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Letting the Kids Run Wild: Free-Range Parenting and the (De)Regulation of Child Protective Services

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Abstract

Families in the United States suffer from a removal epidemic. The child welfare framework allows unnecessary and harmful intervention into family and parenting matters, traditionally left to the discretion of the parent. Many states allow Child Protective Services ("CPS") to investigate, intervene, and permanently separate a child from their parents for innocuous activities such as letting the child play outside unattended. This especially affects low-income and minority families.

To prevent CPS from unnecessarily intervening in a family's decision to let their children engage in independent, unsupervised activities, Utah passed a "free-range" parenting act ("Act") in 2018. The Act explicitly excludes independent, age-appropriate activities from the definition of neglect. This Act has remained largely unexamined: whether the passage of the free-range parenting law has resulted in a decrease of non-supervision cases referred to and substantiated by CPS is unclear. It is also unclear whether free-range parenting laws are

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a viable solution to the issue of unnecessary and harmful state intervention, in general.

This Note explores whether the free-range parenting law passed in Utah in 2018 has led to any discernible reduction in non-supervision cases and removals. Since the statistical analysis has significant limitations, the Note then takes a more general approach in examining whether these laws address the causes of unnecessary state intervention. The Note finds that many free-range parenting laws fail to address larger issues in the child welfare system and tend to mainly benefit middle-class and high-income families. A solution will likely require a concerted effort by all three branches of the government. It is imperative that efforts to pass free-range parenting laws are not abandoned but rather utilized for bigger and more equitable change.

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Of all tyrannies, a tyranny sincerely exercised for the good of its victims may be the most oppressive. . . . [T]hose who torment us for our own good will torment us without end for they do so with the approval of their own conscience.

C. S. Lewis[1]

INTRODUCTION

The current child welfare system in the United States is rife with problems, and families suffer from a removal epidemic.[2] The current child welfare framework allows unnecessary and harmful intervention into family and parenting matters, traditionally left to the discretion of the parent.[3] This is aptly illustrated by the fact that many states allow Child Protective Services ("CPS")[4] to investigate, intervene, take a child into its custody, and permanently separate the child from their parents for innocuous activities such as letting the child play outside unattended or travel to school alone.[5] Additionally, many states

1. C. S. LEWIS, GOD IN THE DOCK: ESSAYS ON THEOLOGY AND ETHICS 324 (Walter Hooper ed., 1970).

2. *See infra* note 149 and accompanying text.

3. *See infra* Part II.

4. CPS is the generic name for the agency in many states that is empowered to investigate child abuse and child neglect cases, to work with the families to avoid separation, and to take appropriate steps if the agency determines that the child is no longer safe at home.

5. *See* Diane L. Redleaf, *Where Is It Safe and Legal to Give Children Reasonable Independence?*, 23 CHILD.'S RTS. LITIG. 27, 28–31 (2021) [hereinafter Redleaf, *Where Is It Safe*] (describing a fifty-state survey of juvenile and neglect statutes, and finding that most states count non-supervision as neglect in some way).

allow criminal prosecution of parents for leaving their children unsupervised.[6] This especially affects low-income and minority families.[7]

To prevent CPS from unnecessarily intervening in a family's decision to let their children engage in independent, unsupervised activities, Utah passed a "free-range" parenting law in 2018,[8] explicitly excluding independent, age-appropriate activities from the definition of neglect.[9] This law remains largely unexamined, and whether its passage has resulted in a decrease of non-supervision cases referred to and substantiated by CPS is still unclear.[10] It is also unclear whether free-range parenting laws are a viable solution to the issue of unnecessary and harmful state intervention in general.[11]

This Note briefly introduces the current child protection system in the United States, including an exploration of its origins and parallels in the modern system.[12] The Note then explores the issues in the current system, focusing on the harm unnecessary removals cause.[13] Next, the Note examines one possible solution that has gained increased traction: free-range parenting laws.[14] It analyzes whether the law passed in Utah in 2018 has led to any discernible reduction in non-supervision cases and removals.[15] The Note argues that free-range parenting laws fail to address larger issues in the child welfare system and tend to only benefit middle-class and high-income

6. *See id.* at 31 ("And while most states would allow prosecutions of children left alone, some states like Maryland are clear that children under 8-years-old cannot be unsupervised at all, on pain of criminal prosecution.").

7. *See* David Pimentel, *Punishing Families for Being Poor: How Child Protection Interventions Threaten the Right to Parent While Impoverished*, 71 OKLA. L. REV. 885, 887 (2019) [hereinafter Pimentel, *Punishing Families*] ("Vague child neglect laws conflate poverty and neglect so that families that are already disadvantaged face the prospect of being forcibly broken up for the putative protection of the children, but for the actual protection and, indeed, the actual benefit, of no one." (emphasis omitted)).

8. S.B. 65, 62d Leg., Gen. Sess. (Utah 2018).

9. *See id.*; UTAH CODE ANN. § 80-1-102(58)(b) (LexisNexis 2018).

10. *See infra* Part III.B.

11. *See infra* Part III.B.

12. *See infra* Part I.

13. *See infra* Part II.

14. *See infra* Part III.

15. *See infra* Part III.B.

families.[16] Finally, it concludes by providing big-picture suggestions for solutions that should have a more significant impact on reducing unnecessary state intervention.[17] This does not mean that efforts to pass free-range parenting laws should be abandoned but rather that these laws should be utilized for broader and more equitable change.[18]

I. THE CURRENT CHILD PROTECTIVE SERVICES SYSTEM

Child protection and foster care are subject to a vast statutory and regulatory framework.[19] This Part touches only on a selection of the most important federal statutory and regulatory provisions affecting removal decisions, and roughly sketches out general trends of laws at the state level.[20] Before doing so, it is imperative to provide an overview of the history of the modern child welfare system in order to understand its critiques. This Part first gives a historical overview of the development of the modern welfare system before explaining the federal statutory and regulatory framework. It then briefly sketches out the life of a child welfare case in the judicial system and the statutory frameworks on the state level. Finally, this Part concludes by explaining Utah's child welfare statutes.

A. *History of Child Protection in the United States*

The origin of both modern foster care and juvenile justice institutions can be traced back to the establishment of poorhouses and orphanages in the nineteenth century.[21] To deal

16. *See infra* Part III.B.

17. *See infra* Part IV.

18. *See infra* Part IV.

19. *See* Kira Luciano, *The Myth of the Ever-Watchful Eye: The Inadequacy of Child Neglect Statutes in Illinois and Other States*, 14 NW. J.L. & SOC. POL'Y 293, 296–97 (2019) (giving a brief overview of the current federal regulatory framework); DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 33–46 (2022) (discussing the history of the federal framework, particularly focusing on the effect on low-income and minority families).

20. In the interest of space, this Note does not engage in a complete overview of all federal and state laws but rather focuses on the laws that are most pertinent to the issues discussed in this Note.

21. *See* ANTHONY WALSH & CRAIG HEMMENS, LAW, JUSTICE, AND SOCIETY: A SOCIOLEGAL INTRODUCTION 200–06 (4th ed. 2016) (discussing the

with enormous levels of poverty, especially affecting children, private citizens started to rally for schools and housing for impoverished children.[22] One consequence of these efforts was the removal of children from their families.[23] The first removal happened in 1874, when Mary Ellen Wilson was removed from her guardians because they had allegedly repeatedly beaten and neglected the nine-year-old.[24] A private "religious missionary to the poor" sought the help of a lawyer to remove Mary from her guardians after the police declined to investigate the issue.[25] Following Mary's removal, the private missionary and one of the lawyers that had assisted her in the case founded the New York Society for the Prevention of Cruelty to Children.[26] Many other societies were subsequently founded, most of which dealt with the effect of extreme poverty on children.[27]

The modern child welfare system developed out of the actions taken by the early, private child welfare societies and, to some extent, their legacy prevails today. The first large-scale child removals also occurred in New York, when an aid society decided to run "orphan trains" from New York to the Midwest and place "nearly 100,000 New York City children [in] new

development of juvenile justice institutions in the United States and their origins); *see also* ROBERTS, *supra* note 19, at 109 ("The colonial approach to child welfare for white families was imported from the Elizabethan Poor Laws of 1601, which provided for state-supported assistance to the needy outside the church.").

22. *See* WALSH & HEMMENS, *supra* note 21, at 203 (describing the development of the idea that children were best helped by providing education and housing).

23. *See* John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 451–52 (2008) (describing advocacy efforts for child protection laws).

24. *See id.* at 451.

25. *Id.*

26. *See id.* at 452 ("Bergh and Gerry decided to create a nongovernmental charitable society devoted to child protection, and thus was born the New York Society for the Prevention of Cruelty to Children (NYSPCC), the world's first entity devoted entirely to child protection.").

27. *See* Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 552–53 (2019) ("Missionary Charles Loring Brace helped to found the New York Children's Aid Society in an effort to focus solely on the needs of poor children.").

homes."[28] These placements were meant to find children more "wholesome environ[ments]"[29] and are considered a precursor to the modern foster care system.[30] The idea that poverty alone is enough to justify the removal of a child has persisted since the very beginning of the child welfare system.[31] The first removals were initiated and carried out by private citizens—not the state.[32] But in 1912, the Federal Government founded the Children's Bureau, the first government agency worldwide to deal with the welfare of children.[33]

The modern child welfare system is rooted not only in a feeling of economic and moral superiority held by protestant missionaries but also in a feeling of racial superiority. The state utilized the development of a child welfare system, for example, by establishing boarding schools for Native American children with the express goal of eliminating their cultural traditions and to "civilize" them.[34] Black children, on the other hand, were entirely ignored until the mid-twentieth century.[35]

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28. JOHN E.B. MYERS, CHILD PROTECTION IN AMERICA: PAST, PRESENT, AND FUTURE 21 (2006).

29. *Id.*; *see also* STEPHEN O'CONNOR, ORPHAN TRAINS: THE STORY OF CHARLES LORING BRACE AND THE CHILDREN HE SAVED AND FAILED xx (2001) (discussing orphan trains and the fact that these trains were not only transporting orphans but also children that still had at least one living parent).

30. ROBERTS, *supra* note 19, at 110–14 (tracing modern foster care back to the orphan trains and the early understanding of child protection).

31. *See* Trivedi, *supra* note 27, at 554 ("The pioneers of the child welfare system determined that poverty was reason enough to remove a child from her parents. . . . Modern child welfare activists argue that labeling the poor with genetic inferiority has simply been replaced in today's system with a label of psychological inferiority . . . .").

32. *See id.* at 553.

33. *See History*, CHILD.'S BUREAU, https://perma.cc/7AME-PZ8R (last updated July 14, 2023).

34. *See* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1831 (2019)

> The boarding schools aimed to take Native children from their families in reservation communities and place them into boarding schools based in "white communities" where the children would be taught through violence to speak only English; eschew their Native language, clothes, and customs; and perform manual labor without compensation . . . .

35. *See* ROBERTS, *supra* note 19, at 113–14.

Modern child protection as we know it today arose in the mid-twentieth century. While previous child welfare programs focused on physical child abuse and neglect, the definition of child abuse expanded in the twentieth century to include emotional, medical, and sexual abuse, broadening the reach of child welfare agencies to its modern level.[36]

Today, the definition of child abuse and neglect remains relatively broad.[37] CPS and removals still disproportionately affect low-income and racial and cultural minority families. Not only is "poverty . . . the single greatest predictor of a child welfare case," but its presence also means that the families subject to child welfare cases frequently do not possess the resources to defend these cases.[38] State intervention regarding child welfare is also most likely in "communities that exist at the intersection of structural racism and poverty."[39] In 2021, roughly 22% of children in foster care were Black, while Blacks only made up around 13% of the general population.[40] Similarly, around 2% of foster children were American Indian or Alaska Native despite only being 1.3% of the general population, and 22% of foster children were Hispanic, while only making up 18%

> Black children were more likely to be labeled delinquent than needy. The main child-caring institution for them was prison or the nascent reformatory for juvenile delinquents. . . . But the state's main approach to Black children's needs in the first decades of the twentieth century was to ignore them.

