and conducting an additional investigation. Second, information in the CACI is specifically made available to other identified agencies: state contracted licensing agencies overseeing employment positions dealing with children; persons making pre-employment investigations for "peace officers, child care licensing or employment, adoption, or child placement;"

In *Valmonte v. Bane*,<sup>90</sup> the Second Circuit evaluated the case of a plaintiff whose employment opportunities were impacted by being on the New York State child abuse and neglect registry.<sup>91</sup> At that time in New York, an individual had a right to ask for expungement of the record and a hearing at which the state had to “prove to the commissioner the allegations against the subject by some credible evidence, and then prove that the allegations are reasonably related to employment in the child care field.”<sup>92</sup> The Second Circuit found, as the Ninth Circuit later did in *Humphries*, that the requirement that some employers check the registry met the “stigma-plus” standard.<sup>93</sup> The court stated, “[i]n other words, by *operation of law*, her potential employers will be informed specifically about her inclusion on the Central Register and will therefore choose not to hire her. Moreover, if they do wish to hire her, those employers are required by law to explain the reasons why in writing.”<sup>94</sup> The Seventh Circuit came to an almost identical conclusion in *Dupuy v. Samuels*.<sup>95</sup>

Not all courts have found potential impacts on employment opportunities to be adequate to implicate a liberty interest

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individuals in the Court Appointed Special Advocate program conducting background investigations for potential Court Appointed Special Advocates, and out-of-state agencies making foster care or adoptive decisions.

90. 18 F.3d 992 (2d Cir. 1994).

91. *Id.* at 994.

92. *Id.* at 996 (internal citations omitted).

93. *See id.* at 1001 (citing *Paul v. Davis*, 424 U.S. 693 (1976)).

When the Supreme Court stated in *Paul v. Davis* that injury to reputation was not by itself a deprivation of a liberty interest, we presume that the Court included the normal repercussions of a poor reputation within that characterization. . . . Valmonte is not going to be refused employment because of her reputation; she will be refused employment simply because her inclusion on the list results in an added burden on employers who will therefore be reluctant to hire her.

94. *Id.* at 1001 (emphasis in original).

95. *See Dupuy v. Samuels*, 397 F.3d 493, 503 (7th Cir. 2005) (“The district court concluded that child care workers effectively are barred from future employment in the child care field once an indicated finding of child abuse or neglect against them is disclosed to . . . licensing agencies and present or prospective employers. Such circumstances squarely implicate a protected liberty interest.”).

requiring the provision of due process.<sup>96</sup> Some courts, including Fourth and Eleventh Circuit appellate courts, have dismissed claims for lack of a specific, concrete injury to the plaintiff's liberty interests.<sup>97</sup> In *Hodge v. Jones*,<sup>98</sup> the Fourth Circuit dismissed a claim, specifically noting that the plaintiffs did not demonstrate any direct impact on their family life or on their employment as a result of their investigation.<sup>99</sup> Notably, in *Hodge*, the plaintiffs were not placed on a registry—they sought to have the investigative report itself expunged.<sup>100</sup> The Eleventh Circuit also found in *Smith v. Siegelman*<sup>101</sup> that the plaintiff-registrant had not demonstrated that state action had implicated a liberty interest sufficient to meet the stigma-plus standard,<sup>102</sup> going so far as to say that “the deleterious effects that flow directly from a sullied reputation, such as the adverse impact on job prospects, are normally insufficient [to demonstrate a protected liberty interest].”<sup>103</sup>

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96. See, e.g., *Glasford v. New York Dep't Soc. Servs.*, 787 F. Supp. 384, 388 (S.D.N.Y. 1992) (stating that the plaintiff did not allege a harm to his employment prospects from being placed on a child abuse and neglect registry). The court ruled that he did not demonstrate a harm to his liberty or property interests. *Id.* at 387–89.

97. See, e.g., *Hodge v. Jones*, 31 F.3d 157, 165 (4th Cir. 1994) (identifying only a conclusory allegation of a reputational injury and no accompanying deprivation of a *tangible* interest); *Smith v. Siegelman* 322 F.3d 1290, 1297 (11th Cir. 2003) (“We agree that Smith’s employment and custody rights in the future could be affected adversely due to the information on the Registry, but the district court’s conjecture overlooks *Paul’s* insistence that reputational damage alone is insufficient to constitute a protected liberty interest.”).

98. 31 F.3d 157 (4th Cir. 1994).

99. *Id.* at 164–65.

100. See *id.* at 162 (identifying the basis of the Hodges’ action); see also *Howard v. Malac*, 270 F. Supp. 2d 132, 141–42 (D. Mass. 2003) (noting that plaintiffs *were* placed on a child abuse and neglect registry). The court cited *Hodge* and *Glasford* to find that the plaintiffs had not met the stigma-plus standard because they had not demonstrated an injury beyond that to their reputation. *Id.*

101. 322 F.3d 1290 (11th Cir. 2003).

102. See *id.* at 1297–98 (“The complaint does not at any point allege that Smith was denied any right or status other than his not being branded a child sexual abuser.”).

103. *Id.* (citing *Seigert v. Gilley*, 500 U.S. 226 (1991)).

*C. Parenting as a Right*

As described above, in order for a court to reach the merits of a due process claim, a plaintiff must demonstrate that the state has interfered with a protected interest. That qualifying injury must be to a right given by the state, including fundamental rights recognized by the Constitution.<sup>104</sup> The Supreme Court required in *Paul v. Davis* that a plaintiff must demonstrate more than “merely” an injury to his or her reputation, and courts have tended to focus on that standard as they have evaluated whether a plaintiff demonstrated an injury to a protected interest in the context of child abuse and neglect registries.<sup>105</sup> We contend that since parenting has been recognized by the Supreme Court to be a fundamental right that states must protect, and child abuse and neglect registries significantly alter that right, all parents listed on these registries should be entitled to the protections of the Due Process Clause of the Fourteenth Amendment. Especially as the use of historical data to guide agency action multiplies in the form of predictive analytics, this argument takes on considerable force.<sup>106</sup>

Privacy interests, long recognized by the Supreme Court as fundamental liberty interests, though not specifically enumerated in the Constitution,<sup>107</sup> take two forms: “interest in avoiding disclosure of personal matters [and] interest in independence in making certain kinds of important decisions.”<sup>108</sup> Here, we focus on the latter—“interest of independence in making certain kinds of important decisions.”<sup>109</sup>

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104. See, e.g., *Paul v. Davis*, 424 U.S. 693, 711–14 (1976) (discussing the scope of rights protected by the due process clause of the Fourteenth Amendment).

105. See *supra* Part II.B.

106. See Glaberson, *supra* note 64, at 310 (discussing increased use of predictive analytics).

107. See *Griswold v. Connecticut*, 381 U.S. 479, 486–87 (1965) (Goldberg, J., concurring) (identifying a right of privacy that is “older than the Bill of Rights”).

108. *Whalen v. Roe*, 429 U.S. 589, 598 (1977).

109. *Id.*

In *Pierce v. Society of Sisters*,<sup>110</sup> the Supreme Court established the principle that parents have a constitutional right to direct the upbringing and education of their children absent a compelling state reason to the contrary.<sup>111</sup> Later cases clarified and elaborated on that principle. In *Roberts v. United States Jaycees*,<sup>112</sup> the Court said, “[c]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.”<sup>113</sup> In a substantive due process analysis in *Moore v. City of East Cleveland*,<sup>114</sup> the Supreme Court made very clear that the liberty rights of a family were significant enough to require a state to fully justify any infringement on those rights.<sup>115</sup> The Court cited *Cleveland Board of Education v. LaFleur*<sup>116</sup> to say, “[t]his Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”<sup>117</sup> The

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110. 268 U.S. 510 (1925).

111. *See id.* at 534–35

[W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

112. 468 U.S. 609 (1984).

113. *Id.* at 617–18.

114. 431 U.S. 494 (1977).

115. *See id.* at 499 (“[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.”).

116. 414 U.S. 632 (1974).

117. *Moore*, 431 U.S. at 499 (quoting *LaFleur*, 414 U.S. at 639–40).

Court specifically noted that the right of extended families' members to reside with each other was significant.<sup>118</sup>

The Supreme Court has, in *Smith v. Organization of Foster Families for Equality & Reform*,<sup>119</sup> noted that familial liberty interests are rooted in “intrinsic human rights,” and are not limited in the way that liberty interests derived from state law might be limited by state law.<sup>120</sup> Evaluating due process rights under the Fourteenth Amendment, the Court cites a long history of cases highlighting the importance of the liberty interests in marriage and family, including *Wisconsin v. Yoder*<sup>121</sup> and *Griswold v. Connecticut*,<sup>122</sup> concluding that “natural” family relationships must be accorded greater protection than rights derived from contractual relationships with the state.<sup>123</sup>

There are, of course, limitations on liberty rights in parenting and family life. As noted by the First Circuit, “The right to family integrity clearly does not include a constitutional right to be free from child abuse investigations.”<sup>124</sup> Those limitations, however, are accompanied by an emphasis on the importance of procedural due process. This is illustrated in, for example, *Santosky v. Kramer*,<sup>125</sup> in which the Supreme Court held that an entity or person petitioning for termination of parental rights must prove the case by “clear and convincing”

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118. See *id.* at 504 (“The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.”).

119. 431 U.S. 816 (1977).

120. *Id.* at 845.

121. 406 U.S. 205 (1972).

122. 381 U.S. 479 (1965).

123. *Smith*, 431 U.S. at 846–47

It is quite another [matter] to say that one may acquire [a liberty] interest in the face of another’s constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right—an interest the foster parent has recognized by contract from the outset. Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents.

124. *Watterson v. Page*, 987 F.2d 1, 8 (1st Cir. 1993).

125. 455 U.S. 745 (1982).

evidence, which is a higher standard than the “preponderance of the evidence” standard that applies in most civil cases.<sup>126</sup>

It is not necessary for the state to completely extinguish a right in order for a court to find infringement. For example, in *Humphries*, the plaintiffs did not show they had been completely barred from employment—they demonstrated that their employment and volunteering would become more difficult because of their inclusion on the registry.<sup>127</sup>

The harm caused by inclusion in registries, regardless of employment consequences, is omnipresent. Parents who are placed on child abuse and neglect registries face a significant increase in scrutiny from child welfare workers. Placement on a child abuse and neglect registry also impacts custody decisions. Such placement can also impede parents’ ability to volunteer in the activities in which their children participate, as well as affect an individual’s ability to act as a foster parent.<sup>128</sup>

With the advent of predictive analytics in child welfare, the ways in which registry placement might impact a government agency’s approach to a parent or family has become more

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126. See *id.* at 769 (considering precedent for the applicable burden of proof).

127. See *Humphries v. Cty. of L.A.*, 554 F.3d 1170, 1186–87 (9th Cir. 2009)

We recognize that being listed on the CACI may not fully extinguish the Humphries’ rights or status. Agencies that obtain information from the CACI are responsible for “drawing independent conclusions regarding the quality of the evidence disclosed.” . . . However, we need not find that an agency will necessarily deny the Humphries a license to satisfy the “plus” test. Outright denial would mean that a listing on the CACI has extinguished the Humphries’ legal right or status. Rather, *Paul* provides that stigma-plus applies when a right or status is “altered or extinguished.”

(internal citations omitted). In other contexts, courts have said that a right must be completely extinguished. Compare *Latif v. Holder*, 969 F. Supp. 2d 1293 (D. Or. 2013) (finding a liberty interest in the right to fly), with *Beydoun v. Sessions*, 871 F.3d 459 (6th Cir. 2017) (stating that the liberty interest found in *Latif v. Holder* did not apply when the plaintiff was not completely banned from flying).

128. The impact of registry placement on individual’s ability to serve as foster and kinship care placements is significant and merits its own discussion. It is, however, beyond the scope of the argument of this Article. See generally Courtney Lewis, *Placing Children with Relatives: The Case for a Clear Rationale for Separate Foster Care Licensing Standards, Background Check Procedures, and Improved Relative Placement Statutes in Alaska*, 34 ALASKA L. REV. 161 (2017).

pervasive and more pernicious.<sup>129</sup> Once, a child welfare worker might have received information showing that the family previously had been referred to the agency, or that the parent's name was listed on the statewide registry, and develop an opinion of the family as a result. Now that information is being fed into statistical, predictive models that spit out purported "risk scores" that may severely—yet opaquely—impact the course of a family's interaction with the agency.

The fact that registry information may be included as an input into these tools raises the stakes for ensuring that information included in state registries is as accurate, fair, and relevant as possible.<sup>130</sup> Where reports remain on state registries despite inaccuracies, or as a result of mere procedural barriers, they infect these tools—and the decisions that agencies make in reliance on their results—with further error and unfairness.

Placement on a child abuse and neglect registry impacts a parent's ability to participate in her children's lives. Placement on a registry can prevent parents from coaching their children's sports teams.<sup>131</sup> It can also prevent parents from volunteering in their children's schools.<sup>132</sup> In Washington, Heather Cantamessa found that her placement on the registry prevented her from volunteering in the classroom or on field trips, and volunteering was a requirement of the special public-school program in which she had enrolled her children.<sup>133</sup> A school in

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129. See Glaberson, *supra* note 64, at 310 (discussing the risks of human error ingrained in predictive analytics).

130. See *id.* ("Unless careful attention is paid to the assumptions, biases and realities of our child welfare system at this critical juncture, algorithmic decision-making risks perpetuating and magnifying existing problems.").

131. See Email from David Lansner, Partner, Lansner & Kubitschek, to author (July 17, 2019, 5:30 PM EST) (describing a client who could not coach his daughter's baseball team because of a report) (on file with author); Email from Diane Redleaf, Exec. Dir., Family Def. Ctr., to author (July 18, 2019, 10:24 AM EST) (reflecting on cases involving parents who served as volunteer coaches) (on file with author).

132. See Email from Bonnie Saltzman, Law Offices of Bonnie E. Saltzman, LLC, to author (July 18, 2019, 7:12 PM EST) (describing an experience with one client prohibited from volunteering at his child's school) (on file with author); Telephone Interview with Diane Redleaf, Exec. Dir., Family Def. Ctr. (Dec. 14, 2018).

133. Email from Heather Cantamessa, Parent Support Social Servs. Worker, to author (July 18, 2019, 12:22 AM EST) (on file with author).

Illinois banned a parent from entering her child's school because she had been briefly placed on the registry before a successful appeal.<sup>134</sup> Even when parents have not been officially rejected from volunteering, the fear that their placement on the registry might be discovered by people they know can be overwhelming and prevent them from participating.<sup>135</sup>

Placement on the registry can also have significant impacts for parents who are in court for custody determinations. An attorney in Arizona described opposing parents using the registry "as a cudgel in custody battles."<sup>136</sup> Carolyn Kubitschek, an attorney in New York, says that clients she represents in child custody cases are sometimes surprised to find that they are listed in New York's child abuse and neglect registry.<sup>137</sup> When that happens, the client may be able to contest the finding and placement on the registry.<sup>138</sup> However, the process of clearing one's name can take six months or more, and the custody case will not be stayed while the parent seeks to clear his or her name.<sup>139</sup> Since a parent who is listed on the registry

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Ambrosia Eberhardt had a similar experience. *See* Email from Ambrosia Eberhardt, Program Manager, Parents for Parents, to author (July 23, 2019, 7:07 AM EST) (on file with author). The state of Washington explicitly forbids people who are listed on the state child abuse and neglect registry from volunteering in schools. *See* WASH. REV. CODE § 28A.400.303 (2020) (requiring a record check through the Washington state patrol criminal identification system and the FBI before hire); *see also* Email from Amelia S. Watson, Parents Representation Managing Attorney, Wash. State Office of Pub. Def., to Stephanie Glaberson, Staff Attorney, Civil Litig. Clinic, Georgetown Univ. School of Law (Mar. 12, 2019, 07:50 PM EST) (discussing Washington's permanent bar from volunteering at a child's school) (on file with author).