36. *See* J. Robert Shull, *Emotional and Psychological Child Abuse: Notes on Discourse, History, and Change*, 51 STAN. L. REV. 1665, 1681–97 (1999) (detailing the development of modern societal and legal understanding of child abuse and neglect, and explaining the expanding definitions of child abuse, including emotional and educational neglect and medical and sexual abuse).

37. *See infra* Part I.D.

38. Amy Mulzer & Tara Urs, *However Kindly Intentioned: Structural Racism and Volunteer CASA Programs*, 20 CUNY L. REV. 23, 27 (2016); *see id.* at 28 n.16 ("Poor families are more susceptible to state intervention because they lack power and resources and because they are more directly involved with governmental agencies.").

39. ROBERTS, *supra* note 19, at 36.

40. *Compare* CHILD.'S BUREAU, THE AFCARS REPORT NO. 29 2 (2022) [hereinafter CHILD.'S BUREAU, REPORT NO. 29], https://perma.cc/2ZT8-FJ8Z (PDF), *with* U.S. CENSUS BUREAU, POPULATION ESTIMATES, JULY 1, 2021 (2021) [hereinafter U.S. CENSUS BUREAU, POPULATION ESTIMATES 2021], https://perma.cc/5K5L-HJFJ.

of the general population.[41] In short, "Black, Brown, and Indigenous children are the most likely to be separated from their parents, and nonwhite children make up more than half of America's foster care population."[42]

B. *Federal Statutory and Regulatory Framework*

Since the early twentieth century, the Supreme Court has held that a parent's right to decide how to raise their child is protected under the Fourteenth Amendment. In *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*,[43] the Supreme Court recognized that "[t]he 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."[44] Although this right has arguably been diminished in recent years,[45] it has been reaffirmed by the Supreme Court several times.[46]

While the regulation of child welfare programs was traditionally a state issue,[47] the federal government asserts considerable influence over child welfare by conditioning funds on the implementation of certain regulations. When Congress

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41. *Compare* CHILD.'S BUREAU, REPORT NO. 29, *supra* note 40, *with* U.S. CENSUS BUREAU, POPULATION ESTIMATES 2021, *supra* note 40.

42. ROBERTS, *supra* note 19, at 39.

43. 268 U.S. 510 (1925).

44. *Id.* at 535.

45. *See* David Pimentel, *Criminal Child Neglect and the "Free-Range Kids": Is Overprotective Parenting the New Standard of Care*, 2012 UTAH L. REV. 947, 953–56 (2012) [hereinafter Pimentel, *Overprotective Parenting*] (describing a decline in deference to parental choices reflected in federal and state law and no vindication of the Constitutional parental right).

46. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (reiterating the fundamental rights parents enjoy regarding rearing their children); Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right[] . . . to have children [and] to direct the education and upbringing of one's children . . . ." (citation omitted)); Troxel v. Granville, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

47. *See* Trivedi, *supra* note 27, at 555–56 (explaining that regulation of child welfare is traditionally seen as part of the states' police powers).

passed the Child Abuse Prevention and Treatment Act[48] ("CAPTA") in 1974, the federal government, for the first time, "venture[d] into a subject area that had been exclusively the domain of state law."[49] While states are not required to follow CAPTA, the federal government provides funding to a state's CPS only if the state implements certain minimum standards set by the federal government.[50] CAPTA originally included a federal definition of child abuse and neglect defining it as the "physical or mental injury, sexual abuse, negligent treatment, or maltreatment of a child under the age of eighteen by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened."[51] The definition has been amended several times afterwards, illustrating the difficulty that Congress has in balancing "child protection on the one hand, and preserving both the liberty interests of parents and societal interests in the integrity of the family on the other."[52] In 2010, Congress deleted the federal definition of child abuse and neglect from CAPTA altogether.[53] By that point, however, many states had already adopted one of the federal definitions to meet the minimum federal standard to receive federal funding.[54]

CAPTA minimum standards include a litany of features that have been adopted by most states. For one, CAPTA requires

48. Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101–5116).

49. David Pimentel, *Fearing the Bogeyman: How the Legal System's Overreaction to Perceived Danger Threatens Families and Children*, 42 PEPP. L. REV. 235, 243 (2015) [hereinafter Pimentel, *Fearing the Bogeyman*].

50. *See id.* (describing how the federal government influences state-level child welfare systems); *see* also Howard Davison, *Federal Law and State Intervention When Parents Fail: Has National Guidance of Our Child Welfare System Been Successful?*, 42 FAM. L.Q. 481, 485 (2008) (explaining the role of the federal government in setting child welfare standards).

51. Pub. L. No. 93-247 § 3.

52. Pimentel, *Fearing the Bogeyman*, *supra* note 49, at 243.

53. *See* 42 U.S.C. § 5106g (defining relevant terms regarding child welfare).

54. See David Manno, *How Dramatic Shifts in Perceptions of Parenting Have Exposed Families, Free-Range or Otherwise, to State Intervention: A Common Law Tort Approach to Redefining Child Neglect*, 65 AM. U. L. REV. 675, 684 (2016) (explaining how old federal definitions still cause issues in enforcement at the state level today because states have adopted variable, vague definitions of child abuse and neglect).

that individuals who report child abuse or neglect in good faith[55] are immunized from liability.[56] CAPTA also requires that states have mandatory reporting laws, requiring a defined set of people to have the legal duty to report any instances of "known and suspected . . . child abuse and neglect."[57] This requirement is somewhat superfluous considering that almost all states had passed their own mandatory reporting provisions by 1967.[58]

Other important federal legislation includes the Adoption Assistance and Child Welfare Act of 1980[59] ("AACWA"), the Adoption and Safe Families Act of 1997[60] ("ASFA"), and the Family First Prevention Service Act of 2017[61] ("Family First Act"). The AACWA was passed to decrease family separation numbers and requires state CPS to make "reasonable efforts" to leave children with their families and return foster children to their parents.[62] This was seen as a policy shift toward family unity,[63] but a short-lived one at that. With the passage of the ASFA in 1997, Congress expressed a preference for having foster children adopted over being reunified with their parents by instituting requirements and incentives that encourage adoption and weaken the "reasonable efforts" standard of the

55. Interestingly, CAPTA did not always impose a good faith requirement but rather required blanket immunity for any report of child neglect or abuse until 1996. *See* Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society's Response*, 36 OHIO N.U. L. REV. 819, 863–64 (2010).

56. *See* 42 U.S.C. § 5106a(b)(2)(B)(vii) (requiring "provisions for immunity from civil or criminal liability under State and local laws and regulations for individuals making good faith reports of suspected or known instances of child abuse or neglect").

57. *Id.* § 5106a(b)(2)(B)(i).

58. *See* ROBERTS, *supra* note 19, at 166 (discussing mandatory reporting laws and various issues caused by such laws).

59. Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).

60. Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 2 and 42 U.S.C.).

61. Pub. L. No. 115-123, 132 Stat. 64 (codified as amended in scattered sections of 42 U.S.C.).

62. 42 U.S.C. § 671(a)(15)(B).

63. *See* ROBERTS, *supra* note 19, at 120 (exploring federal child welfare law and critiquing the tendency of child welfare scholars to characterize child safety and family unity as mutually exclusive policy goals).

AACWA.[64] The ASFA provides monetary incentives for states—that is, between $4,000 to $10,000 for every child adopted out of foster care in excess of a baseline comprised of an average of prior annual adoption rates—incentivizing an ever-increasing number of adoptions.[65] The ASFA accelerates adoption of children by requiring "permanency decisions" regarding the child's future within one year of the child's entry into the foster system.[66] While, in theory, the ASFA continues the goal of family unity by still requiring that "reasonable efforts" are made to keep the child in the family, this requirement has been described as "toothless" because the ASFA fails to define the term "reasonable efforts" and excuses the need for such efforts in certain "aggravated circumstances."[67] Like "reasonable efforts," the ASFA also fails to define the term "aggravated circumstance" which has led to divergent practices between states.[68] Lastly, the Family First Act, passed in 2018, allows states to use federal funds previously designated for foster care placements to provide substance abuse and mental health treatment, and prevention services to families for up to one year.[69] It is noteworthy that the Family First Act did not repeal any major provisions of the previously discussed acts,[70] meaning that it does little to clarify statutory

64. *See id.* at 120–21 (exploring federal child welfare law and the impact the ASFA had on state child welfare systems).

65. *See* 42 U.S.C. § 673b(d); MOVEMENT FOR FAM. POWER, "WHATEVER THEY DO, I'M HER COMFORT, I'M HER PROTECTOR." HOW THE FOSTER SYSTEM HAS BECOME GROUND ZERO FOR THE U.S. DRUG WAR 47 (2020), https://perma.cc/43UF-LZB7 (PDF) (explaining how the ASFA incentivizes adoption over reunification).

66. *See* 42 U.S.C. § 675(5)(C) (requiring that "no later than 12 months after the date the child is considered to have entered foster care . . . [a] hearing shall determine the permanency plan for the child"); *see also* Mary O'Flynn, *The Adoption and Safe Families Act of 1997: Changing Child Welfare Policy Without Addressing Parental Substance Abuse*, 16 J. CONTEMP. HEALTH L. & POL'Y 243, 247 (1999) (exploring the impact of the ASFA on the permanent removal of children from parents struggling with substance abuse).

67. *See* Trivedi, *supra* note 27, at 557–60 (exploring issues in child welfare after the ASFA).

68. *See id.* at 559.

69. *See* 42 U.S.C. § 671(e)(1)(A); *see also* Trivedi, *supra* note 27, at 565–66 (discussing how the Family First Act may be a sign of a general shift toward a policy preference of family preservation).

70. *See* MOVEMENT FOR FAM. POWER, *supra* note 65, at 49–51.

language or to address the economic incentives that guide state actions.

C. *The Judicial Process*

While state processes may differ in some respects, their basic structures and requirements are generally the same. The process usually starts with CPS receiving a report regarding possible child neglect or abuse.[71] CPS then sends an investigator to determine whether the report can be substantiated, that is, whether there is actual evidence of child neglect or abuse.[72] If the investigator determines that the report is substantiated, depending on the state, the child may be separated from their parents and taken into CPS's custody,[73] or CPS may develop a "voluntary" plan under which the parents agree to certain conditions in order to keep their child.[74] Annually, around 17,000 children are temporarily removed from their homes—just to be returned within ten days of the removal.[75] It is the court's task to determine whether the neglect or abuse warrants a termination of parental rights through an adjudication hearing.[76] Because such hearings tend to take time, a temporary custody hearing will initially determine whether a child should stay with their parents or be kept in CPS's custody until the adjudication hearing.[77] The standard of proof during

71. *See* Mulzer & Urs, *supra* note 38, at 30 (describing the life of a child welfare case).

72. *See id.* (explaining that reports are investigated for actual evidence).

73. *See* Candra Bullock, Comment, *Low-Income Parents Victimized by Child Protective Services*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1023, 1030 (2003) (describing the judicial process to determine neglect).

74. *See* ROBERTS, *supra* note 19, at 134–39 (describing how CPS circumvents the judicial process by offering the family to sign so-called safety plans agreeing to certain conditions or even transferring guardianship to friends or family, which many parents sign because their choice is between signing or potentially loosing custody altogether).

75. Eli Hager, *The Hidden Trauma of "Short Stays" in Foster Care*, MARSHALL PROJECT (Feb. 11, 2020), https://perma.cc/Q56R-RWU7.

76. *See* Bullock, *supra* note 73, at 1031 (describing the judicial process of determining whether parents will lose their parental rights).