134. Telephone Interview with Diane Redleaf, Exec. Dir., Family Def. Ctr. (Dec. 14, 2018).

135. *See* Hope Lyzette Newton, *Branded*, RETHINKING FOSTER CARE (July 5, 2019), <https://perma.cc/9NDM-FWVX> (last visited Jan. 10, 2020) (describing ways in which the author feared participating in her family's activities and lives because of her inclusion on New York's State Central Registry, a status she later successfully appealed) (on file with the Washington and Lee Law Review).

136. Mary Jo Pitzl, *DCS Lists People It Says Are a Danger to Kids. Even When They're Not*, AZCENTRAL (Apr. 29, 2018), <https://perma.cc/6M52-LZF6> (last visited Jan. 10, 2020) (on file with the Washington and Lee Law Review).

137. Telephone Interview with Carolyn A. Kubitschek, Partner, Lansner & Kubitschek (Dec. 21, 2018).

138. *Id.*

139. *Id.*

is at a serious disadvantage in a custody case, placement on the registry can have serious long-term impacts on their custody and visitation rights.<sup>140</sup> Even if the parent eventually succeeds in clearing his or her name, the negative custody or visitation order may already have been issued.<sup>141</sup>

### *III. Achieving Procedural Due Process*

If a plaintiff convinces a court that she has a protected liberty interest that has been significantly altered by the state, thus meeting the stigma-plus standard, the court goes on to evaluate the due process claim on the merits.<sup>142</sup> In the child abuse and neglect registry cases that have gotten to this point in federal appellate courts, the courts have found several states' procedures constitutionally insufficient.<sup>143</sup> In *Valmonte v. Bane*, for example, the Second Circuit found that the "staggering figure" of roughly 2,000,000 individuals listed on New York's Central Register, combined with statistics showing that approximately seventy-five percent of those who were able to challenge their inclusion in the registry were successful, showed that there was an "unacceptably high risk of error."<sup>144</sup> The court attributed this risk of error to the low standard of proof required before a person's name was listed, stating that "[t]he crux of the problem with the procedures is that the 'some credible evidence' standard results in many individuals being placed on the list who do not belong there."<sup>145</sup> Similarly, the Ninth Circuit found in *Humphries* that the risk of erroneous deprivation under California's scheme was "perhaps the most important" factor to consider, and that California's procedures resulted in it being

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140. *Id.*

141. *Id.*

142. *See* *Paul v. Davis*, 424 U.S. 693, 712 (1976) (framing the existence of a liberty interest as the threshold issue in a due process violation claim).

143. *See* *Humphries v. Cty. of L.A.*, 554 F.3d 1170, 1176 (9th Cir. 2009) (holding that California's maintenance of the CACI violates the Due Process Clause of the Fourteenth Amendment); *Dupuy v. Samuels*, 397 F.3d 493, 508–09 (7th Cir. 2005) (ratifying the district court's proposed remedy, which added more steps to the pre- and post-deprivation processes); *Valmonte v. Bane*, 18 F.3d 992, 1004 (2d Cir. 1994) (holding that the procedural protections established by New York are unsatisfactory).

144. *Valmonte*, 18 F.3d at 1004.

145. *Id.*

“quite likely” that a person would end up “erroneously listed.”<sup>146</sup> As a result, the Court held that the “lack of any meaningful, guaranteed procedural safeguards before the initial placement” on the registry, “combined with the lack of any effective process for removal from” the registry constituted a due process violation.<sup>147</sup> The respondent states made changes in their practices in response to those court decisions,<sup>148</sup> but more changes are required to ensure that all state processes and procedures fully comply with the Due Process Clause.

In this Part, we will lay out due process standards and considerations in the child welfare context. We will then use case law and findings from comparing the laws, practices, and outcomes in states across the country to suggest best practices to maximize due process under *Mathews v. Eldridge*.

### A. Balancing Act

#### 1. The Mathews v. Eldridge Standard

Once a right to a due process analysis has been identified, courts evaluate the claim by using the balancing test laid out in *Mathews v. Eldridge*. Under *Mathews v. Eldridge*, a due process analysis requires a court to consider three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>149</sup>

#### 2. Weighing Abuse and Neglect Registries’ Processes

There are high stakes in child welfare actions and listing individuals in child abuse and neglect registries is no exception.

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146. *Humphries*, 554 F.3d at 1194.

147. *Id.* at 1200.

148. See, e.g., A.B. 717, 2011 State Assemb., Reg. Sess. (Cal. 2011) (codified at CAL. PENAL CODE §§ 11165.12, 11169, 11170 (Deering 2019)) (applying provisions of the code only to abuse reports that are *substantiated*). Prior to the bill’s enactment, the standard was any report “not unfounded.” *Id.*

149. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

Jill D. Moore lays out some of these considerations when she says:

When a state chooses to place an individual's name on a child maltreatment central registry, it is taking an action that potentially could affect that individual's family life, his employment prospects, or even his reputation in the community, if registry information becomes known to the public. That same action, however, may further any one of three interests that the state may have, including: (1) an interest in maintaining data that could help it to identify children who are being abused or neglected over an extended period of time; (2) an interest in maintaining data about child maltreatment in the state generally, for the purposes of research, policy-making, or funding decisions; or (3) an interest in establishing a database of individuals who, because of their history of maltreating children, should not be provided opportunities—employment or otherwise—to obtain unsupervised access to children.<sup>150</sup>

Some courts and scholars have concluded that little needs to change,<sup>151</sup> but advocates vehemently disagree, and the large degree of difference in procedures across state lines speaks to the fact that there is no consensus on what procedures would best serve due process.<sup>152</sup>

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150. Moore, *supra* note 24, at 2111–12 (internal citations omitted).

151. See, e.g., *Bohn v. Cty. of Dakota*, 772 F.2d 1433, 1438–39 (8th Cir. 1985)

[T]he ex post procedures for review are fully adequate to test the veracity of the County Department's finding in that these procedures substantially incorporate truth-testing measures long approved by our legal system. . . . In addition, we believe that the interjection of fuller procedural protections at an earlier state in the process would be unduly time-consuming and cumbersome, and might well reduce important protections which the state legislature designed for otherwise vulnerable children.

See also Sherman, *supra* note 33, at 894 (“[U]nder the current decisions, the Federal Due Process Clause can only be relied upon to require a preponderance of the evidence standard in abuse registry cases . . .”).

152. See generally CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH AND HUM. SERVS., ESTABLISHMENT AND MAINTENANCE OF CENTRAL REGISTRIES FOR CHILD ABUSE REPORTS: STATE STATUTES (2018), <https://perma.cc/S76Q-PCJ3> (PDF).

*a. Private Interests*

Placement on a child abuse and neglect registry can have significant impacts on individuals. As laid out above, being placed on a child abuse and neglect registry can increase the intensity of any future interactions with the child welfare system, impede involvement in children's activities and schooling, and impact child custody and visitation orders.

Beyond the implications for parenting, inclusion on child abuse and neglect registries can have serious employment consequences. Many states make registrants' names available to organizations whose employees may have any potential contact with children, even in a limited capacity.<sup>153</sup> For example, a public records request revealed that the New York Statewide Central Registry provides access to over 5,000 employers in a wide range of industries beyond traditional childcare, including home-health aid agencies and transportation services.<sup>154</sup> This impacts not just teachers and daycare workers, but also people who work in any capacity in large agencies, such as hospitals and police departments.<sup>155</sup> Employers are extremely reluctant

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153. See, e.g., MONT. CODE ANN. § 41-3-205 (3)(o) (2019) (permitting access to any employer whose employees "may have unsupervised contact with children through employment"); N.Y. SOC. SERV. LAW § 424-a (McKinney 2019) (permitting access to organizations with "the potential for regular and substantial contact with children"); ARK. CODE ANN. § 12-18-506 (West 2019) (permitting access to employers "engaged in child-related activities"); GA. CODE ANN. § 49-5-185 (West 2019) (permitting access to employers whose employees "interact with children or are responsible for providing care for children"); NEV. REV. STAT. § 432.100 (2019) (permitting access to organizations whose employees "could, in the course of his or her employment, have regular and substantial contact with children"); WYO. STAT. ANN. § 14-3-214 (West 2019) (permitting access to organizations whose employees "may have unsupervised access to children in course of their employment").

154. See NEW YORK OFFICE OF CHILDREN AND FAMILY SERVICES, LIST OF ENTITIES AUTHORIZED TO SUBMIT CLEARANCES TO OCFS' STATEWIDE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT, OCFS FOIL #18-101 (2018) (on file with author).

155. See, e.g., ABIGAIL KRAMER, THE NEW SCHOOL CENTER FOR NEW YORK CITY AFFAIRS, BANNED FOR 28 YEARS: HOW CHILD WELFARE ACCUSATIONS KEEP WOMEN OUT OF THE WORKFORCE 5 (2019), <https://perma.cc/82Y4-58M7> (PDF) (providing an anecdote from a healthcare worker who was placed on New York's registry); Email from Amelia Watson, Parents Representation Managing Attorney, Washington State Office of Public Defense, to author (July 23, 2019, 2:17 PM EST) (on file with author) (stating that being listed on

to hire individuals who are on the registry, more so, some say, than individuals with a minor criminal history.<sup>156</sup> In many jurisdictions, parents can lose jobs even when a court has dismissed their child abuse or neglect case because, in most states, the registry is not coordinated with family court decisions.<sup>157</sup>

The right to greater family association is also impacted by inclusion on child abuse and neglect registries.<sup>158</sup> Individuals on registries are precluded from serving as foster parents and very often are not approved to provide kinship care to their own family members.<sup>159</sup> CAPTA requires that foster care agencies conduct a criminal record check and a check of the child abuse and neglect registry for all prospective foster and adoptive parents.<sup>160</sup> Though it does not require a criminal record check for all residents of a prospective adoptive household, CAPTA does require that *all* adult residents in a prospective foster or kinship home be checked for inclusion in the child abuse or neglect registry in order to qualify for federal kinship care funding.<sup>161</sup>

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the registry in the state of Washington prevents employment in many health care fields, among other obstacles).

156. See KRAMER, *supra* note 155, at 4 (noting the recently enacted laws which make it illegal for employers to ask about an applicant's criminal history).

157. See *infra* Part III.B.4.c; see also Nikita Stewart, *The Child Abuse Charge Was Dismissed. But It Can Still Cost You a Job.*, N.Y. TIMES (Feb. 25, 2019), <https://perma.cc/3QRK-25MV> (last visited Dec. 27, 2019) (“[M]any state databases keep names on the lists even after people are cleared of allegations.”) (on file with the Washington and Lee Law Review).

158. See CHILD WELFARE INFO. GATEWAY, ESTABLISHMENT, AND MAINTENANCE, *supra* note 17, at 1–4 (listing the bases upon which a state may deny a prospective foster parent, adoptive parent, or kinship giver).

159. See *id.* at 3–4 (providing that all states “require checks of the [state’s] child abuse and neglect registries” as part of the review process and the applicant’s name on a child abuse registry is a basis for disqualification in all states).

160. See Howard Davidson, *The CAPTA Reauthorization Act of 2010: What Advocates Should Know*, 29 CHILD. L. PRAC. 177, 182 (2011) (explaining the CAPTA background check requirements).

161. See *id.* at 182 (noting the background check requirements for the applicants *and* those living in the residence).

*b. Risk of Erroneous Deprivation*

As will be discussed below, low evidentiary standards, imprecise requirements for placement on child abuse and neglect registries, limited time frames for challenging hearing placement, problems with notice, and challenges for pro se parents at hearings create a high risk for erroneous deprivation of rights. Currently, a very high number of individuals who seek removal of their report from the registry are ultimately successful at overturning their report.<sup>162</sup> State courts have found “a disturbingly high” reversal rate, even as high as seventy-five percent.<sup>163</sup> Recent data collected from state agencies suggests that appellants continue to have an over fifty percent reversal rate.<sup>164</sup> This high error rate is still woefully incomplete because many people face barriers to requesting an appeal in the first place. For example, for the estimated 50,000 people added to the registry in 2017 in New York, the State received fewer than 9,300 requests for removal.<sup>165</sup> From the existing data and the barriers to litigation, it is clear that a high risk of erroneous deprivation exists across jurisdictions today.<sup>166</sup>

*c. State Interests*

As the Supreme Court noted in the context of termination of parental rights proceedings in *Santosky v. Kramer*, “[t]wo state interests are at stake” when dealing with state interference in parental rights: “[A] *parens patriae* interest in

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162. See *Lee TT v. Dowling*, 664 N.E.2d 1243, 1252 (N.Y. 1996) (stating that the margin of error in adding an individual to the registry is “unquestionably significant”).

163. *Id.*; see also *Jamison v. Dep’t of Soc. Servs.*, 218 S.W.3d 399, 409 (Mo. 2007) (citing to evidence that Missouri’s Child Abuse and Neglect Review Board reverses the local agency’s “probable cause determination[s] somewhere in the vicinity of 35–40% of the time”).

164. NEW YORK OFFICE OF CHILDREN AND FAMILY SERVICES, RESPONSE TO FREEDOM OF INFORMATION LAW REQUEST REGARDING OCFS’ STATEWIDE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT, OCFS FOIL #18-101 (2018) (on file with author); GA. DIVISION OF FAMILY AND CHILDREN SERVICES, OPEN RECORD REQUEST REGARDING GEORGIA CHILD PROTECTIVE SERVICES INFORMATION SYSTEM (2018) (on file with author).

165. *KRAMER*, *supra* note 155, at 6.

166. See *id.* at 5–6 (explaining the numerous barriers that individuals face in seeking to remove their report from the registry).

preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings.”<sup>167</sup> These interests are at times conflicting and at times convergent.<sup>168</sup>

Similar conditions are present in the state’s adjudication of public benefits issues.<sup>169</sup> In *Goldberg v. Kelly*,<sup>170</sup> the Supreme Court observed that the state has an interest in avoiding erroneous denials of public assistance.<sup>171</sup> Noting that, “[f]rom its founding, the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders,” the *Goldberg* Court found that ensuring uninterrupted public assistance until such time as an adjudication that comports with due process can occur serves the state’s interest.<sup>172</sup> The Court found that the state’s interest in allowing the poor to participate meaningfully in community life protects against societal malaise, and that this interest, coupled with a strong private interest, “clearly outweigh[ed]” the state’s competing fiscal concern.<sup>173</sup>

Ultimately, state interests are served by ensuring the most accurate results in its adjudications of listings on child abuse and neglect registries because of the state’s “urgent interest in the welfare of the child.”<sup>174</sup>

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167. *Id.* at 766.

168. *See id.* at 766–67 (discussing the interplay between the two interests).

169. *See Goldberg v. Kelly*, 397 U.S. 254, 264–65 (1970) (summarizing the two state interests implicated in public benefits issues: ensuring that welfare benefits are conferred to individuals eligible to receive them and the state’s interest in “conserving fiscal and administrative resources”).

170. 397 U.S. 254 (1970).

171. *See id.* at 264 (“[I]mportant governmental interests are promoted by affording recipients a pre-termination evidentiary hearing.”).