77. *See id.* at 1030 ("Since this process can last for months or years, a temporary custody hearing takes place in the meantime to determine whether the child should remain in the temporary custody of [CPS] or be returned home under supervision pending the decision at trial.").

the temporary custody hearing is preponderance of the evidence.[78] Many states use the "best interest of the child" test in the court's determination.[79] This test generally requires the courts to balance "(1) the parent's interest for family integrity; (2) the state's interest to protect the minor; and (3) the child's interest in safety and a stable family environment."[80] The children's rights movement in the 1960s, however, led to increased judicial discretion in the test's application, and statutes now frequently provide "judges with a list of nondescript factors, giving them broad discretion to enforce the best interest of the child standard in cases of neglect."[81]

If a court determines that a parent engaged in child abuse or neglect, the child will likely enter foster care.[82] Once the child remains in the foster system for a statutorily prescribed period, CPS will initiate a proceeding to terminate the parental rights, effectively severing any legal claim a parent has to their natural child.[83] Children whose parents have lost their parental rights are considered "legal orphans" until they are adopted—if they are lucky enough to be adopted before aging out of the foster system.[84]

D. *Statutory and Regulatory Framework of the States*

Even though many state child welfare systems share common characteristics, there are some important differences between the states that merit examination. A state's authority

78. *See id.* at 1031 ("A fair preponderance of the evidence, which is a minimal standard of proof, is applied at this stage of the child abuse and neglect proceedings.").

79. *See* Luciano, *supra* note 19, at 299.

80. Joyce Koo Dalrymple, Note, *Seeking Asylum Alone: Using the Best Interest of the Child Principle to Protect Unaccompanied Minors*, 26 B.C. THIRD WORLD L.J. 131, 143 (2006).

81. Manno, *supra* note 54, at 687.

82. *See* Bullock, *supra* note 73, at 1031–32 (describing judicial proceedings for termination of parental rights).

83. *See id.*

84. See Martin Guggenheim, *The Effect of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 121–22 (1995) ("[T]here is reason to be concerned that, in an increasing number of cases, states are destroying the legal relationship between parents and children for no good purpose and that, as a result, a record number of children have become legal orphans.").

to pass child welfare legislation is rooted in state police powers.[85] In the context of child welfare, states often rely on the *parens patriae*—parent of his country—doctrine[86] to initiate lawsuits on behalf of their citizenry.[87]

Under many states' definitions of child neglect and child abuse, non-supervision can be understood as such neglect. Child neglect and abuse statutes appear as both criminal and civil statutes.[88] The majority of states have civil child neglect statutes that prohibit parents from leaving their children home alone or allowing their children to engage in independent activities.[89] Such restrictions may be age dependent[90] and generally allow flexibility for CPS to determine the "reasonableness" of the time or circumstances in which the child was left unsupervised.[91] Another vast group of states define neglect so vaguely that CPS workers have discretion to argue that an unsupervised child is neglected based on non-supervision alone, even if this prohibition is not explicitly listed in the statute.[92] This vagueness puts a strain on low-income and minority communities.[93] For example,

85. *See* Trivedi, *supra* note 27, at 555 ("Although the government initially was not involved in child welfare, the law evolved to recognize state authority to protect its citizens.").

86. *See* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 57 (1890) (describing *parens patriae* as "inherent in the supreme power of every state . . . often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves").

87. *See* Trivedi, *supra* note 27, at 556 (describing the states' use of the *parens patriae* doctrine in child welfare cases).

88. *See* Redleaf, *Where Is It Safe*, *supra* note 5, at 28–29 (detailing a survey of both state criminal and civil statutes to determine the status of child welfare laws in each state).

89. *See id.* at 31 ("And while most states would allow prosecutions of children left alone, some states like Maryland are clear that children under 8-years-old cannot be unsupervised at all, on pain of criminal prosecution.").

90. *See id.* at 33 (describing different age limits imposed by Kansas, Michigan, Tennessee, and other states).

91. *See id.* (describing state child welfare policies that allow CPS discretion to determine reasonableness of non-supervision).

92. *See id.* at 29 ("The survey shows that almost all states fail to distinguish reasonable independence from neglect.").

93. *See* Pimentel, *Punishing Families*, *supra* note 7, at 887 ("Vague child neglect laws conflate poverty and neglect so that families that are already disadvantaged face the prospect of being forcibly broken up for the *putative*

stay-at-home orders for schools during the COVID-19 pandemic highlighted that low-income parents often lack the time or resources to stay home to supervise their children or find alternative care.[94] Thus, civil and criminal child neglect statutes essentially mandate a parenting style that may be unattractive for some and unachievable for many.[95]

Additionally, criminal child neglect statutes can lead to issues beyond family separation and may have far-reaching implications for employment and housing. An arrest record and charge for child abuse or neglect may mean that the parent becomes ineligible to work at educational and health care facilities.[96] Landlords may also refuse to rent their property to the affected family.[97]

Further, states have divergent mens rea (intent) elements in criminal child neglect statutes. These statutes generally "reflect an extremely wide range of *mens rea* requirements," from knowing and intentional to negligent and reckless.[98] For free-range parents, these requirements are of little consequence because their decision to leave their child unsupervised is generally a highly conscious, deliberate decision. This means they would be liable under any of the above-mentioned requirements, since people that have a conscious intent to do

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protection of the children, but for the *actual* protection and, indeed, the actual benefit, of no one.").

94. *See* OFF. HUM. SERVS. POL'Y, U.S. DEP'T HEALTH & HUM. SERVS., THE IMPACT OF THE FIRST YEAR OF THE COVID-19 PANDEMIC AND RECESSION ON FAMILIES WITH LOW INCOMES 3 (2021), https://perma.cc/43WR-LHV2 (PDF) ("With fewer options for alternative child care, women of color, women without a college degree, and low-income women lost more hours of work to care for children than higher-income and White women.").

95. *See* Pimentel, *Overprotective Parenting*, *supra* note 45, at 950–56 (describing an increased trend in societal and legal norms towards overprotective parenting and punishing parents that deviate from those norms).

96. *See, e.g.*, ROBERTS, *supra* note 19, at 18–21 (describing a mother struggling to gain employment after she was charged with child endangerment, following a stranger's call to 911, because her child was walking seemingly alone in a park).

97. *See, e.g.*, *id.* at 21.

98. Pimentel, *Overprotective Parenting*, *supra* note 45, at 972 (emphasis added).

something usually also meet the requirements for a negligent or reckless intent.[99]

E. *Utah's Child Welfare Statutory Framework*

Since this Note examines Utah's free-range parenting law specifically, this subpart will first give a short overview of the statutory framework of child welfare in Utah. The laws governing Utah's child welfare system are found in the Utah Juvenile Code.[100] Fundamentally, the Utah Juvenile Code states, "It is in the best interest and welfare of a child to be raised under the care and supervision of the child's natural parents."[101] The code clarifies, however, that Utah "retains a compelling interest in investigating, prosecuting, and punishing abuse and neglect."[102]

Utah is one of the few states that has a universal mandatory reporting duty, meaning that, under the Utah Code, anyone, except clergy and attorneys in certain situations, who has "reason to believe" that abuse or neglect occurred or that a situation "would reasonably result in abuse or neglect" must report such a situation to CPS.[103] Willful failure to make a report counts as a Class B misdemeanor and may be prosecuted.[104] Further, the identity of a mandatory reporter is kept confidential,[105] and the reporter is immunized from civil or criminal liability if the report is made in good faith.[106]

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99. *See id.* at 972 ("The Free Range parent, who consciously chooses to allow her child some freedom and autonomy, carefully weighing those risks, will easily meet the 'knowing' or 'intentional' mens rea requirement in terms of exposing her children to the attendant risks.").

100. UTAH CODE ANN. §§ 80-2-101 through 80-7-105 (West 2023).

101. *Id.* § 80-2a-201(1)(c).

102. *Id.* § 80-2a-201(2).

103. *Id.* § 80-2-602(1).

104. *See id.* § 80-2-609(2)(a).

105. *See id.* § 80-2-608.

106. *See id.* § 80-2-610(1)(a)

> A person who in good faith makes a report under Section 80-2-602, 80-2-603, or 80-2-604, or who otherwise notifies the division or a peace officer or law enforcement agency of suspected abuse or neglect of a child, is immune from civil and criminal liability in connection with the report or notification.

When a caseworker finds that a report is sufficiently substantiated, they may take the child into temporary custody,[107] with the primary goal of the investigation being the "protection of the child."[108] If a child is removed from their home, a shelter hearing is held within seventy-two hours of the removal to determine the child's continued placement.[109] During this hearing, a judge decides whether a preponderance of evidence justifies the continued placement of the child outside their home.[110] A final adjudication hearing must be held within sixty days of either the shelter hearing or the initial filing for child neglect and abuse.[111] The final placement decision has to be made by a judge under a clear and convincing evidence standard.[112] The child may then be placed in foster care or under the care of "any other appropriate person."[113] CPS may, at a later point, file for the termination of parental rights.[114]

Having sketched out the structure and workings of the current child welfare system, this Note next explores issues arising under that system.

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107. *See id.* § 80-2-701(3) ("The division shall make a written report . . . that includes a determination regarding whether the alleged abuse or neglect in the report . . . is supported, unsupported, or without merit."); *see also id.* § 80-2-701(7)(b).

108. *Id.* § 80-2-701(1)(b).

109. *See id.* § 80-3-301 (describing the procedures and requirements of a shelter hearing).

110. *See id.* § 80-3-301(9)(a) (prescribing a presumption in favor of returning the child to the parents unless one of the exceptions is found by a preponderance of the evidence).

111. *See id.* § 80-3-401(2) ("The final adjudication hearing shall be held no later than 60 calendar days after the later of: (a) the day on which the shelter hearing is held; or (b) the day on which the abuse, neglect, or dependency petition is filed.").

112. *See id.* § 80-3-402(1) ("If, at the adjudication hearing, the juvenile court finds, by clear and convincing evidence, that the allegations contained in the abuse, neglect, or dependency petition are true, the juvenile court shall conduct a dispositional hearing.").

113. *Id.* § 80-3-405(2)(a)(i).

114. *See id.* § 80-4-301(1) (allowing for the termination of parental rights if the parent is unfit, fails to make efforts, abandoned the child, has neglected or abused the child, has failed to make parental adjustments, etc.).

II. PROBLEMS IN THE CURRENT FRAMEWORK

This Part examines issues with the incentives that drive reporting of possible cases as well as decisions to remove children from their families. Removals can have serious consequences for the child's development, which are explored as well. Finally, this Part concludes by detailing the problems with foster care itself.

A. *Problems with Removal Decisions*

The introduction of mandatory reporting requirements following CAPTA drastically increased the numbers of reports and investigations by CPS.[115] The fact that mandatory reporters may be prosecuted for failing to report potential abuse or neglect, under statutes such as the Utah Juvenile Code, has substantially contributed to that increase.[116] Mandatory reporters, although well-intentioned, are often ill-informed as to CPS's capacity.[117]

Current federal law allows and even encourages economic incentives to govern removal decisions. Title IV-E of the Social Security Act[118] provides funds for children in foster care, which are "open-ended entitlements,"[119] and states have monetary incentives to increase the number of adoptions out of foster care annually instead of reuniting families.[120] In *Washington State Department of Social and Health Services v. Guardianship Estate of Danny Keffeler*,[121] the Supreme Court found that state

115. *See* ROBERTS, *supra* note 19, at 166 ("As the meaning of what constitutes child abuse broadened and mandated reporting expanded, the number of maltreatment reports skyrocketed—from ten thousand in 1967 to more than two million annually two decades later.").

116. *See* Pimentel, *Fearing the Bogeyman*, *supra* note 49, at 267 ("These [mandatory reporting] requirements are bolstered by a system of incentives virtually guaranteed to result in serious over-reporting. . . . [T]he law of forty-six states imposes criminal penalties on those who become aware of suspicious facts but fail to report that a child may be at risk.").

117. *See* ROBERTS, *supra* note 19, at 168 (describing how most mandatory reporter's reports result in unsubstantiated cases and how most mandatory reporters "tend to overestimate how well CPS will address children's needs").

118. 42 U.S.C. §§ 670–679.

119. ROBERTS, *supra* note 19, at 144.

120. *See supra* note 65 and accompanying text.

121. 537 U.S. 371 (2003).

agencies tasked with child welfare could legally collect and use all of a foster child's social security benefits.[122] This has led to perverse consequences. For one, the vast majority of states allow themselves to collect all of foster children's benefits without having to withhold anything for the children themselves.[123] Consequently, the majority of foster children "aging out" of the foster system, that is, reaching the age of eighteen and losing eligibility to be in foster care, leave the system with no savings or any equivalent safety funds.[124] A congressional report found that, in 2018, thirty-eight states and the District of Columbia collected around $179 million of social security benefits in the name of children in the foster care system.[125] And while the Supreme Court intended these funds as reimbursements to the states for their child welfare expenditures,[126] this is not always how states use these funds. Instead, some states divert the funds to general state coffers, covering other state expenditures.[127]

Unfortunately, many state child welfare agencies contract with corporations to increase cashflow and efficiency. Law professor Daniel Hatcher details how private entities such as MAXIMUS, Inc. help agencies to "increase efforts to obtain

122. *See id.* at 377–78 ("The question here is whether the State's use of Social Security benefits to reimburse itself for some of its initial expenditures violates a provision of the Social Security Act protecting benefits from 'execution, levy, attachment, garnishment, or other legal process.' We hold that it does not." (citing 42 U.S.C. § 407(a))).

123. *See* ROBERTS, *supra* note 19, at 158 ("In 2018, . . . Maryland became the first state to enact legislation that gives some shield for foster children's benefits.").

124. *See* Eli Hager & Joseph Shapiro, *State Foster Care Agencies Take Millions of Dollars Owed to Children in their Care*, NPR (Apr. 22, 2021), https://perma.cc/A5CR-3L6U.

125. *See* CONG. RSCH. SERV., R46975, CHILDREN IN FOSTER CARE AND SOCIAL SECURITY ADMINISTRATION BENEFITS: FREQUENTLY ASKED QUESTIONS 1 (2021), https://perma.cc/6AHH-U7KV ("Data reported for state FY2018 indicate that 38 states and the District of Columbia had access to about $179 million in SSI/Social Security benefits received on behalf of children in foster care to offset child welfare agency foster care costs.").

126. *See Guardianship Estate of Danny Keffeler*, 537 U.S. at 377–78.

127. *See* DANIEL L. HATCHER, THE POVERTY INDUSTRY: THE EXPLOITATION OF AMERICA'S MOST VULNERABLE CITIZENS 50 (2016) (detailing how Maine credited "Title IV-E foster care federal reimbursement to the General Fund as undedicated revenue," and Arizona "assumed [the foster care reimbursements] as part of the overall 'balance sheet'").

foster children's Social Security benefits."[128] The corporation did not hide that its main goal was not the welfare of the children but rather the implementation of an initiative to achieve "maximum revenue impact"[129] by increasing "the number of Maryland foster children determined disabled for Social Security benefits from the current 2 percent to 15–20 percent."[130]

Additionally, until recently, federal policy required that states charge the parents of a child in foster care for child support to reimburse spending on child welfare.[131] Fortunately, on June 8, 2022, the Children's Bureau revised its policy manual, allowing states to decide not to charge low-income parents for child support payments in order to allow these families to use the resources on efforts to reunite with their children instead.[132]

CPS's decision to remove a child based on a court's finding of neglect or abuse is also problematic because child neglect statutes tend to conflate poverty with neglect.[133] For one, child neglect statutes tend to be vague in order to give CPS workers the discretion necessary to address different familial situations.[134] This discretion, however, leaves parents "without clear guidance as to what is permissible and what is not."[135] Moreover, as law professor David Pimentel points out, most

128. *Id.* at 83.

129. *Id.* at 84.

130. *Id.* at 83.

131. *See* ROBERTS, *supra* note 19, at 155 ("Federal law requires that state child welfare agencies refer cases of children eligible for Title IV-E to child support enforcement.").

132. *See* CHILD.'S BUREAU, CHILD WELFARE POLICY MANUAL, 8.4C TITLE IV-E, GENERAL TITLE IV-E REQUIREMENTS, CHILD SUPPORT (2022), https://perma.cc/6TZA-TMLX ("We are issuing revised policy for title IV-E agencies to define more narrowly 'where appropriate' so that the default position in these determinations can be for the title IV-E agency not to secure an assignment of the rights to child support for children receiving title IV-E FCMPs.").

133. *See* Pimentel, *Punishing Families*, *supra* note 7, at 895–909 (discussing how vague laws and legal standards of safety make it harder for low-income families to comply with child neglect laws).

134. *See* Pimentel, *Overprotective Parenting*, *supra* note 45, at 991–94 (providing hypotheticals demonstrating why flexibility regarding children's developmental maturity is necessary).

135. Pimentel, *Punishing Families*, *supra* note 7, at 895.

neglect statutes define child neglect in terms of "risk of harm," without acknowledgement that "[v]irtually all parenting choices bear some risk of harm, so using 'risk of harm' terminology in child neglect statutes effectively makes parenting itself illegal."[136]

Further, neglect is often defined in a way that includes the failure of a guardian to provide "food, clothing, shelter, medical care, or supervision."[137] Many children are held in CPS's custody for a parent's failure to find acceptable shelter,[138] and are referred to CPS because mandatory reporters believe that CPS can assist the families in acquiring these basic necessities.[139]

Unfortunately, CPS provides limited family assistance, even though such assistance has been shown to be one of the most effective ways to reduce the number of CPS interventions. One study found that one-third of children involved in the foster care system could have remained at home if their parents' housing situation were secured.[140] Another study found that when states cut welfare benefits, placement of children into foster care proportionally increased.[141] And yet, only a handful of states have statutory or policy exceptions for low-income families whose financial situation is the sole cause of a CPS intervention.[142]

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136. *Id.*

137. CHILD.'S BUREAU, DEFINITION OF CHILD ABUSE AND NEGLECT 3 (2022), https://perma.cc/3GVQ-77SP (PDF).

138. *See* ROBERTS, *supra* note 19, at 67 ("Children are routinely apprehended and kept in foster care because their parents are unable to find decent shelter.").

139. *See id.* at 167 ("[M]any professionals, relatives, and neighbors turn to CPS as a way to address the hardships they see families facing but not equipped to handle themselves.").

140. *See* NAT'L COAL. CHILD PROT. REFORM, WHO IS IN "THE SYSTEM"—AND WHY (2021), https://perma.cc/HW7K-L8T8 (PDF) (finding that secure housing would reduce the foster care population by 30 percent).

141. *See* Donna K. Ginther & Michelle Johnson-Motoyama, *Do State TANF Policies Affect Child Abuse and Neglect?*, 41 HEALTH AFFS. 1744, 1744 (2022) (finding an inverse relationship between federal funding aiding low-income families and foster care placements).

142. *See* Pimentel, *Punishing Families*, *supra* note 7, at 896 ("Only about twelve states and the District of Columbia make a specific exception for parents who lack the financial means or ability to provide these necessities for their children.").

While "poverty is the single greatest predictor of a child welfare case,"[143] this affects minority families disparately. Families with minority backgrounds are more likely to live under the federal poverty limit than their White counterparts. In 2021, an average of 9.5% of all families in the United States were estimated to have lived below the poverty level.[144] However, only about 7.9% of White families lived under the poverty level, while the number jumps to 18.1% for Black families and 22.1% for American Indian and Alaska Native families.[145] And while Asian families were seemingly less likely to live in poverty than their White counterparts, at 6.8%,[146] this is only the case until the numbers are compared to White, non-Hispanic families, 5.7% of which were living in poverty.[147] Overall, then, minority families are more likely to live in poverty, also making it more likely that the parents are involved with the child welfare system.

B. *The Harm of Removal*

All these factors have contributed to a removal "epidemic" in the United States. Indeed, more children are being separated from their families by CPS weekly than were separated from their parents at the border during the entire Trump Administration's "Zero Tolerance"[148] policy.[149] Nonetheless, there is little to no outrage regarding the removal of children by CPS because there is a persistent belief that such removal is

143. Mulzer & Urs, *supra* note 38, at 27.

144. JOHN CREAMER ET AL., U.S. CENSUS BUREAU, REPORT NO. P60-277, POVERTY IN THE UNITED STATES: 2021, at 25 tbl.A-4 (2022), https://perma.cc/QUF4-K2EN (PDF).

145. *Id.* at 26–32.

146. *Id.* at 30.

147. *Id.* at 28.

148. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (2017).

149. *Compare* Myah Ward, *At Least 3,900 Children Separated from Families Under Trump 'Zero Tolerance' Policy, Task Force Finds*, POLITICO (June 8, 2021), https://perma.cc/N5FQ-HS3D ("The Biden administration has determined that more than 3,900 children were separated from their families at the U.S.-Mexico border under the Trump administration's 'zero tolerance' policy from July 2017 through January 2021, according to a Reunification Task Force report released Tuesday . . . ."), *with* CHILD.'S BUREAU, NO. 28, THE AFCARS REPORT 1 (2021), https://perma.cc/5JQP-X4ES (PDF) (reporting that 252,352 children entered foster care in 2019).

better than leaving the children with their parents.[150] This belief must be challenged.

When a court decides whether a child should be removed from their parents and put into CPS's custody, the court typically does not have to consider the harm that removal itself may cause to the child.[151] While some courts have to conduct the above discussed "best interest of the child" test, this test does not require the court to consider the harm of removal itself.[152] This failure to consider the harm is especially problematic because removal has been shown to have vast, negative developmental impacts on children who are separated from their families. Separation may affect child development,[153] mental health,[154] physical health,[155] and educational

150. *See* Trivedi, *supra* note 27, at 527 ("[T]he accepted wisdom is that removal is the better option for a child in a potentially abusive or neglectful home . . . .").

151. *See id.* at 523 ("The majority of jurisdictions *do not* require that courts consider the harm of removal when answering [removal] questions.").

152. *See id.* at 560–61 ("In some states' statutory schemes, such evidence could be introduced, though the court is under no obligation to consider it."); *see also* Luciano, *supra* note 19, at 299 (explaining that the best interest of the child test "concentrates on the child's interests, yet it does not have particularized or standardized factors, guidelines, or measures to determine what is in the child's best interest").

153. *See* Melissa De Witte, *Separation from Parents Removes Children's Most Important Protection and Generates a New Trauma, Stanford Scholar Says*, STAN. NEWS (June 26, 2018), https://perma.cc/3EJH-FYEH ("[I]n studies of institutionalized children, such separation has been found to disrupt normal child development and to have long-term negative consequences for their psychological and physical health.").

154. *See, e.g.*, Lily A. Brown, *Suicide in Foster Care: A High-Priority Safety Concern*, 15 PERSPS. ON PSYCH. SCI. 665, 665 (2020) (describing that foster youths have a suicide rate about four times higher than youths in the general population); ROBERTS, *supra* note 19, at 235 ("Suicide is extremely rare among preadolescent children, yet shockingly common among those in foster care."); Amy D. Engler et al., *A Systematic Review of Mental Health Disorders of Children in Foster Care*, 23 TRAUMA, VIOLENCE, & ABUSE 225, 226 (2016) (describing more common health issues in foster care than in the general population, including ODD, depressive disorder, PTSD, and reactive attachment disorder); Candice N. Plotkin, *Study Finds Foster Children Suffer PTSD*, HARV. CRIMSON (Apr. 11, 2005), https://perma.cc/TXL4-GSHH ("Former foster children are almost twice as likely to suffer from Post-Traumatic Stress Disorder (PTSD) as U.S. war veterans . . . .").

155. *See, e.g.*, Barbara H. Chaiyachati et al., *All-Cause Mortality Among Children in the US Foster Care System, 2003–2016*, JAMA PEDIATRICS (2020), https://perma.cc/F99Y-9DVS ("Children in foster care were 42% more likely to

outcomes.[156] The consequences are especially pronounced in children who are separated from their mother in early childhood.[157] One study found that children exposed to maternal prenatal drug use dealt better with the consequences of the drug use when allowed to have continued contact with their mothers rather than being removed and separated after birth.[158] This result has been theorized by psychologists to be due to a disruption in the child's "basic trust," which is necessary to form healthy attachments and trust rather than mistrust in the world.[159] Disruption of or failure to build such basic trust "can have physical, emotional, and social consequence for later life."[160] In the context of foster care and child welfare involvements, it is important to note that a child in foster care may never be able to build that basic trust because of frequent change of caregivers and homes.[161] Similarly, a child's

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die than children in the general population, and the disparity was largely irrespective of race or age."); Trivedi, *supra* note 27, at 546–49 (detailing increased physical health issues of foster children).