172. *See id.* at 264–65 (explaining that due process is essential to the government’s interest in “uninterrupted provision [of welfare] to those eligible to receive it”).

173. *See id.* at 266 (“[T]he interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State’s interest that his payments not be erroneously terminated, clearly outweighs the State’s competing concern to prevent any increase in its fiscal and administrative burdens.”).

174. *See Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981) (“Since the State has an urgent interest in the welfare of the child, it shares the parent’s interest in an accurate and just decision.”).

Allowing that reducing the cost and burden of proceedings is a state interest, though perhaps not as important as ensuring accurate decisions, looking to the laws that states have already enacted can provide insight into what practices improve accuracy without substantially increasing the burden on the state. Our survey of the laws of all fifty states revealed a wide variety of practices. The different state laws provide concrete examples of different ways that a state can articulate and protect its interests, including both *parens patriae* interests and fiscal interests in minimizing unnecessary process. They are evidence that rigorous due process protections are possible.

### *B. Due Process Best Practices*

Due process protections can and should be clearer and more robust across the United States for persons included in child abuse or neglect registries. The following is a list of suggested procedures, drawn from best practices across all fifty states. For each procedural protection, this Article will analyze the *Mathews v. Eldridge* factors. Since the private interest has been discussed above, this section will focus on: 1) the risk of erroneous deprivation with the procedure currently used and the probable value of the additional procedural safeguard, and 2) the state's interest, including the administrative and fiscal burden.

To create the following recommendations regarding best practices, we compiled laws and regulations from all fifty states regarding child abuse and neglect registries. We requested data through states' freedom of information acts from states where data might be illuminating, and we spoke with practitioners from many states. We offer a starting point from which legislators, courts, practitioners and activists can, in their own states, make improvements to their states' registries. This list is not exhaustive. We do not, for example, make recommendations regarding employer access to registry information, as that is outside the scope of this Article. Some states have taken great steps toward providing procedural protections to parents on the registry.<sup>175</sup> Those states should

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175. See Nicholas E. Kahn, Josh Gupta-Kagan & Mary Eschelbach Hansen, *The Standard of Proof in the Substantiation of Child Abuse and*

continue to implement those provisions and look to other states to see how their statutes can be refined and improved.

### 1. *Initial Placement on the Registry*

The first key point in the registry process is the decision to place an individual on the registry.<sup>176</sup> When a call is made to the state's central hotline, a hotline worker typically forwards the report to the local child protective agency for investigation.<sup>177</sup> A child protective investigator is assigned to the case to both collect evidence and serve as the decisionmaker as to whether abuse or neglect occurred.<sup>178</sup> The child protective investigator conducts a brief investigation, which may consist of a single interview with the child and the parent, or include additional interviews with household members, neighbors or school and medical professionals.<sup>179</sup>

After gathering evidence, the child protective investigator must decide whether to mark the case "substantiated" or "not substantiated."<sup>180</sup> Different states use different terms, such as "indicated"<sup>181</sup> or "founded,"<sup>182</sup> but this Article will use "substantiated" generally to include those terms. Some states have a third category, which allows child protective investigators to classify reports as "inconclusive" or

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*Neglect*, 14 J. EMPIRICAL LEGAL STUD. 333, 341–50 (2017) (summarizing the efforts of five states to heighten the standard of proof required to substantiate a claim of child abuse).

176. See Stewart, *supra* note 157 (describing the effect of an individual's name on the registry).

177. See, e.g., A PARENT'S GUIDE TO CHILD PROTECTIVE SERVICES IN NEW YORK CITY, *supra* note 39 (explaining that calls are first received at the state level and then forwarded to the local agency).

178. See, e.g., *id.* (detailing the investigative process and the investigator's decision-making authority).

179. See, e.g., *id.* (explaining that the investigator will speak with members of the household and may also speak with teachers, neighbors, and health care providers).

180. See, e.g., MONT. ADMIN. R. 37.47.602 (2019) (defining the investigating worker's conclusion that a danger to the child may exist as a "substantiated report").

181. See, e.g., N.Y. SOC. SERVS. L. § 424-a (McKinney 2019) (using "indicated"); 23 PA. CONS. STAT. § 6303 (2019) (using "indicated").

182. See, e.g., VA. CODE ANN. § 63.2-1505 (2019) (stating that the investigation results in a determination of "founded" or "unfounded").

“undetermined” if there is not enough evidence of abuse or neglect to make a clear determination.<sup>183</sup> Child protection investigators must write a brief explanation of the outcome of their investigation in the record.<sup>184</sup> According to practitioners, the explanation of a substantiated case is rarely more than a few sentences long.<sup>185</sup>

There are two main purposes behind an agency’s preliminary decision to substantiate a case of child abuse or neglect.<sup>186</sup> First, substantiation is generally necessary before the agency pursues court intervention, such as a judicial finding of abuse or neglect against the parent or placement in foster care,<sup>187</sup> though the vast majority of child welfare cases are never brought to court.<sup>188</sup> Second, in most states, child protective agencies are required to substantiate a case before providing

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183. See, e.g., D.C. CODE § 4-1301.02 (2020) (“Inconclusive report means a report . . . which cannot be proven to be substantiated or unfounded.”); 325 ILL. COMP. STAT. 5/3 (2019) (“An undetermined report’ means any report made under this Act in which it was not possible to initiate or complete an investigation on the basis of information provided to the Department.”); MONT. ADMIN. R. 37.47.602 (2019) (stating that a “substantiated report” is based on a preponderance of evidence but a “founded report” is based only on probable cause); CAL. PENAL CODE § 11165.12 (West 2019) (“Inconclusive report means a report that is determined by the investigator . . . not to be unfounded, but the findings are inconclusive and there is insufficient evidence to determine whether child abuse or neglect . . . has occurred.”).

184. See E-mail from Janet F. Ginzberg, Senior Staff Attorney, Cmty. Legal Servs., to author (Feb. 14, 2019, 11:23 EST) (stating that “[i]nvestigators write up investigation summaries in their files” and “put their conclusions on a form called a CY-48, which is sent in to the child abuse registry”) (on file with author).

185. See *id.* (estimating that the investigators’ written summaries are “an average of 2 or 3 sentences”); see also E-mail from Diana Rugh Johnson, Child Welfare Law Specialist, Diana Rugh Johnson, PC, to author (Mar. 13, 2019, 11:54 EST) (noting that the summary “is a very short blurb,” akin to a tweet) (on file with author).

186. See Kahn et al., *supra* note 175, at 335 (summarizing the two purposes).

187. See *id.* (“Substantiation is generally a prerequisite to pursuing a judicial finding of abuse or neglect and an order placing a child in foster care.”).

188. See KRAMER, *supra* note 155, at 2 (explaining that most individuals on the New York registry are on it because of neglect and were never notified of a court proceeding against them).

services to the family.<sup>189</sup> However, child protective agencies have tools at their disposal to keep children safe without substantiating a case against a parent.<sup>190</sup> Many agencies now employ a differential response model in low- to moderate-risk cases, wherein they provide services to families without making a substantiation decision.<sup>191</sup> Services can include a wide range of resources, such as emergency financial assistance for housing and food, daycare, and home-based family services.<sup>192</sup> Studies suggest that agencies following these practices are just as successful at keeping children safe and may even be more effective in child protection.<sup>193</sup>

Child protective workers typically submit a report on their investigation to the state child abuse and neglect registry shortly after receipt of the initial report or substantiation.<sup>194</sup>

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189. *See id.* at 335 (“In most states, the substantiation of abuse or neglect is required before child welfare services can be provided, even if those services work toward preserving the family and not removal of a child to foster care.”).

190. *See* Patricia L. Kohl, Melissa Jonson-Reid & Brett Drake, *Time to Leave Substantiation Behind: Findings from a National Probability Study*, 14 CHILD MALTREATMENT 17, 18 (2009) (explaining that data indicate that more children of unsubstantiated claims received services than children of substantiated claims).

191. *See id.* (“Some states using an ‘alternative response’ or ‘two-track’ system do not even attempt to apply the substantiated/unsubstantiated distinction to apparently less serious cases.” (citation omitted)).

192. *See* Christine H. Kim, *Putting Reason Back into the Reasonable Efforts Requirement in Child Abuse and Neglect Cases*, 1999 U. ILL. L. REV. 287, 291 (1999) (listing the services that a state agency may offer to abused and neglected children and their families).

193. *See, e.g.*, JOANNE RUPPEL, YUFAN HUANG & GAIL HAULENBEEK, N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., DIFFERENTIAL RESPONSE IN CHILD PROTECTION SERVICES IN NEW YORK STATE: REPORT TO THE GOVERNOR AND LEGISLATURE 103 (2011), <https://perma.cc/WU9Q-ZPRQ> (PDF) (summarizing the success of an alternative response to child abuse and neglect cases in the state of New York).

194. *See, e.g.*, N.Y. SOC. SERVS. LAW § 424 (McKinney 2019)

Each child protective service shall . . . upon the receipt of each written report . . . transmit, forthwith, a copy thereof to the state central register of child abuse and maltreatment. In addition, not later than seven days after receipt of the initial report, the child protective service shall send a preliminary written report of the initial investigation, including evaluation and actions taken or contemplated, to the state central register.

GA. CODE ANN. § 49-5-182 (West 2019)

The state registry is typically maintained by a separate department or staff within the child welfare agency.<sup>195</sup> Once the report is in the registry, the listed individual is at risk of being flagged when an employer or other entity submits a clearance request to the registry.<sup>196</sup>

The following section makes two key recommendations as to how states can strengthen due process for parents at this critical stage, prior to placing their names on the registry. First, states should employ a higher burden of proof in making the substantiation determination. Second, states should not place a parent's name on a registry until after he or she has had an opportunity to exhaust available appeal procedures.

*a. Raise Burden of Proof for Initial Inclusion in Registry*

In at least seventeen states, a caseworker is permitted to place a person on the state registry with only some “credible evidence” or “probable cause” of abuse or neglect.<sup>197</sup> However, a

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An abuse investigator who completes the investigation of a child abuse report made pursuant to Code Section 19-7-5 or otherwise and determinates that it is a substantiated case if the alleged child abuser was at least 18 years of age at the time of the commission of the act shall notify the division within 30 days following such determination.

195. See, e.g., *Child Protective Services Information System (Child Abuse Registry)*, GA. DIV. OF FAM. & CHILD. SERVS., <https://perma.cc/PM3S-6LY4> (last visited Jan. 8, 2020) (stating that Georgia's Division of Family and Children Services maintains the registry) (on file with the Washington and Lee Law Review).

196. See Kohl et al., *supra* note 190, at 18 (“29 states and the District of Columbia allow or require agencies providing care to children and youth to be checked against state databases . . .”).

197. See, e.g., ALA. CODE § 26-14-8(a)(1) (2019) (stating that a report is indicated “[w]hen credible evidence and professional judgment substantiates . . . abuse or neglect”); ALASKA STAT. § 47.17.290(9) (2019) (requiring “reasonable cause”); ARIZ. REV. STAT. ANN. § 8-804.01(D) (2019) (using “probable cause”); CONN. GEN. STAT. § 17a-101g (2019) (“[T]he commissioner shall determine, based upon a standard of reasonable cause, whether a child has been abused or neglected . . .”); FLA. ADMIN. CODE ANN. r. 65C-30.001 (2019) (“‘Finding’ means the investigative determination that there is credible evidence to support or refute the alleged child maltreatment.”); HAW. CODE R. § 17-1610-2 (2019) (using “reasonable cause”); 325 ILL. COMP. STAT. 5/3 (2019) (requiring “credible evidence” for a report to be indicated); 1982 Iowa Op. Att’y Gen. 7 (1981), 1981 WL 37084 (interpreting

clear majority—over twenty-nine states—require a higher burden of proof, such as “substantial evidence” or a “preponderance of the evidence.”<sup>198</sup> State legislatures in states

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Iowa statute on child abuse report standard to mean “some credible evidence” (citing IOWA CODE § 232.71D (2020)); LA. CHILD. CODE ANN. art. 615 (2019) (requiring only that “there is evidence of child abuse or neglect”); MD. CODE ANN., FAM. LAW § 5-701 (West 2020) (stating that an indicated report is a “finding that there is credible evidence, which has not been satisfactorily refuted”); 110 MASS. CODE REGS. § 4.32 (2019) (requiring a standard of “reasonable cause to believe”); NEV. ADMIN. CODE § 432B.170 (2019) (requiring “credible evidence”); N.M. CODE R. § 8.10.3.17 (West 2019) (requiring “credible evidence”); N.Y. SOC. SERVS. L. § 412 (McKinney 2019) (stating that a report is “indicated” if an investigator determines that “some credible evidence” exists); OKLA. STAT. ANN. tit. 10A § 1-2-106 (West 2019) (requiring “probable cause”); UTAH CODE ANN. § 62A-4a-101 (West 2019) (requiring a “reasonable basis”); VT. STAT. ANN. tit. 33, § 4912 (West 2019) (stating that a substantiated “report is based upon accurate and reliable information that would lead a reasonable person to believe” that abuse or neglect occurred).

198. See, e.g., ARK. CODE ANN. § 12-18-702 (West 2019) (requiring a “preponderance of the evidence”); CAL. PENAL CODE § 11165.12 (West 2019) (defining a “substantiated report” as a report that “is based upon evidence that makes it more likely than not that child abuse or neglect . . . occurred”); 12 COLO. CODE REGS. § 2509-2:7.111(B) (2020) (stating that a basis for appeal is that a founded report is not supported by a “preponderance of credible evidence”); DEL. CODE ANN. tit. 16, § 902 (2019) (stating that substantiation requires a “finding by a preponderance of the evidence”); D.C. CODE § 4-1301.02 (2020) (“Substantiated report means a report . . . which is supported by credible evidence and is not against the weight of the evidence.”); GA. CODE ANN. § 49-5-180 (West 2019) (stating that a substantiated case is based on a preponderance of the evidence); IDAHO ADMIN. CODE r. 16.06.01.560 (2019) (using the standard of “more likely than not”); IND. CODE ANN. § 31-9-2-123 (West 2020) (defining a substantiated report as one based upon the “preponderance of evidence”); KAN. ADMIN. REGS. § 30-46-10 (2019) (using “preponderance of evidence”); 922 KY. ADMIN. REGS. 1:330 (2019) (requiring a “preponderance of evidence”); ME. OFFICE OF CHILD & FAM. SERVS., CHILD AND FAMILY SERVICES POLICY § IV.D-1 (using a standard of “preponderance of facts and evidence”); MICH. COMP. LAWS § 722.628d (2019) (requiring a finding of evidence of abuse or neglect before listing on central registry); MINN. R. § 9560.0220 (2019) (requiring “a preponderance of the evidence”); 18-102 MISS. CODE R. § E (LexisNexis 2019) (using a standard of “substantial and material evidence”); MO. REV. STAT. § 210.152 (2019) (requiring preponderance of the evidence after 2004); MONT. ADMIN. R. 37.47.614 (2019) (explaining that only substantiated reports, which are based on a preponderance of evidence, may be disclosed through the registry); NEB. REV. STAT. § 28-720 (2019) (defining an “agency substantiated” report as based on a preponderance of the evidence); N.H. REV. STAT. ANN. § 169-C:3, -C:35 (2019) (stating that “[f]ounded report” means a report made pursuant to this chapter for which the department finds by a preponderance of the evidence” and only founded reports are put on the

such as New York have recently reviewed this issue and voted to raise the burden of proof to comport with the best practices of the majority of states across the country.<sup>199</sup>

Low “credible evidence” or “probable cause” standards present high risks of erroneous deprivation.<sup>200</sup> “Some credible evidence” has been interpreted to mean merely any “evidence worthy of being believed.”<sup>201</sup> Courts and scholars have described this standard as requiring nothing more than rumor.<sup>202</sup> If a caseworker believes that there is *any* support for the allegation, she can mark the allegation as substantiated, even if she believes the allegation may not actually be true.<sup>203</sup> This low standard not only does not require the caseworker to seek out

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registry); N.J. ADMIN. CODE § 3A:10-7.3 (2019) (stating that “substantiated report” is based on preponderance of the evidence); N.C. GEN. STAT. § 7B-320 (2019) (using “substantial evidence”); 23 PA. CONS. STAT. § 6303 (2019) (stating that the basis for an indicated report is a finding of “substantial evidence”); S.C. CODE ANN. § 63-7-930 (2019) (stating that indicated findings must be based upon on a preponderance of evidence); S.D. ADMIN. R. 67:14:39:04 (2020) (defining a substantiated report as one based upon a “preponderance of the evidence”); TENN. COMP. R. & REGS. § 0250-07-09-.06 (2018) (stating that substantiation requires a “preponderance of the evidence”); 40 TEX. ADMIN. CODE § 700.511 (2019) (defining “reason-to-believe” as “based on a preponderance of the evidence”); 22 VA. ADMIN. CODE § 40-705-10 (2019) (defining “founded” as based on “a preponderance of the evidence”); WASH. REV. CODE § 26.44.020 (2020) (defining a “founded report” as a determination that “it is more likely than not that child abuse or neglect did occur”); WISC. STAT. § 48.981 (2020) (requiring “a preponderance of the evidence”); WYO. STAT. ANN. § 14-3-202 (West 2019) (using “a preponderance of the evidence”).