156. *See, e.g.*, MARK E. COURTNEY ET AL., CHAPIN HALL, MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 26, at 20–28 (2011), https://perma.cc/N7HJ-JU58 (PDF) (describing the educational outcomes of former foster care children).

157. *See* JEANNETTE OCASIO & JANETTE KNIGHT, REDISCOVERY OF TRUST: ERIKSON, KAPLAN, AND THE MYTH OF FOSTER CARE 6, 11 (2003), https://perma.cc/P4QV-B4MK (PDF) (describing how early separation from the primary caregiver, usually mothers, can lead to Reactive Attachment Disorder and that "the earlier the infant enters foster care and the longer they stay, the 'less able they are to sustain earlier attachments,'" which in turn leads to "frightening and violent behaviors").

158. *See* Trivedi, *supra* note 27, at 530 ("[B]abies who were allowed to spend more time with their mothers had shorter periods of withdrawal symptoms than those who were isolated and treated pharmacologically.").

159. *See* OCASIO & KNIGHT, *supra* note 157, at 5 ("According to Erikson, 'the amount of trust derived from the earliest infantile experience does not seem to depend on absolute qualities of food and demonstrations of love, but rather on the quality of maternal relationships.'").

160. *Id.*; *see also* LOUISE KAPLAN, ONENESS AND SEPARATENESS FROM INFANT TO INDIVIDUAL 36–37 (1978) (describing how failure to build basic trust can cause physical, emotional, and social issues later in the child's life because our "discordant, two-year-old, not-yet-logical, imperfect, symbol-making mind of absolute goodness [i.e., basic trust] and absolute badness . . . is still with us").

161. *See* OCASIO & KNIGHT, *supra* note 157, at 8 ("Children who are in and out of the foster care system are traumatized over and over again by the experience; therefore they are less likely to develop the level of trust needed to stabilize a relationship with a significant other.").

undeveloped concept of time makes it difficult to understand concepts such as "temporary placement," which consequently may mean that such placements have a similar effect on the child's development as permanent removals do.[162]

Lastly, separation or permanent removal has an added component of cultural alienation for children from families with a cultural-minority background. Removal from their cultural community can disrupt a child's feeling of identity and "cultural belonging,"[163] which may increase feelings of anxiety and isolation.[164] The harm of removal, thus, cannot be underestimated and should be considered by the courts making removal and placement decisions.

C. *The Harm of Foster Care*

Beyond the harm of removal, the harm that foster care itself can inflict on children and their development should not be underestimated. There is a considerable risk of abuse and neglect in foster care itself. One study found that sexual abuse was four times more common in foster care than in the general population.[165] Another study found that physical abuse in foster care was three times higher than in the general population.[166] These findings are particularly concerning considering that one-third of foster children are in the system solely because of

162. *See id.* ("Because young children do not fully understand time concepts or the idea of 'temporary,' placement and treatment decisions need to be made quickly.").

163. Nell Clement, *Do "Reasonable Efforts" Require Cultural Competence? The Importance of Culturally Competent Reunification Services in the California Child Welfare System*, 5 HASTINGS RACE & POVERTY L.J. 397, 419 (2008).

164. *See* Trivedi, *supra* note 27, at 541 ("Placing children with families who are ethnically different or speak a different language may make the children feel stigmatized, and thereby intensify feelings of isolation and anxiety.").

165. *See* NAT'L COAL. CHILD PROT. REFORM, FOSTER CARE VS. FAMILY PRESERVATION: THE TRACK RECORD ON SAFETY AND WELL-BEING (2022), https://perma.cc/4UWG-LCH6 (PDF) ("A study of reported abuse in Baltimore, found the rate of 'substantiated' cases of sexual abuse in foster care more than four times higher than the rate in the general population." (citation omitted)).

166. *See id.* ("[A]n Indiana study found three times more physical abuse and twice the rate of sexual abuse in foster homes than in the general population.").

their families' insecure housing situation[167] and that only about one-fourth of children in foster care are in the foster system due to physical, sexual, or medical abuse by their parents or guardians.[168] Even if the child does not experience any kind of physical abuse in foster care, significant numbers of children report having been neglected in foster care itself, often in a way that would lead to removal outside the foster care system.[169]

Foster care also has consequences beyond increasing the likelihood of abuse for some children. Comparatively, foster children's mental and physical health is considerably worse than the health of children in the general population. This is aptly and shockingly demonstrated by one study, finding that people who had spent time in foster care as children suffer from PTSD at almost twice the rate of Vietnam war veterans.[170] Another study found that children in the foster system are four times more likely to attempt to commit suicide than children in the general population.[171] Foster care children are also over 40 percent more likely to die than children in the general population.[172] The physical health of many foster children does not fare much better. Some children in foster care lack routine

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167. *See supra* note 140 and accompanying text.

168. *See* KIDS COUNT DATA CTR., CHILDREN WHO ARE CONFIRMED BY CHILD PROTECTIVE SERVICES AS VICTIMS OF MALTREATMENT TYPE IN THE UNITED STATES (2022), https://perma.cc/62BQ-DU9L (describing how, in 2020, 16% of child maltreatment incidents were physical abuse, 9% were sexual abuse, 2% were medical abuse, but 76% were neglect).

169. *See* Trivedi, *supra* note 27, at 543 (describing how one- fifth of foster care children reported not getting enough food and one-fourth reported not having season appropriate clothing).

170. *See* Plotkin, *supra* note 154.

171. See Emily Gurnon, *Suicide Looms Large in Minds of Many Foster Youth*, IMPRINT (Sept. 27, 2020), https://perma.cc/U6UD-NZ9J

> The suicide of any child is a tragedy, but studies show children in foster care are four times more likely than other children to attempt to take their own lives. In one study of more than 700 California 17-year-olds in foster care, 41% reported they had thought about death by suicide and nearly one-quarter had attempted it.

see also Brown, *supra* note 154, at 665.

172. *See* Chaiyachati et al., *supra* note 155 ("Children in foster care were 42% more likely to die than children in the general population, and the disparity was largely irrespective of race or age. In addition, the mortality gap widened over time.").

health care,[173] are missing immunizations,[174] and have medical needs that are unmet.[175]

Lastly, foster care has abysmal outcomes.[176] When the main rationale of a system is the protection and furtherance of children's welfare and development, the system should be able to show that it does just that. The United States' foster care system, however, fails to produce favorable outcomes for foster care children "across virtually all metrics of success."[177] Foster care survivors are more likely to be involved in the criminal justice system than the general population,[178] are more likely to suffer from drug and alcohol addiction,[179] and earn less than their similarly situated peers.[180] They are also less likely to graduate high school[181] and earn a higher educational degree.[182]

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173. *See* U.S. GEN. ACCT. OFF., GAO/HEHS-95-114, FOSTER CARE: HEALTH NEEDS OF MANY YOUNG CHILDREN ARE UNKNOWN AND UNMET 2 (1995), https://perma.cc/32B4-L7G9 (PDF) (reporting that around 12% of children in foster care "receive no routine health care").

174. *See* Margaret R. Swire & Florence Kavaler, *Health Supervision of Children in Foster Care*, 57 CHILD WELFARE 563, 565 (1978) ("Over half of the preschool children had no record of immunizations against mumps (68%), about two-fifths were apparently unprotected against measles (36%) and rubella (43%), and close to one-fifth had not been fully immunized against polio (19%) and diphtheria, tetanus and pertussis (23%).").

175. *See* U.S. GEN. ACCT. OFF., *supra* note 173, at 2 (reporting that 32% of surveyed foster children "had at least some identified health needs that were not met").

176. *See* ROBERTS, *supra* note 19, at 221–42 (detailing the long-term consequences of foster care and arguing that, given these outcomes, foster care is unjustifiable).

177. Trivedi, *supra* note 27, at 550.

178. *See* Joseph Doyle Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1583 (2007) ("Those placed in foster care are far more likely than other children to commit crimes, drop out of school, join welfare, experience substance abuse problems, or enter the homeless population.").

179. *See id.*

180. *See id.* at 1602 ("When foster care placement is instrumented, however, the children who were removed are associated with an 11-percentage point reduction in the fraction of quarters worked, and earnings of less than $850. When controls are introduced, these estimates increase to -0.15 and -$1,269 . . . .").

181. *See id.* at 1583.

182. *See* PETER J. PECORA ET AL., IMPROVING FAMILY FOSTER CARE: FINDINGS FROM THE NORTHWEST FOSTER CARE ALUMNI STUDY 2 (2005), https://perma.cc/8X3W-WASC (PDF) (finding that only around 1.8% of foster

One study found that close to 40 percent of foster care survivors "had been homeless or lacked stable housing at some point since leaving foster care."[183] For a system that claims to be helping children, it seemingly fails to provide them with necessary tools and support.

All of this is to demonstrate that unnecessary state intervention has serious consequences and that it is of utmost importance to limit removal to those cases in which it is absolutely necessary. To decrease unnecessary and harmful removals and to protect unsupervised play, some states have passed free-range parenting acts.[184]

III. FREE-RANGE PARENTING STATUTES AS A SOLUTION

This Part explores free-range parenting acts[185] as a possible solution to the removal epidemic in the United States and examines why free-range parenting laws are a deeply flawed solution.

A. *Free-Range Parenting Explained*

The free-range parenting movement developed as a reaction to the current legal standards requiring "overprotection" of children.[186] Free-range parenting is the idea that parents should be allowed to intentionally let their children engage in unsupervised, independent activities, such as playing outside unsupervised and walking to school or other places, and remain unattended at home or in a car in order to teach them greater independence and further their mental and physical

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care alums hold a bachelor's degree compared to 24% of the general population).

183. Trivedi, *supra* note 27, at 551.

184. *See* Diane L. Redleaf, *Narrowing Neglect Laws Means Ending State-Mandated Helicopter Parenting*, 23 CHILD.'S RTS. LITIG. 1, 1 (2020) [hereinafter Redleaf, *Narrowing Neglect Laws*] (describing states' attempts to protect free-range parents through free-range parenting laws).

185. Recently, more often referred to as "reasonable childhood independence acts" and sometimes as "free-play acts."

186. *See* David Pimentel, *Protecting the Free-Range Kid: Recalibrating Parents' Rights and the Best Interest of the Child*, 38 CARDOZO L. REV. 1, 7 (2016) [hereinafter Pimentel, *Recalibrating Parents' Rights*] ("To a large degree, free-range parenting is a reaction to the present-day obsession with child-safety, and the emerging parenting norms that reflect those fears.").

development.[187] The underlying philosophy of the free-range parenting movement is "that children can and should be given greater responsibility and autonomy at young ages and that the perceived risks that prompt overprotective parenting are overblown."[188] Numerous studies confirm the benefit of unsupervised activities for a child's development.[189] In an effort to immunize parents from liability for engaging in free-range parenting, the movement has lobbied for free-range parenting acts or amendments that codify the parents' right to allow their children to engage in unsupervised, independent activities without intervention from CPS.[190] This aligns directly with a more general goal of reducing unnecessary state interventions by child welfare agencies across the board.

In 2018, Utah was the first state to adopt such an amendment.[191] It passed the free-range parenting amendment, changing the definition of neglect contained in Utah's Juvenile Code.[192] This made Utah the first state to actively protect parents' right to allow their child to engage in unsupervised, independent activities.[193] The Utah Juvenile Code now explicitly excludes independent activities from the definition of neglect:

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187. *See id.* at 9 ("Others have argued that today's coddled kids not only lose a sense of discovery and exploration when they are kept home and under nonstop adult supervision, they are deprived of an opportunity to develop self-sufficiency and or [sic] to learn to take responsibility for themselves."); Nicole Vota, Note, *Keeping the Free-Range Parents Immune from Child Neglect: You Cannot Tell Me How to Raise My Children*, 55 FAM. CT. REV. 152, 153 (2017) ("[Free-range parenting] refers to 'everyday parental decisions,' such as allowing children to independently walk to parks, play outside, or remain unattended inside a car.").

188. Pimentel, *Overprotective Parenting*, *supra* note 45, at 949.

189. *See, e.g.*, Mark Tremblay et al., *Position Statement on Active Outdoor Play*, 12 INT'L J. ENV'T RSCH. & PUB. HEALTH 6475, 6476 (2015) ("Access to active play in nature and outdoors—with its risks—is essential for healthy child development. We recommend increasing children's opportunities for self-directed play outdoors in all settings—at home, at school, in child care, the community and nature.").