199. See S. 6427A, 2019 Reg. Sess. (N.Y. 2019) (proposing legislation that heightens the burden of proof for adding an individual to the state’s registry); see also LAUREN SHAPIRO & SARA L. HILTZIK, N.Y. CITY BAR ASS’N, REPORT ON LEGISLATION BY THE COUNCIL ON CHILDREN AND THE CHILDREN AND THE LAW COMMITTEE 3 (2019), <https://perma.cc/4PSF-UYG9> (PDF) (explaining that the proposed legislation would heighten New York’s standard to be more consistent with the majority of other states).

200. See Kahn et al., *supra* note 175, at 335 (explaining the link between the stringency of the standard and the associated risks).

201. See *Lee TT v. Dowling*, 664 N.E.2d 1243, 1251 (N.Y. 1996) (citing state guidance on the meaning of “some credible evidence”).

202. See *id.* (“One commentator has observed that this standard safeguards only against bad faith or entirely unfounded reports of child abuse: it provides no assurance that reports sounding reasonable are, nevertheless, erroneous because the same evidence motivating the report will provide the basis for confirming it.” (citation omitted)).

203. See *id.* (stating that the standard “allows a report to be indicated if only one out of several believable items of evidence supports it”).

evidence favorable to the parent, but also does not require her to weigh the available evidence.<sup>204</sup> The lack of requirement for weighing evidence and justifying decisions encourages caseworkers to base their decisions on intuition.<sup>205</sup> These determinations thus become entry points for bias.<sup>206</sup> Caseworkers make the same errors inherent in all human decision-making: when they form a quick intuitive assessment, they are “skeptical about information when it conflict[s] with their view of [a] family but . . . [are] uncritical when the new evidence support[s] their view.”<sup>207</sup> They often face institutional pressure to be risk averse and substantiate cases even if they doubt that neglect or abuse occurred because the agency may face negative media attention if they fail to monitor a family.<sup>208</sup> Studies have documented that, in the wake of high-profile child fatalities, child protection workers react by going into “panic” mode,<sup>209</sup> substantiating drastically more cases against parents, without evidence that the actual incidence of abuse or neglect has risen in the population.<sup>210</sup> These “panics” ultimately make

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204. See *id.* (“[The standard] imposes no duty on the fact finder to weigh conflicting evidence, no matter how substantial . . .”).

205. See *id.* (“Under the present standard a fact finder in such cases may be tempted to rely on an intuitive determination, ignoring any contrary evidence.”).

206. See *Jamison v. Dep’t of Soc. Servs.*, 218 S.W.3d 399, 411 (Mo. 2007) (“As the probable cause standard does not require a balancing of available evidence, it leaves the ultimate assessment ‘open to the subjective values’ of the fact finder, thereby magnifying the risk of erroneous fact finding.” (citation omitted)).

207. See Eileen Munro, *Common Errors of Reasoning in Child Protection Work*, 23 CHILD ABUSE & NEGLECT 745, 751 (1999) (explaining that child protection professionals fail to maintain “a critical attitude to all evidence”).

208. See, e.g., Yoav Gonen, *Child Abuse Reports Surge After High-Profile Tragedies*, N.Y. POST (July 24, 2018, 2:51 PM), <https://perma.cc/Q56C-VPCC> (last visited Jan. 8, 2020) (describing the intense media pressure that New York’s Administration of Children Services faced after the deaths of Zymere Perkins and Jaden Jordan in late 2016) (on file with the Washington and Lee Law Review).

209. See Glaberson, *supra* note 64, at 322 (explaining that “foster care panic” is “the tendency of child welfare systems to engage in a frenzied push toward removal of children from their homes following the highly publicized death of a child”).

210. See Katie Hanna, N.Y.C. INDEP. BUDGET OFFICE, UNDER PRESSURE: HOW THE CITY’S CHILD WELFARE SYSTEM RESPONDED TO RECENT HIGH-PROFILE

children less safe by overburdening systems and resulting in more children experiencing the traumas associated with removal and state intervention.<sup>211</sup> Finally, the overrepresentation of people of color in the child welfare system suggests that caseworker determinations may be influenced by implicit and explicit racial bias.<sup>212</sup> Studies suggest that black and Native American children are twice as likely to have their parents subjected to child welfare investigations, but also twice as likely to have that investigation *substantiated* against their parent.<sup>213</sup> Under the low “credible evidence” standard, these faulty decision-making processes are encouraged and no safeguards exist to cut against the current.<sup>214</sup> In fact, courts in multiple states have acknowledged that this low standard is largely responsible for a “disturbingly high number of false positive findings of abuse.”<sup>215</sup>

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TRAGEDIES 1 (2018), <https://perma.cc/9W4A-CC55> (PDF) (determining that “the number of reports of abuse that were substantiated rose by 20 percent in fiscal year 2017” after two high-profile child fatalities occurred).

211. See Glaberson, *supra* note 64, at 323–24 (summarizing the detrimental effects of the child protection agency’s “panic”).

212. See ROBERT B. HILL, CASEY-CSSP ALLIANCE FOR RACIAL EQUITY IN CHILD WELFARE, AN ANALYSIS OF RACIAL/ETHNIC DISPROPORTIONALITY AND DISPARITY AT THE NATIONAL, STATE, AND COUNTY LEVELS 1–2 (2007), <https://perma.cc/652W-BGB4> (PDF) (explaining that overrepresentation of minorities in the child welfare system occurs at each phase of decision-making in the process). While scholars debate what accounts for the racial disproportionality in the child welfare system, there is evidence that racial disproportionality worsens as families move through the child welfare system based on a variety of determinations made by caseworkers. See *id.* (identifying three phases of decision-making—investigation, substantiation, and placement into foster care—and finding minority overrepresentation at each phase).

213. See *id.* at 10–11 (“[B]lack and American Indians are about twice as likely to be investigated or substantiated than whites . . .”).

214. See *Lee TT v. Dowling*, 664 N.E.2d 1243, 1251 (N.Y. 1996) (summarizing the risks inherent to a low standard).

215. See *id.* at 1252 (citing evidence that seventy-five percent of challenged reports were reversed after administrative hearings); see also *Jamison v. Dep’t of Soc. Servs.*, 218 S.W.3d 399, 409 (Mo. 2007) (citing evidence that Missouri’s Child Abuse and Neglect Review Board reverses the local agency’s “probable cause determination[s] somewhere in the vicinity of 35–40% of the time”). These courts reconciled the due process concerns by allowing the “some credible evidence” standard at the initial stage and then requiring a higher standard of proof at the administrative hearing before the report is released to employers. Given that this Article argues for a broader appreciation of the

For all these reasons, states should require a higher burden of proof for placing an individual on the registry. A higher standard, such as preponderance of the evidence, and regulations requiring investigating caseworkers to gather available evidence that does not just support the initial assessment but also any evidence that may conflict with that assessment, and then to weigh the conflicting evidence, would greatly improve the accuracy of substantiation. A recent study found that requiring a high standard of proof for substantiation of child abuse and neglect does, in fact, influence the disposition of reports.<sup>216</sup> This study focused on five states: the District of Columbia, California, Idaho, Missouri and Wyoming, examining the effects after each of these states increased the burdens of proof from credible evidence to a preponderance of the evidence.<sup>217</sup> In some states, the study found that the higher standard reduced the likelihood of substantiation by five percent.<sup>218</sup> Across states that employ a variation of standards, a heightened standard of proof is associated with a fourteen percent decrease in the likelihood of substantiation.<sup>219</sup> States that raise their burden of proof can and have trained investigators on how to thoroughly collect evidence, document observations without using conclusory language, and balance the weight of the evidence.<sup>220</sup>

Under *Mathews v. Eldridge*, the high risk of erroneous deprivation presented by the low “some credible evidence” standard must be weighed against the state’s interest in

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private interest beyond employment interests, we argue that a higher burden of proof should be established at the initial stage as well.

216. See Kahn et al., *supra* note 175, at 333 (“[A] high standard is associated with lower rates of substantiation.”).

217. See *id.* at 346–50 (summarizing each state’s policy change and the effect of that change).

218. See *id.* at 334 (“[A]n increase in the standard of proof decreases the odds of substantiation by 1–5%.”).

219. See *id.* at 343 (“[A]n increase in the standard of proof is associated with a decrease in the odds of substantiation of 14%.” (citation omitted)).

220. See Joan Owhe, Note, *Indicated Reports of Child Abuse or Maltreatment: When Suspects Become Victims*, 51 FAM. CT. REV. 316, 323 (2013) (explaining the techniques that investigators would need to employ to meet a heightened standard); see also Kahn et al., *supra* note 175, at 350 (noting that the Missouri Department of Social Services held a mandatory training on how to carefully employ the standard of proof after the legislative reform).

maintaining such a low threshold.<sup>221</sup> When assessed in light of the many states that employ a higher standard—with no concomitant reduction in their ability to ensure children’s safety—the state’s interest is revealed to be less weighty than traditionally thought.<sup>222</sup> There are currently no studies that suggest that states with a higher burden of proof face increased rates of child abuse and neglect nor any increase in child fatalities due to an agency’s failure to substantiate a case against a parent.<sup>223</sup> According to the recent study discussed above, an increase in the standard of proof is not associated with an increase in child fatalities in the state.<sup>224</sup>

*b. Do Not Place Name in Registry Until Right to a Hearing Has Been Exercised and Exhausted*

Most states place a person’s name on their registry immediately after the report is substantiated by a brief agency investigation.<sup>225</sup> Under this system, the onus is then on the

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221. See *Lee TT v. Dowling*, 664 N.E.2d 1243, 1251 (N.Y. 1996) (explaining that the state’s interest in keeping a low standard is to retain its ability to “respond quickly to isolate children from potentially dangerous contact with adults on the first indication of possible maltreatment and forewarn providers and licensing agencies of possible future harm”). In this case, the court brushed by the analysis by simply referring to the state’s *parens patriae* interest generally, with no further explanation. See *id.* (“[T]he State has a strong interest in preserving and promoting [children’s] health and welfare and protecting them from abuse.” (citation omitted)).

222. See, e.g., *Jamison v. Dep’t of Soc. Servs.*, 218 S.W.3d 399, 410 (Mo. 2007) (explaining that while protecting children from abuse and neglect is a significant interest, inclusion in the registry is a “complement to the additional and more immediate protective measures” already permitted by state law).

223. See *Kohl et al.*, *supra* note 190, at 19 (“To our knowledge, there is no existing evidence that substantiation is a general and powerful predictor or rereport or recidivism or any other meaningful subsequent events.”).

224. See *Kahn et al.*, *supra* note 175, at 358 (“[A]n increase in the standard of proof is not associated with an increase in fatalities in total.”).

225. See, e.g., N.Y. SOC. SERVS. LAW § 424 (McKinney 2019)

Each child protective service shall . . . upon the receipt of each written report . . . transmit, forthwith, a copy thereof to the state central register of child abuse and maltreatment. In addition, not later than seven days after receipt of the initial report, the child protective service shall send a preliminary written report of the initial investigation, including evaluation and actions taken or contemplated, to the state central register.

individual to challenge their registry status, even as the report remains on file and the consequences are ever-present.<sup>226</sup> Even when an individual immediately files a request for a hearing, the administrative appeal process can take months or over a year.<sup>227</sup> By the time the individual reaches their administrative hearing, they may have already experienced substantial deprivations: they may have lost their employment, had a finding entered against them in a custody case, or been prevented from volunteering at their child's school.

Some state courts have found that placing an individual on the registry prior to a hearing violates due process under their state constitutions.<sup>228</sup> Those courts observed that the risk of erroneous deprivation was high because parents are not always afforded an opportunity to respond to allegations during the

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GA. CODE ANN. § 49-5-182 (West 2019)

An abuse investigator who completes the investigation of a child abuse report made pursuant to Code Section 19-7-5 or otherwise and determines that it is a substantiated case if the alleged child abuser was at least 18 years of age at the time of the commission of the act shall notify the division within 30 days following such determination.

226. See Stewart, *supra* note 157 (“[I]n New York, it is especially easy to get on the database and arduous to be removed, amounting to a blacklist for many jobs . . .”).

227. When a parent challenges their status on the registry, the agencies first do an administrative review before proceeding to a hearing. See, e.g., ARIZ. REV. STAT. ANN. § 8-811(E) (2019) (“If a request for a hearing is made . . . the department shall conduct a review before the hearing.”). The case is then often set for a pre-trial conference and awaits a hearing date. See, e.g., *id.* (explaining that if the agency “does not amend the information or finding in the report . . . within sixty days after it receives [a] request for a hearing,” the individual has a right to a hearing). Many states require administrative hearings to be stayed until related family court cases are concluded, thereby extending the time that the person is on the registry even further. See, e.g., *id.* § 8-811(F)(1) (providing that an individual does not have a right to a hearing if that individual is a party in a pending proceeding “in which the allegations of abuse or neglect are at issue”). For parents who have pending cases in family court, they are incentivized to speed up their cases by accepting settlements so they can challenge their registry status immediately. See, e.g., *id.* (stating that a pending proceeding related to the matter prevents an individual from seeking a hearing).