190. *See Let Grow Legislative Toolkit*, LET GROW, https://perma.cc/J48L-R896 (last visited Jan. 6, 2024) ("We mobilize support for policies that allow kids to grow up resourceful and resilient, including 'Reasonable Childhood Independence' laws.").

191. *See id.*

192. S.B. 65, 62d Leg., Gen. Sess. (Utah 2018).

193. *See* Meagan Flynn, *Utah's 'Free-Range Parenting' Law Said to Be First in the Nation*, WASH. POST (Mar. 28, 2018), https://perma.cc/5ZZJ-6BE5

> 'Neglect' does not include: . . . (iv) permitting a child, whose basic needs are met and who is of sufficient age and maturity to avoid harm or unreasonable risk of harm, to engage in independent activities, including:
> (A) traveling to and from school, including by walking, running, or bicycling;
> (B) traveling to and from nearby commercial or recreational facilities;
> (C) engaging in outdoor play;
> (D) remaining in a vehicle unattended, except under the conditions described in Subsection 76-10-2022(2);
> (E) remaining at home unattended; or
> (F) engaging in a similar independent activity.[194]

Of note, the statute explicitly excludes independent activities from the neglect statute. However, the amendment still allows for Child and Family Services, Utah's CPS agency,[195] involvement if the children are engaged in activities that a CPS worker deems inappropriate for the child's age or when the child's basic needs are not met.[196] This carve-out provides considerable discretionary power to CPS workers.

(reporting on the first "free-range" parenting law in the United States and its public reception).

194. UTAH CODE ANN. § 80-1-102(58)(b) (LexisNexis 2023).

195. CPS is called Child and Family Services ("DCFS") in Utah. *See Child Protective Services*, UTAH DEP'T HEALTH & HUM. SERVS., https://perma.cc/L672-T4PS (last visited Jan. 10, 2024).

196. *See* UTAH CODE ANN.§ 80-1-102(58)(b)(iv) (excluding independent activities from neglect only when the child's "basic needs are met and [the child] is of sufficient age and maturity to avoid harm or unreasonable risk of harm").

Since 2018, free-range parenting amendments have been passed in Colorado,[197] Connecticut,[198] Montana,[199] Oklahoma,[200] Texas,[201] and Virginia.[202] Proposals failed, however, in Arizona,[203] Arkansas,[204] Nebraska,[205] Nevada,[206] and South

197. *See* COLO. REV. STAT. § 19-1-103(100)(b) (2023) ("A child is not neglected when allowed to participate in independent activities that a reasonable and prudent parent, guardian, or legal custodian would consider safe given the child's maturity, condition, and abilities . . . .").

198. *See* CONN. GEN. STAT. § 53-21a(a)(2) (2023) ("[N]o finding of substantial risk may be based solely on a parent, guardian or person having custody or control, or providing supervision, of such child allowing such child's participation in independent activities . . . .").

199. *See* MONT. CODE ANN. § 45-5-622(1)(b) (2023) ("A parent or guardian of a child does not violate a duty of care, protection, or support by permitting the child to engage in independent activities consistent with the child's intellectual, emotional, and physical maturity . . . .").

200. *See* OKLA. STAT. tit. 1, § 1-105(49)(b) (2023) ("'Neglect' shall not mean a child who engages is independent activities, except if the person responsible for the child's health, safety or welfare willfully disregards any harm or threatened harm to the child, given the child's level of maturity, physical condition or mental abilities.").

201. *See* TEX. FAM. CODE ANN. § 261.001(4)(B)(ii) (West 2023) ("'Neglect' . . . does not include: . . . allowing the child to engage in independent activities that are appropriate and typical for the child's level of maturity, physical condition, developmental abilities, or culture . . . .").

202. *See* VA. CODE ANN. § 16.1-288(2) (2023) ("No child whose parent or other person responsible for his care allows the child to engage in independent activities without adult supervision shall for that reason alone be considered to be an abused or neglected child . . . .").

203. *See* S.B. 1461, 54th Leg., 1st Reg. Sess. (Ariz. 2019) ("A parent may not be considered as having neglected or be charged with neglect of a child solely for allowing a child, whose basic needs are met and who is of sufficient age and maturity to avoid harm or unreasonable risk of harm, to engage in independent activities . . . .").

204. *See* S.B. 12, 92d Gen. Assemb., Reg. Sess. (Ark. 2019) ("'Neglect' does not include a parent, custodian, guardian, or foster parent who permits his or her child to perform the following actions unsupervised if the child is of sufficient capacity to avoid immediate danger and a significant risk of harm . . . .").

205. *See* L.B. 1000, 107th Leg., 2d Reg. Sess. (Neb. 2022) ("Permitting a minor child, who is of sufficient maturity, physical condition, and mental abilities to avoid a substantial risk of physical harm, to engage in independent activities, either alone or with other children, shall not be considered child abuse under section 28-707 or child abuse or neglect under section 28-710.").

206. *See* S.B. 143, 81st Leg., Reg. Sess. (Nev. 2021) ("A person does not commit [child neglect] by virtue of the sole fact that the person . . . [c]onsents to a child engaging in an activity that constitutes an independent activity as

Carolina.[207] In Illinois,[208] Michigan,[209] Nebraska,[210] and West Virginia,[211] the legislative branch is currently (re)considering free-range parenting bills.

It is also worth mentioning that, in 2015, the federal government amended the Every Student Succeeds Act[212] by including a "Rule of Construction Regarding Travel" to and from school, noting that letting a child travel unsupervised should not "expose parents to civil or criminal charges for allowing their child to responsibly and safely travel to and from school by a means the parents believe is age appropriate."[213] While this development may be indicative of a changing legal landscape, the scope of this amendment is extremely limited. Specifically, the amendment only protects unsupervised travel to and from

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provided by the regulations adopted by the Division and Child and Family Services . . . .").

207. *See* S.B. 288, 124th Gen. Assemb., Reg. Sess. (S.C. 2021)

> 'Child abuse or neglect' or 'harm' does not occur if a parent, guardian, or other person responsible for a child's welfare permits the child, whose basic needs are met and who is of sufficient age and maturity to avoid harm or the unreasonable risk of harm, to engage in independent activities . . . .

208. *See* H.B. 4305, 102d Gen. Assemb., Reg. Sess. (Ill. 2021)

> A minor shall not be considered neglected for the sole reason that the minor's parents or other person responsible for the minor's welfare permits the minor to engage in independent activities unless the minor was permitted to engage in independent activities under circumstances presenting unreasonable risk of harm to the minor's health, safety, or well-being.

209. *See* S.B. 547, 102d Leg., Reg. Sess. (Mich. 2023) ("'Child neglect' does not include a child who engages in independent activities outside the supervision of a parent . . . .); S.B. 548, 102d Leg., Reg. Sess. (Mich. 2023) ("This section does not apply to a person who allows a child to engage in independent activities . . . .").

210. *See* L.B. 42, 108th Leg., 2d Reg. Sess. (Neb. 2023) ("Permitting a minor child, who is of sufficient maturity, physical condition, and mental abilities to avoid a substantial risk of physical harm, to engage in independent activities, either alone or with other children, shall not be considered child abuse . . . or neglect . . . .").

211. *See* H.B. 3194, 86th Leg., Reg. Sess. (W. Va. 2023) ("'Neglected child' does not mean . . . [p]ermitting a child, whose basic needs are met and who is of sufficient age and maturity to avoid harm or unreasonable risk of harm, to engage in independent activities . . . .").

212. Every Student Succeeds Act of 2015, Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified as amended in scattered sections of 20 U.S.C.).

213. *Id.* § 8542(a)(2), 129 Stat. at 2119.

school and explicitly states that it does not "preempt State or local laws."[214] Thus, the amendment has little to no impact on state-run child welfare programs.

B. *Free-Range Parenting Amendment Outcomes*

Free-range parenting laws are aimed at reducing unnecessary state intervention by expressly excluding certain unsupervised activities from the definition of child neglect. However, it has remained unexplored whether free-range parenting laws have achieved that goal. This subpart explores the impact the free-range parenting amendment had in Utah on state intervention in cases of non-supervision. First, this subpart examines the actual numbers, explaining that there are some serious limitations to the statistical analysis of the issue. Then it makes general comments regarding the impact of the free-range parenting amendment, concluding that there are some serious issues with it.

1. Numerical Reality

Before examining trends in non-supervision cases in Utah, it is imperative to understand the impact of a finding of a substantiated non-supervision case by Utah's Child and Family Services. Non-supervision is defined by Utah's Child and Family Services as a situation in which "[t]he child is subjected to accidental harm or an unreasonable risk of (accidental) harm due to failure to supervise the child's activities at a level consistent with the child's age and maturity."[215] A finding that a report of non-supervision is substantiated can lead to a finding of neglect, which can mean that the child will be temporarily separated from the parents.[216] A subsequent judicial finding of neglect can lead to permanent separation and the termination of parental rights if family reunification attempts fail.[217] This

214. *Id.* § 8542(b), 129 Stat. at 2119.

215. CHILD & FAM. SERVS., UTAH DEP'T HEALTH & HUM. SERVS., DEFINITIONS 12 (2022), https://perma.cc/U7EN-RTEP (PDF).

216. *See id.* at 11 ("Neglect includes, but is not limited to, abandonment, educational neglect, environmental neglect, failure to protect, failure to thrive, medical neglect, non-supervision, physical neglect, and sibling at risk.").

217. *See supra* notes 83–84 and accompanying text.

means a finding of substantiation of a non-supervision report can lead to serious state intervention for the affected family.

The raw numbers of non-supervision cases in Utah suggest a post-amendment trend of a decreasing number of cases in which a report is found to be substantiated. As explained above, such substantiations mean that CPS believes the child to be at risk of harm, justifying state intervention.[218] While the pre-amendment numbers of the examined years hover between 341 and 369 substantiated cases annually, the post-amendment numbers fall between 304 and 321.[219] This negative trend is confirmed when looking at the percentages of total reports of non-supervision cases that are substantiated. Pre-amendment percentages averaged at 25.19%, while post-amendment percentages averaged lower, at 22.1%.[220] This is a statistically significant change of roughly 3%.[221] While 3% may not seem like much, for the affected families not having to experience unnecessary intervention, this makes a significant difference. However, there are substantial limitations that must be acknowledged regarding the explanatory power of these numbers that will be discussed below.

For the free-range parenting amendment to be successful, it should not only decrease the number of substantiated non-supervision cases but also decrease the number of non-supervision referrals. A CPS investigation can be extremely disruptive and is in itself traumatizing for most children.[222] Such disruptions should be decreased through any legislation limiting state intervention. Thus, a successful reform would ideally also reduce the number of referrals received. Unlike the statistically significant percentage reduction in substantiated non-supervision cases, however, the percentage of referrals for non-supervision cases did not significantly decrease after the

218. *See supra* note 73 and accompanying text.

219. *See infra* APPENDIX A.

220. *See infra* APPENDIX B.

221. *See infra* APPENDIX B.

222. *See* CASEY FAMILY PROGRAMS, HOW DOES INVESTIGATION, REMOVAL, AND PLACEMENT CAUSE TRAUMA FOR CHILDREN? 2 (2018), https://perma.cc/MN5J-BCKD (PDF) (explaining how shock and surprise, repeated interviews about traumatic events, negative views of police and CPS, loss of trust and control, and worry about parents and siblings can make CPS investigations extremely traumatic experiences for children).

passage of the free-range parenting amendment.[223] This suggests that reporters are either unaware of the new standard or do not believe that the amendment changed their mandate to report non-supervision situations.

While the analysis of case numbers in Utah does show a statically significant difference between the case numbers pre- and post-amendment, the analysis has significant limitations. First, the available data is limited by the fact that the amendment is a relatively recent change in the law. It was passed in 2018,[224] meaning there are only a couple of years that can be examined to determine the impact of the amendment. Second, the numbers that this Note uses for its analysis may be distorted by the COVID-19 pandemic. The amendment passed in 2018, and the pandemic began to significantly affect life in the United States in early 2020.[225] Many places shut down or moved completely online, including schools and CPS.[226] This has impacted both the amount of contact between families and potential mandated reporters and the general processing of reports by CPS.[227] The COVID-19 pandemic may also have reduced the numbers of CPS cases through the economic relief efforts of the federal government,[228] since there is a close relationship between economic support payments and foster

223. *See infra* APPENDIX B.

224. *See* S.B. 65, 62d Leg., Gen. Sess. (Utah 2018).

225. *See* Morgan Welch & Ron Haskins, *What COVID-19 Means for America's Child Welfare System*, BROOKINGS (Apr. 30, 2020), https://perma.cc/Y974-R62Z (describing the impact of the COVID-19 pandemic on the life of children).

226. *See id.* (describing the almost complete elimination of home visits and investigations by CPS during the pandemic).

227. *See* Lisa Riley Roche, *Safety Nets for Abused Children Missing During COVID-19 Shutdown, Doctor Says*, DESERET NEWS (Apr. 19, 2021), https://perma.cc/RBQ8-6VG5 (describing how fewer children came into the hospital for less serious injuries during the pandemic shutdown and how the abuse case numbers returned to normal levels after children returned to schools and encountered mandatory reporters such as teachers and counselors); Ben Winslow, *DCFS Sees Drop in Calls Because of Coronavirus, But It Doesn't Mean Abuse Has Stopped*, FOX13 SALT LAKE CITY (Apr. 2, 2020), https://perma.cc/8CL5-J37X (describing a decrease in calls reporting child abuse or neglect in Utah).

228. *See* Coronavirus Aid, Relief, and Economic Security Act, 15 U.S.C. §§ 9001–9141 (providing an economic stimulus of $2.2 trillion).

case placements.[229] Thus, the numbers may be more influenced by the pandemic and its consequences than by the passage of the free-range parenting amendment.

Apart from limitations imposed by historic events, there are limitations specific to Utah and its child welfare system. For one, while Utah generally collects the racial demographic data of families involved with CPS, they do not break down their non-supervision cases into these demographics.[230] This makes it nearly impossible to tell whether the amendment had a disparate impact on specific racial groups. Importantly, Utah does not publish the socioeconomic data of their involved families at all,[231] further complicating an analysis regarding the question whether the amendment had different effects on families with differing socio-economic backgrounds.

Utah is also not representative of the demographic dynamic and general population of the United States. While Whites alone make up about 58.9% of the general population of the United States, they make up around 76.7% of the population in Utah.[232] Black or African Americans make up only 1.6% of the population in Utah, while making up around 13.6% of the entire population of the United States.[233] Since Black children and children from other minority households are disproportionately removed from their homes,[234] the impact of a free-range parenting amendment may look very different in a state that is more representative of the general population. There are also some scholars arguing that CPS in Utah does not have a history of stopping children from being unsupervised,[235] but that ignores the actual case

229. *See supra* notes 140–141 and accompanying text.

230. *See* Letter from Seven Sullivan, GRAMA Specialist, Utah Dep't of Health & Hum. Servs., to author (Sept. 26, 2022) (on file with author) ("Utah DCFS does not maintain records of family economic status or race/ethnicity in a manner consistent with the information you have requested and therefore cannot be provided to you.").

231. *See id.* (explaining that they do not compile the demographic data of their non-supervision cases).

232. U.S. CENSUS BUREAU, POPULATION ESTIMATES, JULY 1, 2023 (2023), https://perma.cc/9H4F-WNHP.

233. *Id.*

234. *See supra* notes 37–42 and accompanying text.

235. *See* Redleaf, *Narrowing Neglect Laws*, *supra* note 184, at 6 (stating that "Utah had neither a reported history of children being stopped from being

numbers of non-supervision investigations and substantiations by Utah's CPS. Further, the fact that the Utah legislature found it necessary and important enough to pass the amendment means that they believe the dangers of unnecessary state intervention for these cases to be significant enough to require limiting.

Despite these limitations, there are other ways to examine the efficacy of a law. At the very least, one can determine whether and how the law addresses the main issues plaguing the child welfare system. This may even be a more meaningful inquiry because it will yield answers that are applicable to the entirety of the United States and are not confined to just a single state. Thus, this Note next discusses whether Utah's free-range parenting amendment addresses the most prevalent issues within the child welfare system that lead to unnecessary state intervention.

2. Failure to Support the Most Vulnerable

The numbers show a trend in which the mere legislative act of explicitly excluding certain unsupervised activities from the definition of neglect fails to address some fundamental issues in the child welfare system. Specifically, Utah's free-range parenting law fails to address the economic needs of many families involved with CPS. As mentioned previously, one-third of children in foster care would likely not have been removed if the family had access to secure housing.[236] This is an especially important point in light of the fact that the average decrease in non-supervision cases in Utah after the amendment was only 3%,[237] highlighting the limited reach of such amendments when it comes to decreasing unnecessary state intervention. This also means that providing families with housing security could potentially have an impact on decreasing unnecessary state intervention that is ten times bigger than the impact of the free-range parenting law.

Similarly, the fact that any decrease in public spending on food stamps and similar programs is usually followed by a

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alone nor an extended litigation history," without elaboration or citing to proof of the statement).

236. *See supra* notes 140–141 and accompanying text.

237. *See infra* APPENDIX B.

proportional increase of placements of children into foster care[238] means that the most pressing issue for many families is not their inability to supervise in general, but rather their inability to provide basic necessities such as food and shelter. A law addressing non-supervision alone will, therefore, do little to support affected families in their economic need. Utah's free-range parenting law fails on a fundamental level to enable or provide funds for CPS to provide or assist with secure housing and to provide funds for essential necessities required for a safe and healthy childhood. The same can be said about similar laws in other states.

In doing so, Utah's and other states' free-range parenting laws mainly help middle-class and high-income families, because these families are already able to provide secure housing and basic necessities, while the laws additionally shield them from non-supervision liability. This is not entirely surprising given the fact that lobbying for free-range parenting laws requires the resources and education available to middle-class and high-income families. Parents identifying as free-range parents tend to be well educated, making a conscious choice to leave their child unsupervised to further the child's development and independence.[239] These families are usually not involved with CPS for their inability to provide basic necessities and their efforts in advocating for free-range parenting laws are, therefore, not focused on state intervention that is based on such an inability.

3. Vague Standards and Parental Discretion

Utah's free-range parenting law also fails to clarify what is required of parents to avoid state intervention in non-supervision cases. While it defines and clarifies neglect as not including a set of unsupervised actions, it still does so only if the child's "basic needs are met and [if they are] of sufficient age and maturity to avoid harm or unreasonable risk of harm" that may arise from engaging in the unsupervised activity.[240]

238. *See supra* notes 140–141 and accompanying text.

239. *See* Pimentel, *Overprotective Parenting*, *supra* note 45, at 957 ("[T]hese are parents, some of whom are highly educated and highly informed, consciously exercising their best judgment of what is ideal child-rearing.").

240. UTAH CODE ANN. § 80-1-102(58)(b)(iv) (LexisNexis 2023).

This still calls for an assessment of the child's physical and mental capacity and, more importantly, an assessment of whether the child's basic needs are met. The law fails, however, to give the parents any guidance explaining what is required for the physical needs of a child to be met.[241] Thus, parents remain in the dark regarding what is required of them to keep their family united and to avoid state intervention.

Issues arising from vague standards especially affect minority and low-income families. When child neglect laws are vague, third parties will supplant their own values and views regarding child rearing.[242] This can lead to minority and low-income families being involved with CPS more often because "they may be parenting according to a different set of cultural values."[243] In many Latin and Native American cultures, for example, it is common for older children to take care of their younger siblings.[244] The failure to give guidelines as to what is within the parents' discretion can lead to third parties using the economic and cultural circumstances of the child to assess whether their physical needs are met, which will be especially hard on low-income parents that are struggling to provide basic necessities.[245] This, in turn, can lead to an increased number of CPS cases involving minority and low-income families.

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241. *See* Pimentel, *Overprotective Parenting*, *supra* note 45, at 967 ("Vague statutes do not provide sufficient guidance to parents to know what matters remain within their discretion, nor do they provide sufficient guidance to prosecutors and jurors to know when a parental lapse rises to the level of criminal conduct.").

242. *See id.* at 976 ("In the absence of clearer statutory directives, the interpretation and enforcement of vague standards will almost inevitably be driven by cultural-specific norms of parenting.").

243. *Id.* at 977.

244. *See* PETER J. PECORA & DIANA J. ENGLISH, WASH. RISK ASSESSMENT PROJECT, MULTI-CULTURAL GUIDELINES FOR ASSESSING FAMILY STRENGTHS AND RISK FACTORS IN CHILD PROTECTIVE SERVICES 35 (1993), https://perma.cc/MPC2-NDPY (PDF) ("Issues of lack of supervision of young children surface most frequently in referrals for Native American and Hispanic families. Older, but still young children are expected to care for their younger siblings.").

245. *See* Pimentel, *Punishing Families*, *supra* note 7, at 898–904 (exploring the conflation of poverty with abuse and neglect in current child welfare systems).

Along those lines, the law also gives no deference to the parents' conscious choice to leave a child unsupervised, despite the fact that a parent will know the child's physical and mental capacity better than any CPS worker could determine during an investigation.[246] This is a particularly important point because many child neglect statutes, like the free-range parenting amendment of Utah, define neglect in a way that the parental action or inaction is putting the child "at unreasonable risk" of harm.[247] But since any situation has inherent risks, it comes down to the question: What is unreasonable?[248] This question is now expected to be answered by CPS workers, and the process does not give any deference to the parents' own risk assessment that resulted in the decision. This is particularly ironic because one of the main driving forces behind the free-range parenting movement is a call to give parents more discretion to decide to let their children explore unsupervised.[249] Thus, the free-range parenting amendment in Utah is less effective at achieving greater parental discretion and reducing state intervention than it could be.

IV. ADDRESSING THE ISSUE EQUITABLY

While reforming the child welfare system is daunting, the current state of the system requires some fundamental changes that center on family unity and the mental and physical welfare of the children. And while free-range parenting laws are a good step in reducing unnecessary state interventions, they are severely lacking, leaving some of the most vulnerable families unprotected. Although it would be outside the scope of this Note to discuss a system-wide reform in depth, the following are suggestions that address some of the most urgent and prolific issues in the child welfare system.

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246. *See* Pimentel, *Overprotective Parenting*, *supra* note 45, at 962–76 (arguing that parental instinct is easily replaced by judgment of third parties such as CPS workers, jurors, or prosecutors).

247. *See* Manno, *supra* note 54, at 684–86 (surveying the use of terms such as unreasonable, serious, and imminent in various state child neglect statutes).

248. *See* Pimentel, *Overprotective Parenting*, *supra* note 45, at 963 (explaining that the question regarding risks "comes down to which of those risks are 'reasonable'").

249. *See supra* notes 186–190 and accompanying text.

This Part first explores reforms that the judiciary can undertake to ensure a more equitable and family-unity-centered enforcement of child neglect and abuse statutes. Next, this Part looks at steps the legislature can take to help affected families. Finally, this Part examines some improvements that can be made by the executive branch. These suggestions are not free-standing—in order to fully address the severity of the issue, the suggestions should be implemented in tandem.

A. *Judicial Improvements*

The easiest change to reduce unnecessary state intervention is requiring the courts to consider the harm of removal to the child in any foster care proceeding. As discussed above,[250] this is already being done in two jurisdictions, and should become a standard across the board.[251] Considerations of the harm of removal can be achieved through legislation,[252] the court rules governing judicial removal proceedings,[253] or interpretation of removal statutes as including a requirement to consider the harm that removal can have on the child's health

250. *See supra* Part II.B.

251. *See* Trivedi, *supra* note 27, at 567–77 (exploring how the harm of removal may help reduce unnecessary state intervention).

252. *See, e.g.*, *id.* at 573

> Congress and the President should . . . revise ASFA and clearly incorporate harm-of-removal principles into federal legislation, rulemaking, and appropriations. To prevent the harm of removal, state legislatures should add a required consideration of the harm of removal into their statutes that govern removal hearings in abuse and neglect cases.