228. See *In re W.B.M.*, 690 S.E.2d 41, 52 (N.C. Ct. App. 2010) (stating that North Carolina’s registry procedures “violate[d] an individual’s due process rights by listing the individual on the [registry] prior to a hearing”); *Jamison*, 218 S.W.3d at 417 (concluding that the inclusion of individuals on the registry prior to a hearing violates the due process rights of those individuals).

brief agency investigation, and “[n]o matter how elaborate, an investigation does not replace a hearing.”<sup>229</sup> The courts further found that the state’s interest in immediately placing an individual on the registry does not outweigh the private interest because the registry is a “complement to the additional and more immediate protective measures” permitted by law, such as removing children from dangerous environments or pursuing criminal charges against an alleged perpetrator.<sup>230</sup>

States should not place a person’s name on the registry until an individual has an opportunity to exhaust his or her right to a hearing and appeal. Some states have attempted to resolve this “justice delayed is justice denied” problem, with varying success. Some simply provide expedited hearings when a person is facing “imminent collateral consequences.”<sup>231</sup> But some, such as Louisiana and Maryland, do not place a person’s name on the registry until the deadline to appeal expires or the individual loses their administrative hearing.<sup>232</sup> Some states have taken even more protective measures, such as South Carolina and Mississippi, which do not place anyone on the registry unless and until the child protective agency petitions family court and the family court orders the placement of a

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229. See *In re W.B.M.*, 690 S.E.2d at 50 (“Although the accused individual may have the opportunity to respond to the investigator’s inquiries, this opportunity is not guaranteed and there is no requirement that, at the time of the interview, the individual be apprised of the allegations against him.”); *Jamison*, 218 S.W.3d at 408–09 (stating the investigative process does “not constitute an opportunity to be heard at a meaningful time or in a ‘meaningful manner’” (citations omitted)).

230. *Id.* at 51.

231. See, e.g., 10-148-201 ME. CODE R. § XI (LexisNexis 2019) (“[T]he Chief Administrative Hearing Officer shall give priority to any case in which the record . . . shows that the appellant has or is likely to suffer imminent collateral consequences as a result of the substantiation decision.”); GA. CODE ANN. § 49-5-183(d) (West 2019) (“A motion for an expedited hearing may be filed in accordance with rules and regulations promulgated by the Office of State Administrative Hearings.”).

232. See MD. CODE ANN., FAM. LAW § 5-706.1 (West 2020) (noting that the individual’s name will not be placed on the registry unless “the individual has been found responsible for indicated abuse or neglect”); LA. CHILD. CODE ANN. art. 616 (2019) (noting that the individual’s name is not placed on the registry until the “individual’s administrative appeals are exhausted”).

person on the registry.<sup>233</sup> Finally, some states such as North Carolina have created two separate registries, the “Central Registry” and the Responsible Individuals List (RIL).<sup>234</sup> A substantiated finding can be immediately placed on the “Central Registry,” an internal database that is only accessed by child protection workers for the purposes of tracking complaints against a family.<sup>235</sup> Only the RIL is accessible by employers and courts in custody matters.<sup>236</sup> Names are not placed on the RIL until a person fails to file an appeal in a timely manner or loses their appeal.<sup>237</sup>

The value of a pre-deprivation hearing is high because it allows a hearing to be granted at a time when the deprivation can still be prevented.<sup>238</sup> However, the value of requiring a pre-deprivation hearing depends on whether the state effectively requires actual notice and has reasonable deadline provisions. For example, if the state has an unusually short deadline for requesting a hearing, such as ten days, and allows a finding to be entered absent a request for a hearing, allowing a pre-deprivation hearing will not provide a meaningful protection for parents.<sup>239</sup> As discussed below, this Article

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233. S.C. CODE ANN. § 63-7-1930 (2019); MISS. CODE ANN. § 43-21-257 (2019). For example, in South Carolina, the Department must petition Family Court with a written case summary and argue to the court that 1) abuse and neglect is established by a preponderance of evidence and 2) the nature and circumstances of the act indicate the person would present a “significant risk of committing physical or sexual abuse or willful or reckless neglect if placed in position or setting outside of the person’s home that involves the care of or substantial contact with children.” S.C. CODE ANN. § 63-7-1930. The Department has discretion to decide which cases it chooses to petition for placement on the registry and is only required to file a petition for cases of sexual abuse. *Id.*

234. N.C. GEN. STAT. ANN. § 7B-311(b) (2019).

235. *Id.*

236. *Id.*

237. *Id.*

238. *See Lee TT v. Dowling*, 664 N.E.2d 1243, 1252 (N.Y. 1996) (noting that pre-deprivation hearings reduce procedural unfairness in this context because “[t]he damage to the subject following publication of an unsubstantiated report of child abuse may be irreversible”).

239. *See, e.g.*, GA. CODE ANN. § 49-5-183(c) (West 2019) (allowing an individual ten days to request a hearing); WIS. STAT. ANN. § 48.981(5p) (West 2019) (same).

recommends that states adopt a longer time frame to allow people to request hearings, such as 180 days.<sup>240</sup>

## 2. Notice

Notice, the legal warning that is delivered to a party whose rights are affected by a private or state action, is an essential element of due process because the right to be heard has “little reality or worth unless one is informed that a matter is pending and can choose for himself or herself whether to appear or default, acquiesce, or contest.”<sup>241</sup> The Due Process Clause does not prescribe the particular form or contents of notice.<sup>242</sup> However, at a minimum, the notice must provide individuals a reasonable time to respond.<sup>243</sup> The contents of notice must fairly describe how the party can effectuate their rights and the consequences of his or her failure to act.<sup>244</sup>

Currently, all states have some procedure to notify individuals when they are placed on the child abuse and neglect registry.<sup>245</sup> Current practice does not, however, adequately protect individuals’ rights. First, current practice does not take into account that the vast majority of individuals facing child welfare investigations are living in poverty.<sup>246</sup> Scholars have argued that in similar administrative hearings, such as hearings to terminate public assistance, the daily challenges of

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240. See, e.g., MICH. COMP. LAWS ANN. § 722.627 (West 2019) (allowing 180 days from the date of service of notice to request a hearing).

241. 16B AM. JUR. 2D *Constitutional Law* § 983 (2020).

242. *Id.* § 983.

243. *Id.* § 986.

244. *Id.* § 987.

245. See Office of the Assistant Sec’y for Planning and Evaluation, *Interim Report to the Congress on the Feasibility of a National Child Abuse Registry*, U.S. DEP’T OF HEALTH & HUMAN SERVS. (May 15, 2009), <https://perma.cc/8G8J-ZNED> (last visited Jan. 8, 2020) (detailing the due process and notification characteristics of state central child abuse registries) (on file with the Washington and Lee Law Review).

246. See Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 174 (2003) (“Poverty is key to explaining why almost any child gets in the system.”).

poverty prevent self-represented litigants from pursuing meritorious claims.<sup>247</sup>

Second, despite the critical role of notice in due process, most states have not created clear statutory rules for notifying individuals of their placement on the child abuse and neglect registry.<sup>248</sup> Without clear rules in the statute, these states leave the form and contents of the notice to the agency's discretion. Following the best practices of their peers, states can adopt a number of small, practical innovations that ensure individuals receive, understand, and have the opportunity to respond to these notices.

*a. Send Notice via Certified Mail*

Currently, there is no uniformity among states in how they effectuate notice.<sup>249</sup> At least four states, including Georgia and North Carolina, require the agency to send notice letters by certified mail.<sup>250</sup> Most states simply require the agency to send

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247. See Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 23 N.Y.U REV. L. & SOC. CHANGE 131, 134 (2007) (proposing that “the public benefits hearing process is in fact fundamentally unfair to low-income appellants and that these appellants are almost always at a significant disadvantage in the hearing process”); see also Stephen Loffredo & Don Friedman, *Gideon Meets Goldberg: The Case for a Qualified Right to Counsel in Welfare Hearings*, 25 TOURO L. REV. 273, 278 (2009) (addressing “whether unrepresented welfare claimants actually receive the ‘due process of law’ promised by *Goldberg*, or whether the absence of counsel . . . denies vulnerable families any meaningful opportunity to be heard”).

248. See, e.g., IOWA CODE ANN. § 235A.19 (West 2020) (“[T]he department shall provide notice to a person named in the report as having abused a child of the right to a contested case hearing . . . .”); VT. STAT. ANN. tit. 33, § 4916 (West 2019) (“[A] person alleged to have abused or neglected a child and whose name has been placed on the Registry . . . shall be notified of the Registry entry, provided with the Commissioner’s findings, and advised of the right to seek an administrative review . . . .”).

249. Compare WASH. REV. CODE ANN. § 26.44.100(3) (2020) (requiring notification by certified mail, and if returned, notification attempted through personal service), with 325 ILL. COMP. STAT. 5/7.12 (West 2019) (requiring written notification to be sent to the alleged perpetrator by *both* regular and certified mail).

250. See GA. CODE ANN. § 49-5-183(a)(2) (West 2019) (requiring notice to be sent by certified mail with return receipt requested); N.C. GEN. STAT. ANN. § 7B-320 (2019) (“[T]he director shall send the notice to the individual by registered or certified mail, return receipt requested, and addressed to the individual at the individual’s last known address.”).

notice letters by regular mail to the person's last known address.<sup>251</sup> Under the current form of notice in most states, the risk of erroneous deprivation is high.

Careful attention to the methods for effectuating notice is vital, because families who are subject to substantiation are disproportionately poor and homeless, meaning that they are less likely to receive mail. Homeless families are more likely than low-income families who are housed to be the focus of a child protective services investigation.<sup>252</sup> In fact, many parents may be placed on the registry precisely because they are struggling to provide stable shelter for their children.<sup>253</sup> Even if parents on the registry are not homeless, families living in poverty often lack access to stable housing and move frequently.<sup>254</sup>

States should require notice to be sent by certified mail. Certified mail “provides the sender with a mailing receipt and electronic verification that an article was delivered or that a delivery attempt was made.”<sup>255</sup> Without the use of certified mail, the notice letter may be sent to an outdated mailing address and the agency has no indication that delivery was unsuccessful and no reason to attempt more rigorous methods of providing

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251. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 18, § 434.5 (2019) (“All hearings held pursuant to this Part will be scheduled by means of a written notice issued to the appellant and his or her representative, if known, by the department.”).

252. See AMY DWORSKY, FAMILIES AT THE NEXUS OF HOUSING AND CHILD WELFARE 1 (2014), <https://perma.cc/Q72U-NY4F> (PDF) (“[H]omeless families are more likely than their non-homeless counterparts to be the focus of a child protective services (CPS) investigation . . .”).

253. Many parents are investigated for child neglect if they are homeless and struggling to supply their children with adequate shelter. For example, one case study found that the shelter intake centers in Washington D.C. often call the CPS Hotline after parents submit applications. Marta Beresin, *Reporting Homeless Parents for Child Neglect: A Case Study from Our Nation's Capital*, 18 UDC/DCSL L. REV. 14, 26 (2015).

254. In one study of families living below the poverty line, the longest residence for twenty-eight percent of families ranged from one to three years and forty-two percent for five or more years. Cathryne L. Schmitz et al., *Homelessness as One Component of Housing Instability and Its Impact on the Development of Children in Poverty*, 4 J. OF SOC. DISTRESS & THE HOMELESS 301, 309 (1995).

255. USPS, *What is Certified Mail?*, USPS.COM (Nov. 9, 2018), <https://perma.cc/35VB-UHX8> (last visited Jan. 24, 2020) (on file with the Washington and Lee Law Review).

notice.<sup>256</sup> The probable value of using certified mail is high because it alerts agencies to the fact that notice was not accomplished and provides an opportunity to attempt a different address.<sup>257</sup> Using certified mail presents a minimal expense to the agency or state, and the burden of that expense is far outweighed by the value of more effectively effectuating actual notice to parents.<sup>258</sup>

*b. Include Registry Consequences in Notice*

States provide varying types and levels of information to individuals in their notices. Most state statutes do not require the agencies to provide any specific information about the consequences of having their name listed in the state's registry.<sup>259</sup> But at least one state—Washington—explicitly requires by statute that a list of consequences of inclusion be provided in the notice letter.<sup>260</sup> As a result, the notice letters sent in Washington inform parents that their registry status may affect their employment and may be considered in a later investigation of child abuse or neglect.<sup>261</sup> Washington's scheme is a start, but it does not fully protect individuals' rights. As discussed in this Article, a number of important consequences may flow from registry inclusion, including effects on parents' custody and visitation rights and their ability to perform the daily tasks of parenting, such as volunteering at their children's schools.<sup>262</sup>

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256. *Id.*

257. *Id.*

258. See Certified Mail Labels, *New USPS Certified Mail Costs*, CERTIFIEDMAILLABELS.COM, <https://perma.cc/FYH6-HL7J> (last visited Jan. 8, 2020) (detailing the updated 2020 USPS certified mail service cost) (on file with the Washington and Lee Law Review).

259. See, e.g., N.Y. SOC. SERV. LAW § 422 (McKinney 2019) (showing that New York does not require state agencies to inform individuals of the potential consequences of having their name on the registry).

260. See WASH. REV. CODE § 26.44.125 (2020) (providing that the notice letter must explain, among other things, that the department may use the founded report in determining if the individual is qualified to be employed in a position having unsupervised access to children or vulnerable adults).

261. *Id.*

262. See *supra* Part II.A.

Providing notice of the actual consequences of inclusion in a child abuse and neglect registry is vital to ensuring due process. Without listing these consequences on notice letters, most states place individuals at a high risk of erroneous deprivation.<sup>263</sup> If individuals do not understand the extent of the consequences of being on the registry, they may not understand the value of contesting their status relative to the time and burden of pursuing an administrative appeal.<sup>264</sup> Individuals often have a short time frame in which to make this cost-benefit analysis.<sup>265</sup> The probable value of a clear explanation is high because it ensures that individuals fully comprehend the potential consequences to their employment and their parental autonomy. The state's interest does not outweigh the private interest because there is no cost to adding additional information to notice letters.

To provide adequate notice, due process requires that notice letters inform parents of these consequences. In terms of employment, the notice letter should provide more specific information about the wide range of employers that have access to the registry. In terms of parental autonomy, the notice letter should, at a minimum, include the following consequences: a report on the registry may be considered (1) in a later investigation or family court proceeding related to a different allegation of child abuse or neglect; (2) in a future custody proceeding; (3) if a person wishes to adopt or serve as a kinship foster home for relatives; and (4) by schools and youth organizations, impeding volunteering in children's activities.

*c. Include Notice of Available Legal Services Providers*

Generally, individuals contesting their inclusion in a registry have the right to have an attorney present but do not have the right to free legal representation at cost to the state.<sup>266</sup>

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263. *Id.*

264. *Id.*

265. As described further below, most states have a short deadline for filing a request to challenge a registry report, sometimes as short as ten days. *See, e.g.*, ALA. CODE § 26-14-7.1 (2019) (ten days); GA. CODE ANN. § 49-5-183 (West 2019) (ten days).

266. CHILD WELFARE INFORMATION GATEWAY, U.S. DEP'T OF HEALTH AND HUM. SERVS., REVIEW AND EXPUNCTION OF CENTRAL REGISTRIES AND REPORTING RECORDS (2018), <https://perma.cc/34DR-2N4M> (PDF).

Most states simply require that their notice letters inform the individual that they have the right to an attorney, if the statute speaks to this at all.<sup>267</sup> At least one state—Arkansas—goes further, requiring its notice letter to provide the name of a free local legal services organization, the Center for Arkansas Legal Services.<sup>268</sup>

According to practitioners across the country, the vast majority of petitioners challenging registry inclusion are currently representing themselves (*pro se*) in their hearings.<sup>269</sup> In contrast, the child protective agencies are always represented by counsel.<sup>270</sup> Agency counsel have clear advantages over *pro se* litigants, including familiarity with agency records, which can include acronyms and jargon, and knowledge of how to present evidence and cross-examine witnesses.<sup>271</sup> Studies suggest that *pro se* litigants across a range of administrative hearings have far less favorable outcomes than represented parties.<sup>272</sup> *Pro se* litigants in child abuse and registry hearings face an even greater uphill battle. First, the registry hearings do not only involve factual allegations, but also include interpreting the

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267. See, e.g., ARK. CODE ANN. § 12-18-706 (West 2019) (“Notification to an alleged offender . . . shall include . . . [a] statement that the person has a right to have an attorney . . .”).

268. *Id.* § 12-18-706. An appellate court in New Jersey recently went much further, holding that “indigent litigants are entitled to the appointment of counsel when faced with a Division declaration that its investigation has substantiated that litigant for child abuse or neglect.” N.J. Dep’t of Children & Families v. L.O., 213 A.3d 187, 198 (N.J. Super. Ct. App. Div. 2019).

269. Telephone Interview with Brenda Wahler, Law Office of Brenda Wahler (Mar. 22, 2019); E-mail from Michael Agranoff, Law Office of Michael Agranoff (Mar. 13, 2019, 3:21 PM EST) (on file with author); E-mail from Diana Rugh Johnson, Law Office of Diana Rugh Johnson, PC, (Mar. 13, 2019, 11:54 AM EST) (on file with author); see also Kramer, *supra* note 155, at 3.

270. Telephone Interview with Brenda Wahler, Law Office of Brenda Wahler (Mar. 22, 2019); E-mail from Michael Agranoff, Law Office of Michael Agranoff (Mar. 13, 2019, 3:21 PM EST) (on file with author).

271. See Loffredo & Friedman, *supra* note 247, at 318 (“The playing field in *pro se* hearings slants far from level because the local agency is represented by trained advocates who have enormous tactical advantages over the claimant . . .”).

272. See Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POLY 453, 460 (2011) (“[R]epresented litigants are anywhere from two to ten times more likely to procure the relief they seek when they enjoy the benefit of full representation by counsel.”).

legal definitions of “abuse” and “neglect.”<sup>273</sup> These statutory definitions are often vague and the subject of extensive decisional interpretation.<sup>274</sup> Crafting well-supported arguments therefore may require legal research tools that are not accessible to pro se litigants.

Being represented by an attorney is also important because preparing a parent to testify may be the most consequential act of the hearing process. According to practitioners, the parent is expected to testify in the hearing on their own behalf and will be subject to cross-examination by agency counsel.<sup>275</sup> A trained advocate can help a parent to clearly and faithfully present his or her story in a way that an individual acting alone may not be able to do.<sup>276</sup> The hearing officer’s determination often turns heavily, if not fully, on the parent’s testimony. The parent may be required to testify about deeply intimate or sensitive topics, such as their struggle with an addiction or mental illness.<sup>277</sup> Many parents may be living in poverty, lack formal education, and/or come from marginalized communities or groups.<sup>278</sup> Once they have put forward their testimony, they will be subject to cross-examination by the agency’s counsel. The administrative law judge (ALJ)’s assessment of the parent’s testimony, the

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273. See generally N.Y. FAM. CT. ACT § 1012 (McKinney 2019).

274. For example, the term “neglected child” in New York is vaguely defined as a child “whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care . . . .” *Id.*

275. Telephone Interview with Brenda Wahler, Law Office of Brenda Wahler (Mar. 22, 2019); E-mail from Bonnie Saltzman, Law Offices of Bonnie E. Saltzman, LLC, (July 18, 2019, 7:12 PM EST) (on file with author); E-mail from Michael Agranoff, Law Office of Michael Agranoff (Mar. 13, 2019, 3:21 PM EST) (on file with author).

276. See ANTONIO ROBISON ET AL., WITNESS PREPARATION—ETHICAL, PRACTICAL, AND COMMON SENSE CONSIDERATIONS 1–5 (2017), <https://perma.cc/WUQ7-5M2M> (PDF) (highlighting the importance of witness preparation in the context of depositions, hearings, and arbitrations).

277. See, e.g., Jake Gilbreath, *Health Records in Child Custody Cases*, THE WALTERS GILBREATH, PLLC BLOG (July 4, 2019), <https://perma.cc/G66D-TDQK> (last visited Jan. 7, 2020) (noting that physical and mental health records are not necessarily protected by HIPAA and state rules of evidence) (on file with the Washington and Lee Law Review).

278. See Herma Hill Kay & Irving Philips, *Poverty and the Law of Child Custody*, 54 CALIF. L. REV. 717, 726–39 (1966) (discussing how poverty influences child custody decisions).

all-important credibility determination, is vulnerable to the effects of bias.<sup>279</sup>

Failing to provide a list of free legal service providers in notice letters places individuals at a high risk of erroneous deprivation. As discussed above, since the vast majority of individuals on the registry cannot afford an attorney, simply informing individuals that they have a right to counsel is not meaningful. Studies suggest that many low-income Americans do not seek out legal assistance for their civil legal needs because they do not know where to look or they do not believe that free legal help exists.<sup>280</sup> The probable value of providing a list of free legal service providers is high. While civil legal organizations may not be able to provide representation at every hearing, these organizations can provide basic advice about the notice letter and explain the value of an administrative hearing.<sup>281</sup>

Notice letters should clearly state that a person has a right to consult and be represented by an attorney in an administrative hearing *and* provide a list of free legal service providers who may be available to assist those who cannot afford an attorney. In certain states, civil legal service organizations may be able to answer questions about the administrative appeal process.<sup>282</sup> The State's interest does not outweigh the private interest because there is no cost to adding

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279. See *Santosky v. Kramer*, 455 U.S. 745, 763 (1982) (noting that, in the context of termination of parental rights proceedings, parents facing child abuse investigations are vulnerable to judgments based on cultural or class bias because they are often poor, uneducated, and members of minority groups).

280. According to a recent report on civil legal needs, low-income Americans do not seek legal help for eighty percent of their civil legal problems. Those who do not seek help report concerns about the cost of such help, not being sure if their issues are legal in nature, and not knowing where to look for help. LEGAL SERV. CORP., *THE JUSTICE GAP REPORT: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 29–33 (2017), <https://perma.cc/32WK-TZAP> (PDF).

281. Civil legal service offices provide free counsel regarding a wide range of administrative hearings, such as termination of unemployment insurance and social security benefits. There are an estimated 900 civil legal aid programs across the country and 900 pro bono programs through the American Bar Association. *Id.* at 79.

282. See, e.g., MICH. COMP. LAWS ANN. §§ 24.301–24.306 (West 2019) (detailing Michigan's judicial review process as defined by the Administrative Procedures Act of 1969).

additional information to notice letters. Furthermore, states provide this information in notice letters for other administrative hearings that frequently involve indigent litigants.<sup>283</sup>

### *3. Abolish or Extend Statutes of Limitation for Challenging Inclusion on Registry*

Most states currently require individuals to respond to the notice letter and file a request for a hearing within a very short time frame. At least six states require action within a mere ten to fifteen days after notice is received.<sup>284</sup> Most states require individuals to file a request within one to three months of receiving notice.<sup>285</sup> There are states, however, that diverge: Nebraska does not set a time frame to request a hearing but instead allows an appeal to be taken “[a]t any time subsequent to completion of the investigation . . . .”<sup>286</sup> A number of states allow hearings to be granted for requests made after the deadline if good cause is shown.<sup>287</sup>

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283. See, e.g., N.Y. SOC. SERV. LAW § 22(12)(d) (McKinney 2019) (requiring the state to inform appellants of the availability of community legal services in hearings regarding the termination of public assistance).

284. See ALA. CODE § 26-14-7.1 (2019) (giving an individual ten days to request a hearing); GA. CODE ANN. § 49-5-183 (West 2019) (same); MINN. STAT. § 626.556(10i) (2019) (fifteen days); NEV. ADMIN. CODE § 432B.170 (2019) (same); VT. STAT. ANN. tit. 33, § 4916a (West 2019) (fourteen days); WIS. STAT. ANN. § 48.981 (West 2019) (ten days).

285. See, e.g., ARK. CODE ANN. § 12-18-908 (West 2019) (giving an individual thirty days to request a hearing); 325 ILL. COMP. STAT. ANN. 5/7.16 (West 2019) (sixty days); IND. CODE ANN. § 31-33-26-89(c) (West 2020) (thirty days); MO. ANN. STAT. § 210.152 (West 2018) (sixty days); MONT. ADMIN. R. 37.47.602 (2019) (thirty days); N.J. ADMIN. CODE § 3A:5-2.5 (2019) (twenty days); N.Y. SOC. SERV. LAW § 424-8(a)(i) (McKinney 2019) (ninety days); 23 PA. STAT. AND CONS. STAT. § 6341(a)(2) (2019) (ninety days); UTAH CODE ANN. § 62A-4a-1009 (West 2019) (thirty days); VA. CODE ANN. § 63.2-1515 (2019) (thirty days).

286. NEB. REV. STAT. ANN. § 28-723 (2019).

287. See, e.g., MICH. COMP. LAWS ANN. § 722.627(6) (West 2019) (hearing may be granted for “good cause shown” if within sixty days after 180 day notice period expires); UTAH CODE ANN. § 62A-4a-1009(3)(e) (West 2019) (request may be granted after thirty days if person requesting can show good cause and show why response was “unreasonably burdensome” during that time); COLO. CODE REGS. § 2509-2:7.111(E) (2019) (hearing may be granted outside ninety days if “good cause” shown). These grace periods do require additional

When these current short deadlines are enforced, the risk of erroneous deprivation is high. In Nebraska, where individuals are permitted to appeal “at any time,” they often do so several years after first receiving notice of their inclusion in the registry—and win.<sup>288</sup> For example, in 2015, the Nebraska Department of Health and Human Services (NDHHS) received approximately eighty percent of its total requests for hearings more than one year after notice was effectuated.<sup>289</sup> In fact, the majority of hearing requests were filed more than five years after the parents on the registry received notice.<sup>290</sup> Nebraska has a remarkably high reversal rate: hearings were resolved in favor of the petitioner registrant in thirty out of thirty-nine administrative hearings held in 2016.<sup>291</sup> The data from Nebraska suggests that many individuals who cannot appeal their inclusion in state registries because they failed to do so within the brief and arbitrary period set by their state’s scheme may, in fact, have valid claims for expungement.<sup>292</sup>

The reasons that individuals may not effectuate their rights if limited to only brief periods within which to act are myriad. Practical obstacles may deter parents with valid claims from filing a request. In states that only allow requests within five or fifteen days, a busy parent may fail to even read the letter before the deadline expires. Short statutes of limitations pose a major hurdle for parents who often do not understand the notice letter and need time to contact a lawyer who can explain the process.<sup>293</sup> Even if parents fully understand the letter and

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administrative resources to determine whether an exemption should be granted.

288. NEB. DEP’T OF HEALTH AND HUMAN SERVICES, COPY OF CENT. REGISTRY 2015–2016 DATA (2018) (on file with author).

289. According to public records data received from NDHHS, the agency received a total of 682 expungement requests in 2015. NDHHS only received 135 requests within a year of notice. NDHHS received ninety-one within one to two years, sixty within two to three years, forty-five within three to four years, thirty-four within four to five years, and 317 requests after more than five years. NEB. DEP’T OF HEALTH AND HUMAN SERVICES, *supra* note 288.

290. *Id.*

291. *Id.*

292. *Id.*

293. See KRAMER, *supra* note 155. Other practitioners have shared stories about clients who bring the notice letter to their office after thirty days and must be told that it is too late to appeal their registry status.

process, they still may forfeit valid claims simply because they do not understand the value of appealing their administrative finding based on the information provided to them and their current life circumstances. Circumstances change, however, and parents may realize months or even years down the line that their inclusion in the registry poses a barrier to their long-term goals, such as public employment or higher education. The fact that an overwhelming majority of Nebraska parents appeal their registry status after five years suggests that this is so. Additionally, parents who also have court petitions filed against them often may be overwhelmed by fighting their case in court and may fail to respond to the notice letter because their attention is focused on the immediate crisis in their family.

States should abolish, or at the very least drastically extend, the time period during which a parent or listed individual may request an administrative hearing seeking to have their name removed from the registry. States can adopt similar language to Nebraska's statute, which allows expungement requests to be filed "[a]t any time subsequent to completion of the investigation . . ."<sup>294</sup> Any additional burden this change would impose on the states in the form of more frequent hearings may be outweighed by the state's interest in reducing the number of false positives included in its child abuse and neglect registry.<sup>295</sup> It is also important to understand the relative scale of this administrative and fiscal burden: even if each of the estimated 50,000 people added each year to the registry in New York<sup>296</sup> filed an appeal, the number of hearing requests would pale in comparison to the more than 213,000

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294. NEB. REV. ST. ANN. § 28-723 (2019).

295. See *Lee TT v. Dowling*, 664 N.E.2d 1243, 1251 (N.Y. 1996) ("Enhancing procedural protections to protect private interests . . . may serve the State's interest in other ways by reducing the number of false negative findings."); see also Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 96 YALE L. J. 455, 476-78 (1986) (discussing the "accuracy value" of procedural due process as well as the dignity value of participation). The state's interest is also discussed in Part III.A.2.c, *supra*.

296. See *KRAMER*, *supra* note 155, at 2, 6 (describing the estimated 50,000 people added to the registry in 2017, despite the State receiving fewer than 9,300 requests for removal).

requests filed for public assistance hearings each year.<sup>297</sup> For states that maintain smaller registries, such as Pennsylvania, where fewer than 5,000 reports are added each year,<sup>298</sup> this fiscal burden is even lighter.<sup>299</sup> To reduce costs, these requests can be evaluated more closely at the administrative review stage<sup>300</sup> or settled prior to a hearing.<sup>301</sup> Given the high cost to parents of erroneous inclusion, states should not tolerate a short deadline that cuts off recourse for people whose names do not belong on the registry.<sup>302</sup>

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297. See N.Y. STATE OFFICE OF TEMP. AND DISABILITY ASSISTANCE, 2018 ANNUAL REPORT 17 (2018), <https://perma.cc/BBS8-JQ6J> (PDF) (“The office . . . performs administrative hearings on behalf of other agencies and processed more than 213,000 requests for hearings last year.”).

298. From 2012–2017, Pennsylvania has routinely added fewer than 5,000 reports of child abuse and neglect per year to the state registry. PA. DEP’T OF HUMAN SERVS., 2017 ANNUAL CHILD PROTECTIVE SERVICES REPORT 4 (2017), <https://perma.cc/U5QU-N5ZF> (PDF).

299. See *id.* at 29 (discussing Pennsylvania’s low levels of funding required to investigate child abuse, relative to the total local, state, and federal funding for child welfare services in the state).

300. Almost every state requires the agency to immediately conduct an administrative review, which consists of a department official examining the investigation record and determining internally if the report is unfounded. See, e.g., N.Y. SOC. SERV. LAW § 422(8) (McKinney 2019) (establishing the requirements at the administrative review stage for New York child abuse investigations); 23 PA. CONS. STAT. § 6341 (2019) (describing the process for expungement or amendment of records from the child abuse database in Pennsylvania by the Secretary of Human Services). According to practitioners, the administrative review stage is severely underutilized and rarely results in an overturned finding. See KATHERYN D. KATZ, 4 CHILD CUSTODY AND VISITATION § 31.03 (Matthew Bender ed., 2019) (“Although there are procedures for administrative review for individuals seeking to have the record expunged, if there is some credible evidence and the allegations are reasonably related to child care, the report will not be expunged.”).

301. See, e.g., *Doyle v. Camelot Care Ctrs., Inc.*, 160 F. Supp. 2d 891, 898 (2001) (describing a settlement agreement between the state and the accused that led to an expungement of a child abuse report).

302. See Kate Hollenbeck, *Between a Rock and a Hard Place: Child Abuse Registries at the Intersection of Child Protection, Due Process, and Equal Protection*, 11 TEX. J. WOMEN & L. 1, 23 (2001) (“[M]ost courts agree that being listed on an employer-accessible child abuse registry does implicate an individual’s due process rights to both employment and reputation.”).