253. This has already been done in Washington, D.C. *See* D.C. Super. Ct. R. Neglect & Abuse Proc. 13(e)

> Evaluating harm from removal. In making a shelter care determination, the judicial officer shall evaluate the harm to the child that may result from removal. In making such evaluation, the judicial officer shall consider such factors as:
> (1) The child's attitude toward removal and ties to the parent, guardian or custodian, as well as the child's relationships with other members of the household;
> (2) The disruption to the child's schooling and social relationships which may result from placement out of the neighborhood; and
> (3) Any measures which can be taken to alleviate such disruption.

and development.[254] This consideration would ensure that the default in these proceedings is not removal and that the court "balance[s] the risk of harm to a child staying with their parents against the harm that removal would cause, which is rarely if ever considered now."[255]

A second consideration is the need for representation of indigent persons in child neglect and abuse proceedings. The Supreme Court has found that there is no constitutional right to counsel for indigent parents involved in non-criminal child welfare proceedings such as involuntary termination of parental rights.[256] This is not to say that states do not have their own requirements regarding court-appointed counsel but these requirements are not uniform across all states.[257] This is especially important in non-supervision cases where many proceedings are eventually dismissed, but only after several appeals and after some state intervention, which imposes trauma on the family.[258] Indigent parents frequently do not have

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254. This has been done by the Court of Appeals in New York. *See* Nicholson v. Scoppetta, 820 N.E.2d 840, 852 (N.Y. 2004)

> The plain language of the [child neglect statute] and the legislative history supporting it establish that a blanket presumption favoring removal was never intended. The court *must do more* than identify the existence of a risk of serious harm. Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests.

255. Trivedi, *supra* note 27, at 573.

256. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31 (1981) (explaining that the court cannot find "that the Constitution requires appointment of counsel of every parental termination proceeding").

257. *See* Kathleen A. Bailie, Note, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285, 2302–03 (1998) ("Nevertheless, many states grant parents a statutory right to counsel in child protective proceedings. Some states, however, provide for only a limited right to counsel. The duration, scope, and quality of the court-appointed representation afforded to indigent parents, therefore, varies greatly from state to state.").

258. *See* Redleaf, *Narrowing Neglect Laws*, *supra* note 184, at 4 ("What distinguishes these cases from many similar ones is that each of these parents eventually won exoneration from the state's child abuse register. In each case, however, exoneration came only after at least two levels of appeals.").

the resources to appeal their case,[259] which highlights the need for fair and adequate representation at the trial court level. The fact that many cases of non-supervision are eventually dismissed means that there are fundamental issues at the trial court level that need to be addressed. A first step is to provide effective low-cost or free representation to affected low-income families.

B. *Legislative Improvements*

Changes in the judicial system, however, will only be effective if the root causes for unnecessary state intervention are addressed as well. This means removing skewed monetary incentives to separate families, providing help with secure housing and other necessities, and protecting foster children's assets to ensure that they have some funds when they age out of the foster system. The monetary incentives can be fixed the same way they were created—by passing federal law.[260] That law can either repeal the incentives set out in the ASFA or change them so that states will receive money for adopted foster children regardless of the previous years' level of adoptions. The latter option would strike a balance between incentivizing adoption of foster children and removing the incentive to increase the numbers of adoptions annually.

Since poverty is the single most accurate indicator for a child welfare case, addressing issues of poverty will necessarily help reduce unnecessary state intervention. Ironically, it was the COVID-19 pandemic that proved that increased economic aid and reduced state intervention can have a positive impact on child welfare cases.[261] Addressing poverty would be the most ambitious, but likely also the most effective way to decrease

259. *See* Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to* Lassiter, 14 TOURO L. REV. 247, 257 (1997) (exploring the unique struggle indigent parents experience during child neglect case proceedings).

260. *See supra* notes 64–65 and accompanying text.

261. *See* Anna Arons, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 12 COLUM. J. RACE & L. F. 1, 13–20 (2022) (explaining that during the shutdown in New York there were less reports of physical and sexual abuse, that the quantity of reports did not rise after the shutdown ended and explaining that this was mostly due to the increased economic help families received).

unnecessary state intervention. This could be accomplished through federal legislation expanding economic support such as temporary housing assistance and food stamp programs but also by providing CPS with funds to temporarily assist families with housing, utilities, food, or medical expenses.

C. *Executive Improvements*

Improvements in the executive branch could include narrower interpretations of the child neglect and abuse statutes in CPS policies. David Pimentel suggested, for example, the use of a widely accepted torts model in analyzing whether and how much a child is "at risk" in any given situation.[262] This would require an analysis of (1) the probability of the harm, (2) the gravity of the resulting injury, and (3) the burden of precautions.[263] Interpreting child neglect and abuse statutes in light of the probability and severity of harm would ensure that CPS does not intervene unnecessarily if there is no likely, substantial danger to the child.[264] Similarly, the policy manuals of child welfare services should clarify for parents what behavior may result in separation from their children. This transparency may also reduce animosity towards child welfare workers, increasing the likelihood that parents cooperate when confronted with CPS. These are changes that do not even require a change in the law itself but rather in the application of the law, which could be achieved more easily than legislative reform. These changes by the executive branch, however, cannot stand on their own: they require that the root causes of the issues are addressed as well.

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262. *See* Pimentel, *Fearing the Bogeyman*, *supra* note 49, at 280–82 (suggesting the use of the factors set out by Judge Learned Hand in *United States v. Carroll Towing, Co.*, 159 F.2d 169, 170 (2d Cir. 1947) to evaluate whether a parent has put their child into a situation that bears an unreasonable risk of harm).

263. *See id.* at 280.

264. *See id.* at 282 (explaining that using the factors ensures that "parents' choices may be fairly second-guessed only in the context of the larger picture of the risk management decisions they make" avoiding "[d]istorted perceptions by . . . CPS caseworkers").

CONCLUSION

Separation of children from their family is a radical step that requires careful consideration of its effects on the children and the family unit. Unfortunately, there is a persistent belief in the child welfare context that removal is usually the right decision.[265] The consequences of separation on children's development, however, are serious, and foster care itself is rife with problems that may be worse than those children would experience at home with their family. Thus, parents and advocates have challenged the default of separation by calling for free-range parenting laws, limiting the discretion of CPS to remove a child for non-supervision by the parents. However, these laws only address the symptom, not the root cause, of the issue and essentially only further the interests of middle-class and high-income parents.

If free-range parenting laws only marginally improve the issue of unnecessary state intervention for minority and low-income families, the question then becomes whether efforts to pass such laws should be abandoned. The simple answer to this question is no. At the very least, free-range parenting laws draw attention to issues of unnecessary state interventions that can have serious and lasting consequences for affected families. The free-range parenting movement should be used as a vehicle to greater and more equitable change. For one, it can act as a test-run to see whether a particular state is accepting of a child welfare system that gives parents' choices greater deference and recognizes the harm that unnecessary interventions and removals can cause to the fabric of the family unit and the development of the child. Further, the movement's prominence can be a powerful platform to educate, advocate, and eventually force change. Instead of abandoning efforts to pass free-range parenting laws, it is important to expand the scope of the movement and to call for fundamental changes that acknowledge that unnecessary state intervention may actually worsen a child's situation by adding the trauma of separation and uncertainty about their future. The recognition of the harm of such state intervention can then be used to advocate for

265. *See* Trivedi, *supra* note 27, at 527 ("[T]he accepted wisdom is that removal is the better option for a child in a potentially abusive or neglectful home . . . .").

solutions that truly address the root causes of these issues, such as economic need and the statutory conflation of poverty with neglect. If society truly cares about the welfare of its children, it must initiate equitable change—not change only benefitting the already privileged.

APPENDIX A: UTAH'S CHILD AND FAMILY SERVICES DATA

In response to a record request, Utah's CPS provided the author of this Note with the following numbers regarding child welfare cases involving non-supervision of children:

Table 1: Non-Supervision Cases[266]

	Case End Date						
Most Recent Finding:	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**
Unsupported	1,083	979	964	905	1,024	1,073	1,103
Substantiated & Supported	361	341	369	316	318	321	304
Total Non-Supervision Cases	1,490	1,363	1,402	1,246	1,381	1,432	1,458

Table 2: All Active CPS Cases[267]

Most Recent Finding:	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**
Unsupported	7,139	7,183	7,267	7,394	7,517	6,733	6,660
Substantiated & Supported	14,649	14,625	14,598	14,745	15,051	13,891	15,195
Total Cases	20,845	20,831	21,494	21,479	21,895	19,845	21,251

266. The "Total Non-Supervision Cases" line reflects the number of active non-supervision cases that were open at Utah's CPS in the corresponding year. This number is slightly higher than the total of the above two lines of findings would be because a case may have been opened, but CPS did not reach a conclusion in that case.

267. The "Total Cases" line reflects the total open cases that CPS had in any given year. This number is often lower than the total of the above two lines of findings would be because one active case may have multiple findings, e.g., finding that some parts of a report of abuse or neglect were substantiated and while others were not.

Table 3: Referrals[268]

	2015	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**
Total Referrals	38,951	39,275	40,382	42,217	43,245	38,623	43,265
Non-Supervision Referrals	1,598	1,391	1,456	1,271	1,484	1,489	1,539

APPENDIX B: STATISTICAL ANALYSIS

To examine the impact of Utah's free-range parenting amendment, this Note converted the raw numbers into percentages. This Note also ran an unpaired t-test to compare pre- and post-amendment cases of substantiated non-supervision reports to see whether there is a statistically significant difference.

Table 4: Non-Supervision Cases Analysis

	Case End Date						
Most Recent Finding:	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**
Substantiated & Supported in %	24.23	25.02	26.32	25.36	23.03	22.42	20.85
Grand Total	1,490	1,363	1,402	1,246	1,381	1,432	1,458

Table 5: Referrals Analysis

	2015	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**
Total Referrals	38,951	39,275	40,382	42,217	43,245	38,623	43,265
Non-Supervision Referrals in %	4.1	3.54	3.61	3.01	3.43	3.86	3.56

268. "Total Referrals" means any and all reports of and referrals for child neglect or abuse the Utah CPS receives in any given year. "Non-Supervision Referrals" refers to those cases out of the total in the line above that were for alleged non-supervision of the child.

Unpaired T-Tests:

This Note subjected the percentages of substantiated non-supervision case reports and non-supervision referrals to unpaired t-tests. The analyzed data excludes the year 2018 because that is the year the amendment was passed, which makes its grouping into pre- and post-amendment yearly percentages impossible. This Note subjected the data to unpaired t-tests because a paired comparison between different years pre- and post-amendment would be meaningless.

Table 6: Substantiated Non-Supervision Cases:

Group	**Pre-Amendment**	**Post-Amendment**
Group Members	24.23	23.03
	25.02	22.42
	26.32	20.85

Group	**Pre-Amendment**	**Post-Amendment**
Mean	25.1900	22.1000
SD	1.0553	1.1247
SEM	0.6093	0.6493
N	3	3

P value and statistical significance:

The two tailed P value equals 0.0256.

By conventional criteria, this difference is considered to be statistically significant.

Confidence interval:

The mean of the Pre-Amendment Group minus the Post-Amendment Group equals 3.0900.

95% confidence interval of this difference: from 0.6178 to 5.5622.

Intermediate values used in calculations:

t = 3.4702

df = 4

Standard error of difference = 0.890

Table 7: Non-Supervision Referrals:

Group	Pre-Amendment	Post-Amendment
Group Members	4.1	3.43
	3.54	3.86
	3.61	3.56

Group	Pre-Amendment	Post-Amendment
Mean	3.7500	3.6167
SD	0.3051	0.2205
SEM	0.1762	0.1273
N	3	3

P value and statistical significance:

The two-tailed P value equals 0.5728.

By conventional criteria, this difference is considered to be *not* statistically significant.

Confidence interval:

The mean of the Pre-Amendment Group minus the Post-Amendment Group equals 0.1333.

95% confidence interval of this difference: from -0.4701 to 0.7368.

Intermediate values used in calculations:

t = 0.6134

df = 4

Standard error of difference = 0.217