#### 4. Evidentiary Hearings

If a parent receives proper notice and files a timely appeal, she is entitled to an opportunity to be heard to challenge her inclusion in the registry.<sup>303</sup> Almost every state requires the agency first to conduct an administrative review, consisting of a department official examining the investigation record and determining internally if the initial determination is well-founded.<sup>304</sup> If the department official declines to remove the report, the parent then may proceed to an administrative hearing before a hearing officer or ALJ.<sup>305</sup> The hearing officer serves as an impartial arbiter.<sup>306</sup> In the hearing, the parent and the child protective agency each have an opportunity to present witnesses and documentary evidence to support their case.<sup>307</sup> The rules of evidence are relaxed and hearsay is often

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303. See, e.g., N.Y. SOC. SERV. LAW § 422(8)(a)(i) (stipulating the right of the accused to request the commissioner to amend the report, and subsequently request a fair hearing to review the child abuse report); 23 PA. CONS. STAT. § 6341 (“[I]f the secretary refuses a request . . . the perpetrator . . . shall have the right to appeal and request a hearing before the secretary to amend or expunge an indicated report on the grounds that it is inaccurate . . .”).

304. See, e.g., N.Y. SOC. SERV. LAW § 422(8)(a)(ii) (establishing the process by which the Office of Children and Family Services will review the report by the investigating agency); 23 PA. CONS. STAT. § 6341(a)(2) (describing the right of the accused to request an administrative review by the Secretary prior to an administrative hearing).

305. See, e.g., N.Y. SOC. SERV. LAW § 422(8)(b) (providing the accused with an opportunity for a fair hearing with the burden of proof on the state); 23 PA. CONS. STAT. § 6341(c) (listing the hearing process requirements before an ALJ or hearing officer in the event of a refusal to amend or expunge by the Secretary).

306. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 18, § 434.6 (2019) (“The hearing must be conducted by an impartial hearing officer who is employed by the department for that purpose and who has not been involved in any way with the action in question.”); ALA. CODE § 26-14-7.1(7) (2019) (“The alleged perpetrator shall have . . . [t]he right to have a hearing officer appointed who shall be disinterested, fair, and impartial.”).

307. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 18, § 434.8(d) (“Each party is entitled . . . to have witnesses give testimony and to otherwise have relevant and material evidence presented on his or her behalf . . . .”); ALA. CODE § 26-14-7.1(7) (2019) (“The alleged perpetrator shall have . . . [t]he right to present written evidence, oral testimony, and witnesses.”).

permitted.<sup>308</sup> As discussed above, the petitioner is often expected to testify on her own behalf. Almost every state provides a right to appeal the hearing officer's decision to a court of competent jurisdiction.<sup>309</sup>

The number of registry hearings held each year varies by state. In New York and Georgia, states with large populations, two to three thousand hearings are currently held per year.<sup>310</sup> Nebraska, a state with a population under two million,<sup>311</sup> holds fewer than fifty hearings per year.<sup>312</sup> Even in the most populous states, the number of registry hearings pales in comparison to the number of hearings held relating to other administrative

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308. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 18, § 434.8(e) (“Technical rules of evidence following in a court of law will not apply but evidence introduced must be relevant and material.”).

309. See, e.g., GA. CODE ANN. § 49-5-183(f) (West 2019) (requiring appeals be brought to the superior court of the county); MO. REV. STAT. § 210.152.6 (2018) (permitting de novo judicial review in the county circuit court); N.J. ADMIN. CODE § 3A:5-2.8 (2019) (providing judicial review authority to the Appellate Division of Superior Court); 23 PA. CONS. STAT. ANN. § 6341(g) (requiring appeals be brought to the Commonwealth Court). While rarely used, this right to appeal can provide parties with meaningful recourse. See also, e.g., Letter from Judy D. Holdaway, Ga. Dep’t of Family & Children Servs. Deputy Gen. Counsel 3 (Sept. 7, 2018) (on file with author) (providing information on the Georgia Child Protective Services Information System). For example, in Georgia, of the twenty-one cases that were appealed to the Superior Court in 2017, eleven were overturned on appeal. *Id.*

310. According to public records gathered from the New York Office of Children and Family Services, 3,829 hearings were held in 2016. See Letter from Craig Sunkes, New York Office of Children and Family Services Records Access Officer 2 (June 8, 2018) (stating the number of fair hearings that occurred in 2016 in New York State) (on file with author). According to public records gathered from Georgia Department of Human Services, 2,698 hearings were held in 2017. Holdaway, *supra* note 309, at 3.

311. In 2018, the estimated state population of Nebraska was approximately two million. See *Resident Population in Nebraska*, FED. RES. BANK OF ST. LOUIS, <https://perma.cc/P7SE-LMUE> (last updated Feb. 15, 2019) (last visited Dec. 21, 2019) (providing Nebraska population data) (on file with the Washington and Lee Law Review).

312. According to public records gathered from Nebraska Department of Health and Human Services, only thirty-nine hearings were held in 2016. See E-mail from Jaime L. Hegr, Neb. Dep’t of Health and Human Servs. Attorney (July 13, 2018) (on file with author) (providing data regarding child abuse registry hearings in Nebraska).

determinations, such as hearings challenging public assistance determinations.<sup>313</sup>

We recommend the following practical reforms to ensure that hearings are conducted in a manner that comports with due process, based on best practices seen in states around the country.

*a. Disclosure and Compulsion of Evidence*

Currently, most states either do not discuss the individual's rights at the hearing in their statute<sup>314</sup> or provide the agency responsible for handling the hearings with discretion to decide these critical rights.<sup>315</sup> When states delegate this task to agencies, states run the risk that agencies will only provide a few basic rights, such as the right to present and cross-examine witnesses.<sup>316</sup>

States should ensure that parents are afforded certain minimum due process protections during their hearings. States can follow the model of Pennsylvania and Alabama, which provide certain key rights, such as the right to automatic and

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313. For example, in New York, 13,023 hearings were held for denial of public assistance in 2016–2017. *See* N.Y. STATE OFFICE OF TEMP. AND DISABILITY ASSISTANCE, 2017 STATISTICAL REPORT ON THE OPERATIONS OF NEW YORK STATE PUBLIC ASSISTANCE PROGRAMS 55 (2017), <https://perma.cc/VA2H-GJBW> (PDF) (providing data on hearings for public assistance for 2016–2017 in the New York state).

314. *See, e.g.*, N.Y. SOC. SERV. LAW § 422(8) (McKinney 2019) (providing little stipulated protection of the accused's rights at the hearing); GA. CODE ANN. § 49-5-183(d) (West 2019) (same).

315. Mississippi's statute provided this level of discretion prior to 2019. *See* MISS. CODE ANN. § 43-21-257(3) (2003) ("The Department of Human Services shall adopt such rules and administrative procedures, especially those procedures to afford due process to individuals who have been named as substantiated perpetrators before the release of their name from the central registry, as may be necessary to carry out this subsection.").

316. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 18, § 434.8(d) (2019)

Each party is entitled to be represented by an attorney or other representative of his or her choice, to have witnesses give testimony and to otherwise have relevant and material evidence presented on his or her behalf, to cross-examine opposing witnesses, to offer rebuttal evidence and to examine any document or item offered into evidence.

complete disclosure of evidence prior to the hearing<sup>317</sup> and the right for individuals to ask for subpoenas to compel witnesses to attend the hearing.<sup>318</sup>

Without the right to automatic disclosure of evidence, the risk of erroneous deprivation is high.<sup>319</sup> Agency counsel has a strategic advantage over petitioners in cross-examination because they can review the full notes of the child protective investigation, including harmful statements from out-of-court witnesses, prior to the hearing.<sup>320</sup> Since hearsay is generally permitted, agency counsel can surprise parents on the stand

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317. See 23 PA. CONS. STAT. § 6341(c) (2019) (“The department or county agency shall provide a person making an appeal with evidence gathered during the child abuse investigation within its possession that is relevant to the child abuse determination . . .”); see also ALA. CODE § 26-14-7.1(7)(f) (2019)

The alleged perpetrator shall have . . . the right to inspect any exculpatory evidence which may be in the possession of departmental investigators, and the right to be informed of such evidence if known by departmental investigators before the hearing; provided, that a request for such evidence is made at least five working days prior to the date set for the hearing.

While both Pennsylvania and Alabama recognize the need to provide individuals with critical information about the child protective investigation prior to the hearing, Pennsylvania’s statute provides a more straightforward process for pro se litigants and agency counsel. 23 PA. CONS. STAT. § 6341(c); ALA. CODE § 26-14-7.1(7)(f). First, the statute mandates automatic disclosure. 23 PA. CONS. STAT. § 6341(c). This is preferable for pro se litigants who may not be aware of the right to file a request for exculpatory evidence or may not file it within the right time frame. *Id.* Second, the statute simply requires agency counsel to send the entire packet of case records to the individual on the registry. *Id.* This is a more efficient procedure for agency counsel because it does not require them to make a determination of what qualifies as “exculpatory” evidence for the purposes of the hearing. *Id.*

318. See ALA. CODE § 26-14-7.1(7)(i) (“The alleged perpetrator shall have . . . the right to request issuance of subpoenas to witnesses and compel attendance. This request must be received no later than ten calendar days prior to the hearing, unless a shorter time is agreed upon by the hearing officer.”).

319. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (“[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . .”); *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (“Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”).

320. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 18, § 434.8 (providing no opportunity for petitioners to obtain the documents prior to entrance into evidence at a hearing).

with witness statements that the parent could not reasonably have anticipated. A damaging cross-examination can lead a hearing officer to make an erroneous determination about the parent's credibility. The probable value of full disclosure is high because it allows the parent to adequately prepare direct testimony to address the possible motives and bias of the witness. Allowing individuals to have a fair opportunity to address witness bias is particularly critical for child abuse and neglect reports, which "often occur in a context with no disinterested witnesses,"<sup>321</sup> such as former partners and family members.

Without the right to issue subpoenas to compel witnesses to attend hearings, the right of erroneous deprivation also is high.<sup>322</sup> While parents have a right to present witnesses to support their case, parents face unique barriers to conducting their own independent investigation because of the stigma associated with being accused of abuse or neglect in the community.<sup>323</sup> Take the example of an allegation against a parent of a child coming to school unclean.<sup>324</sup> The key witness in this case may be a teacher who observed the child and called in

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321. Molly Greer, Note, *Suggestions to Solve the Injustices of the New York State Central Register for Abuse and Maltreatment*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 729, 764 (2011); see also Phillips, *supra* note 23, at 188–89 ("Providing the accused an opportunity to confront and cross-examine the informant solves the problem of bad faith or erroneous testimony most effectively.").

322. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 18, § 434.8 (providing no subpoena authority to the accused). Cf. *Jamison v. Dep't of Soc. Servs.*, 218 S.W.3d 399, 416–17 (Mo. 2007) (denying the state subpoena power to compel abuse reporters or victims to testify, when the accused were statutorily denied the same right, given the result would be an unfair trial and a failure to meet the minimal standards of due process). *But see supra* note 318 and accompanying text.

323. See *Valmonte v. Bane*, 18 F.3d 992, 1000 (2d Cir. 1994) ("There is no dispute that [the accused]'s inclusion on the list potentially damages her reputation by branding her as a child abuser, which certainly calls into question her good name, reputation, honor, or integrity." (internal citations and quotation marks omitted)).

324. This is a common allegation of failure to provide adequate clothing and hygiene charged under the broader category of "neglect." See, e.g., N.Y. FAM. CT. ACT § 1012(f)(i) (2019) (defining neglect broadly as a child "whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care").

the report.<sup>325</sup> Any parent would feel uncomfortable approaching a school professional about a child protective investigation, especially if they are still regularly involved in the daily lives of their children. Professionals may consider the discussion inappropriate and refuse to speak with the parent. The probable value of the right to issue subpoenas is high because the petitioner could compel this witness to the hearing instead of persuading them to testify. If subpoenaed to testify, the parent can ask specific questions about the child's appearance and establish that, despite the conclusory language used in the child protective investigator's records, the child was dirty because of a fight at recess.

Both subpoenas and full disclosure of documents can be handled at a pre-trial conference, which are already routinely held in many jurisdictions to inform parents of their rights and to encourage settlement between the two parties prior to the hearing.<sup>326</sup> States can pay the cost for the sheriff's office to serve the subpoena or ask parties to serve their own subpoenas through a disinterested party.<sup>327</sup> To accomplish full disclosure, agency counsel is only required to copy a packet of records to

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325. See, e.g., *David II. v. Tracy II.*, 854 N.Y.S.2d 583, 585 (N.Y. App. Div. 2008) (“[A]nother teacher observed that the child frequently arrived at school in an unbathed, disheveled condition, wore unclean clothes and exhibited a pervasive urine smell when he entered the classroom.”).

326. See E-mail from Bonnie Saltzman, Law Offices of Bonnie E. Saltzman, LLC, to author (July 18, 2019, 7:12 PM EST) (describing the limitations for releasing administrative findings in Colorado) (on file with author); Telephone Interview with Brenda Wahler, Law Office of Brenda Wahler (Mar. 22, 2019) (discussing the use of pre-trial conferences by the state to settle cases in Montana).

327. See, e.g., ALA. CODE § 26-14-7.1(8) (2019) (“The Department of Human Resources or its investigative hearing officers shall have the power and authority to issue subpoenas to compel attendance by and production of documents from any witness. Subpoenas may be served in the same manner as subpoenas issued out of any circuit court.”); ALA. R. CIV. P. 45(b)

A subpoena issued on behalf of any party may be served by the sheriff, a deputy sheriff, or *any other person who is not a party*, who is not related within the third degree by blood or marriage to the party seeking service of process, and who is not less than 19 years of age or by certified mail pursuant to the provisions of Rule 4. (emphasis added).

provide to the parent.<sup>328</sup> There may be some burden to the state in requiring state employees to testify pursuant to subpoenas, but this is outweighed by the state's interest in accurate adjudication and the value of offering parents a fair opportunity to prepare their case prior to the hearing.<sup>329</sup>

*b. Raise Burden of Proof at Hearing to “Preponderance of the Evidence”*

A majority of states require the child protective agency to prove that abuse or neglect occurred by a preponderance of the evidence or substantial evidence.<sup>330</sup> However, a few states still only require the agency to prove their case by the same low standard that was used in the caseworker's initial investigation.<sup>331</sup>

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328. See Phillips, *supra* note 23, at 184 (“The administrative costs of evidentiary disclosure are not significant because the state must only copy the documents in its possession or otherwise permit access to its evidence.”).

329. See *id.* at 184–85 (weighing the benefits of witness protection against the value of knowledge of the identities of the state's witnesses to the accused).

330. See, e.g., ARK. CODE ANN. § 12-18-813 (West 2019) (using a preponderance of the evidence standard); COLO. CODE REGS. § 2509-2 (2019) (same); CONN. GEN. STAT. § 17a-101k(d)(2) (2019) (same); DEL. CODE ANN. tit. 16, § 925A(a) (2019) (same); D.C. Mun. Regs. tit. 29, § 5909.7 (2019) (same); GA. CODE ANN. § 49-5-183(d)(4) (West 2019) (same); ILL. ADMIN. CODE tit. 89, § 336.115(c)(2)(B) (West 2019) (same); IND. CODE ANN. § 31-33-26-9(b) (West 2020) (same); KAN. ADMIN. REGS. § 30-46-10 (2019) (same); LA. ADMIN. CODE tit. 67, § 1111(F)(5) (2019) (same); MICH. COMP. LAWS § 722.627(7) (2019) (same); MINN. STAT. § 626.556 (2019) (following standard of proof in all state human services hearings, which is preponderance of the evidence under MINN. STAT. § 256.045(3b)(a) (2019)); MO. REV. STAT. § 210.152(5) (2019) (employing a preponderance of the evidence standard); NEB. REV. STAT. § 28-723 (2019) (“A juvenile court finding of child abuse or child neglect shall be presumptive evidence that the report was not unfounded.”); NEB. REV. STAT. § 28-720(1)(c) (2019) (using a preponderance of the evidence standard); N.Y. SOC. SERV. LAW § 422(8)(c)(ii) (McKinney 2019) (same); 23 PA. CONS. STAT. § 6341(c.2)(5) (2019) (using a substantial evidence standard); S.C. CODE ANN. § 63-7-1930 (2019) (establishing a preponderance of the evidence standard); S.D. ADMIN. R. 67:14:39:07 (2019) (same); 1 TEX. ADMIN. CODE § 351.503(e) (2019) (same); UTAH CODE ANN. § 62A-4a-1009(5)(a) (West 2019) (same); VA. CODE ANN. § 63.2-1526(A) (2019) (same); WASH. ADMIN. CODE § 110-30-0340 (2020) (same); WIS. STAT. § 48.981(3m)(c)(2) (2019) (same).

331. See, e.g., ALA. CODE § 26-14-7.1(11)(a) (referencing when a hearing officer determines the allegations are “indicated,” or “[w]hen credible evidence and professional judgment substantiates that an alleged perpetrator is

States should require the child protective agency to prove at the hearing that abuse or neglect occurred by a preponderance of the evidence. Without the preponderance of the evidence standard at the hearing, the risk of erroneous deprivation is high. Several state supreme courts have ruled that the preponderance of the evidence standard at the hearing is necessary to guard against a high risk of erroneous deprivation.<sup>332</sup> In fact, most court cases challenging the procedures for the child abuse and neglect registry have focused on the burden of proof at the hearing as the most troubling procedural deficiency. The probable value of using an elevated preponderance standard is high because it allows the evidence to be weighed carefully by the finder of fact. This is especially important in an evidentiary hearing because the hearing officer may need to compare and contrast different versions of the same

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responsible for child abuse or neglect.” (ALA. CODE § 26-14-8 (2019)); ARIZ. REV. STAT. ANN. § 8-811(K) (2019) (“On completion of the presentation of evidence, the administrative law judge shall determine if probable cause exists to sustain the department’s finding that the parent, guardian or custodian abused or neglected the child.”); VT. STAT. ANN. tit. 33, § 4916a(e) (West 2019) (“The Department shall have the burden of proving that it has accurately and reliably concluded that a reasonable person would believe that the child has been abused or neglected by that person.”).

332. See, e.g., *Cavarretta v. Dep’t of Children & Family Servs.*, 660 N.E.2d 250, 258 (Ill. App. Ct. 1996) (“[The Department of Children and Family Services (DCFS)] should at least be required to prove its case by a preponderance of the evidence. This standard would allow DCFS and the subject to share the risk of error, rather than have the accused bear the brunt of the risk.”); *Jamison v. Dep’t of Soc. Servs.*, 218 S.W.3d 399, 412 (Mo. 2007) (“Due process requires a [Child Abuse and Neglect Review Board] to substantiate a report of child abuse or neglect by a preponderance of the evidence before an individual’s name can be included in and disseminated from the registry.”); *Benitez v. Rasmussen*, 626 N.W.2d 209, 218 (Neb. 2001) (analyzing a deprivation of liberty without due process in three parts under the preponderance of the evidence standard: (1) what liberty interest is at stake, (2) “what procedural safeguards are required,” (3) whether there was a denial of the process due); *In re Preisendorfer*, 719 A.2d 590 (N.H. 1998) (concluding that the liberty interest in a registry appeal demands the same preponderance of the evidence standard required when protecting the liberty interest in having a parent-child relationship, balanced against the state interest in protecting the safety of children); *Lee TT v. Dowling*, 664 N.E.2d 1243, 1252 (N.Y. 1996) (“We conclude that the Due Process Clause of the Federal Constitution requires the Department to substantiate reports of child abuse by a fair preponderance of the evidence . . .”).

event.<sup>333</sup> The state's interest is low because there is little expense associated with this ratcheting up of the burden of proof.<sup>334</sup> The fact that a clear majority of states employ preponderance of the evidence suggests that the state's interests are not compromised by a higher burden of proof at the hearing stage.

*c. Automatically Expunge Reports When Court Dismisses  
Petition*

One important feature of child abuse and neglect registry systems is that they do not operate in a vacuum. In all states, related but separate court proceedings may be held for those cases for which the agency determines court intervention is needed.<sup>335</sup> In these proceedings, the court is tasked with determining not only whether abuse or neglect did, in fact, occur, but also what should happen to ensure that the child remains safe and the family is able to reunify, if at all possible.<sup>336</sup> An integral feature of these court proceedings is that a court of competent jurisdiction—and in many states, a court that specializes in child protective matters—must adjudicate

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333. See *Cavarretta v. Dep't of Children & Family Servs.*, 660 N.E.2d 250, 258 (Ill. App. Ct. 1996) (“[T]he credible evidence standard is deficient because it does not require the fact finder to weigh conflicting evidence. This is especially unfair and unreliable in light of the nature of the testimony and the need to compare and contrast different versions of the same event.”); *Jamison v. Dep't of Soc. Servs.*, 218 S.W.3d 399, 411 (Mo. 2007) (“As the probable cause standard does not require a balancing of available evidence, it leaves the ultimate assessment ‘open to the subjective values’ of the fact finder, thereby magnifying the risk of erroneous fact finding.” (quoting *Santosky v. Kramer*, 455 U.S. 745, 762 (1982))).

334. See *Jamison*, 218 S.W.3d at 411–12 (determining that, while fiscal and administrative efficiency are substantial state interests, the state's interest does not outweigh the liberty and property interests of the accused).

335. See *Glaberson*, *supra* note 64, at 314–15

The most drastic avenue is to remove the child prior to going to court—an action referred to as an “emergency removal.” Short of removing the child on an emergency basis, the agency can file a petition in the relevant court seeking an order placing the family under supervision of the agency, or mandating that the parents comply with certain services or conditions to keep their child at home. The agency may seek the court's approval to remove the child or children from the home at that time.

336. See *id.* at 313–16 (discussing the ability of state agencies to determine a course of action most beneficial to the child and to remedy abuse or neglect).

precisely the same question that is asked of the substantiating agency: has sufficient evidence been adduced to support the allegations made against the parent?<sup>337</sup> In an overwhelming majority of states, the court will assess this question based on the same burden of proof that the ALJ at a registry hearing would use: preponderance of the evidence.<sup>338</sup> There is reason to believe that court-based findings may be more accurate than administrative determinations. Judges often review a broader array of evidence, and that evidence often must be presented in accordance with the rules of evidence, which are geared toward ensuring reliability.<sup>339</sup> In recognition of this fact, numerous states have written into their registry schemes a mechanism to avoid duplicative adjudications: many states bar parents from taking administrative appeals of their registry inclusion if a court makes a finding against them.<sup>340</sup> Yet too few state schemes employ the reverse procedure, expunging reports when a court does not find that abuse or neglect occurred.<sup>341</sup> As a result, these

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337. See *id.* at 316 (noting that “the court in many states will not yet have ruled as to whether . . . the child actually was abused or neglected,” when determining what intervention is appropriate, making that determination later at a fact-finding hearing).

338. Compare, e.g., N.Y. SOC. SERV. LAW § 422(8)(c)(ii) (McKinney 2019) (stating that in an administrative hearing, the Office of Children and Family Services must prove abuse or neglect occurred based on a preponderance of the evidence), with N.Y. FAM. CT. ACT § 1046(b) (McKinney 2019) (“In a fact-finding hearing: . . . any determination that the child is an abuse or neglected child must be based on a preponderance of evidence . . .”).

339. See, e.g., N.Y. FAM. CT. ACT § 1046(a) (detailing the admissible forms of evidence in a family court hearing). Judges who oversee child protective proceedings everyday also have more expertise in interpreting the statutory definitions of abuse and neglect than ALJs who often adjudicate a variety of issues across agencies. See John L. Gedid, *ALJ Ethics: Conundrums, Dilemmas, and Paradoxes*, 11 WIDENER J. PUB. L. 33, 38 (2002) (“Because ALJs are part of an agency that possess specialized expertise, long time association with a particular agency and its personnel tends to indoctrinate or inculcate into the ALJ ‘the agency culture, viewpoints, and approaches to problems.’” (quoting K.G. Jan Pillai, *Rethinking Judicial Immunity for the Twenty-First Century*, 39 HOW. L.J. 95, 125 (1995))).

340. See, e.g., GA. CODE ANN. § 49-5-183(d)(11) (West 2019) (“The doctrines of collateral estoppel and res judicata as applied in judicial proceedings shall be applicable to the administrative hearings held pursuant to this article.”).

341. See, e.g., ARK. CODE ANN. § 12-18-807 (West 2019) (permitting the prevailing party in a judicial adjudication to file a certified copy of the judicial adjudication to the Office of Appeals and Hearings and requiring the office to

states force individuals to appeal their reports even when a court already has found that no abuse or neglect occurred.<sup>342</sup>

States should automatically expunge a report from the registry if a petition based on that report is dismissed in a court of law. This scheme would mirror the automatic sealing of records that is commonplace in criminal court. For example, in New York, when a criminal action is resolved in favor of the accused, the clerk of court immediately notifies the commissioner of the Division of Criminal Justice Services and other relevant agencies that the record, including the arrest record, shall be sealed.<sup>343</sup> Automatic sealing occurs not only with acquittals after trial, but also when a defendant successfully completes a plea agreement resulting in dismissal.<sup>344</sup> The state's interest in forcing the parent to litigate their registry appeal

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determine if the adjudication has preclusive effect “by applying the principles of claim preclusion and issue preclusion”).

342. See, e.g., Ark. Dep't of Human Servs. v. Salcido, 567 S.W.3d 510, 515 (Ark. Ct. App. 2018) (dismissing an appeal by a parent for failure to report the final disposition of the Office of Appeals and Hearings' determination).

343. See N.Y. CRIM. PROC. LAW § 160.50 (McKinney 2019) (requiring expungement of records upon dismissal or election not to prosecute). This process is automatic and if the District Attorney objects, the onus is on the State to file a motion and demonstrate that the interests of justice require otherwise. See *id.* (“[U]nless the district attorney upon motion . . . demonstrates to the satisfaction of the court that the interests of justice require otherwise . . .”).

344. See *id.* §160.50(3) (“No defendant shall be required or permitted to waive eligibility for sealing or expungement pursuant to this section as part of a plea of guilty . . .”). Petitions can also be dismissed in court when the state has decided that the parent has rectified any concerns in the home, generally when the allegations are minor, and the parent has successfully completed recommended services. See, e.g., N.Y. FAM. CT. ACT § 1051(c) (McKinney 2019) (“If facts sufficient to sustain the petition under this article are not established, or if, in a case of alleged neglect, the court concludes *that its aid is not required* . . . the court shall dismiss the petition and shall state on the record the grounds for the dismissal.” (emphasis added)). In the case of a report where the alleged abuse or neglect did occur, but the family did services and rectified the situation, the state may desire to retain the report for diagnostic purposes. See, e.g., N.C. GEN. STAT. § 7B-311(b) (2019) (“This data shall be furnished by county directors of social services to the Department of Health and Human Services and shall be confidential . . .”). For these circumstances, the state could maintain a registry accessible only to child welfare agencies. *Id.*

after receiving a favorable disposition in a court of law is low.<sup>345</sup> If Family Court has found no abuse or neglect occurred after an adjudicatory hearing on the merits, the only result of requiring a duplicative administrative procedure is waste.<sup>346</sup>

Automatic expungement is a practical cost-saving measure for the state, reducing the number of administrative appeals and hearings per year.<sup>347</sup> States can adopt provisions that provide for prompt expungement of reports if a petition arising from the report has been dismissed by order of a court in a child protective proceeding. Indiana and Hawaii have such provisions, which can serve as a guide.<sup>348</sup> Some states already recognize court findings as presumptive evidence at the administrative hearing, but stop short of automatic expungement.<sup>349</sup> This provision should include not only a finding of no abuse or neglect after an adjudicatory hearing, but

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345. As noted above, the state interest in lower evidentiary requirements does not supersede the liberty and property interests of the parent. In the case where the state could not substantiate the claims of abuse, the state's interest should be even lower. *See supra* note 332 and accompanying text.

346. Given that a vast majority of hearings on expungement result in reversal, automatic expungement for unsubstantiated claims would likely remove a great majority of the judicial and administrative burden. *See supra* notes 163–164 and accompanying text.

347. Without the expense of duplicative hearings, the states may partially offset the expense of the greater number of hearings that results from expanding the time frame for requests. *See supra* Part III.B.3.

348. *See, e.g.*, HAW. REV. STAT. § 350-2(d) (2019) (“The department . . . shall promptly expunge the reports in cases if . . . (2) the petition arising from the report has been dismissed by order of the family court after an adjudicatory hearing on the merits pursuant to chapter 587A.”); IND. CODE ANN. § 31-33-26-15(a) (West 2020) (“The Department shall expunge a substantiated report contained within the index not later than ten (10) working days after any of the following occurs: (1) a court having jurisdiction over a child in need of services proceeding determines that child abuse or neglect has not occurred . . .”).

349. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 18, § 434.10(f) (McKinney 2019) (“A Family Court finding . . . that a child has been abused or neglected is presumptive evidence that the report of child abuse and maltreatment maintained by the [state registry] concerning such child is substantiated by a fair preponderance of the evidence if the allegations are the same.”); *see also* Mich. Att’y Gen., Opinion Letter (Apr. 28, 1978), 1978 Mich. AG LEXIS 126 (“The obverse of this statement is therefore equally true; that is, a finding by a court of competent jurisdiction that there was no neglect or abuse raises a presumption that the report or record was not substantiated and must therefore, be amended or expunged.”).

also any dispositions or settlements that result in a dismissal of the petition.<sup>350</sup>

#### *IV. Conclusion*

The right to family integrity is fundamental. When individuals are included in statewide registries purporting to compile allegations of child maltreatment, this right is infringed. By focusing on employment consequences of registry inclusion and ignoring the impacts on individuals' right to parent, current jurisprudence and scholarship sets the due process scale to the wrong balance. This Article demonstrates that the balance must tip in order to protect families, and has suggested a number of common-sense reforms that, if implemented, will serve to protect families and lead to better outcomes for children.

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350. For example, in New York, many cases do not proceed to fact-finding but the petition is dismissed. *See* N.Y. FAM. CT. ACT § 1051(c) (McKinney 2019) (“If facts sufficient to sustain the petition under this article are not established, or if, in a case of alleged neglect, the court concludes that its aid is not required . . . , the court shall dismiss the petition and shall state on the record the grounds for the dismissal.”). Many other cases do not proceed after successful completion of a suspended judgement. *See id.* § 1053 (permitting the court to “define permissible terms and conditions” for allowing a suspended judgment for up to one year in most cases). Similarly, the court has the power to vacate a finding. *See id.* § 1061 (“For good cause shown and after due notice, the court on its own motion . . . may . . . vacate any order issued in the course of a proceeding under this article.”).