CRIMINISTRATIVE LAW: DATA-COLLECTION, SURVEILLANCE, AND THE INDIVIDUALIZATION PROJECT IN U.S. CHILD WELFARE LAW

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Abstract

Textual analyses of child welfare laws, joined by extensive textual and legal analyses of case law, reveal how the "dance" between the administrative and the criminal in child protective services (CPS) is rooted in the individualized perception of poverty. This individualization, which forms the bedrock of the capitalist American welfare state, promotes the fragmentation of the family unit. Building on individualized perception and reifying it, child welfare laws and practices are neither purely administrative nor criminal, but "criministrative." As such, they serve as a legal shield for the State in its attempts to ensure child welfare; the State refuses to provide protections available in traditional criminal contexts to families involved in CPS investigations, while simultaneously enjoying administrative courts' less restrictive evidentiary rules. This Article follows the thread of individualized surveillance embedded in the law, starting with the conflation of "abuse" and "neglect." This Article proposes three solution pathways, building from practical to theoretical: divorcing neglect from abuse, adopting a Poverty Aware Paradigm, and developing a theoretical framework for an institutionalized "benevolent gaze."

This Article joins growing discussions in critical legal scholarship concerning the carceral nature of the welfare state and the relationship between care and punishment in the United States. This Article adds a further dimension to these discussions by asserting that child welfare law is more aptly described as criministrative law, and by exposing the rootedness of the individualized perception of poverty in the organizing concepts of the child welfare system. Finally, this Article calls for a reconstruction of the legal treatment of children who are at risk of harms caused by poverty. If left unchecked, criministrative law will continue to inflict harm upon parents, thus harming the very children that CPS is meant to protect.

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INTRODUCTION

The trouble is he's lazy / The trouble is he drinks
The trouble is he's crazy / The trouble is he stinks
The trouble is he's growing / The trouble is he's grown
Krupke, we got troubles of our own![1]

In the famed Hollywood musical *West Side Story*, members of the teenage gang the Sharks face many problems—not least, a state system that bounces them from pillar to post. In "Gee Officer Krupke," the problems discussed by the Sharks are all framed as individual—as the above lyrics say, the "trouble" is with "him." Now, more than sixty years later, the societal issues portrayed in *West Side Story* are as pertinent as ever in the United States (U.S.). Despite continued criticism of the child welfare system and the many attempts made to curtail its harms,[2] it is still a haunting feature in the lives of many children

1 LEONARD BERNSTEIN & STEVEN SONDHEIM, *Gee Officer Krupke*, in WEST SIDE STORY (Amberson Holdings LLC & Stephen Sondheim 1956, 1957).

2 This growing criticism is slowly starting to be voiced in the legal scholarship, mainly through the works of Dorothy Roberts and Wendy Bach. *See* DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022); WENDY A. BACH, PROSECUTING POVERTY, CRIMINALIZING CARE (2022); *see also* Anna Arons, *The Empty Promise of the Fourth Amendment in the Family Regulation System*, 100 WASH. UNIV. L. REV. 1057 (2023) [hereinafter *The Empty Promise of the Fourth Amendment*] ("casual home invasions of the family regulation system are . . . a story of a problem-solving system functioning exactly as it was designed"); Anna Arons, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 12 COLUM. J. RACE & L. F. 1 (2022) (exploring the effects of lessening of mandated reporting and growing mutual aid during the COVID-19 pandemic). More critical scholarship can be found outside the legal literature, wherein the issue was identified and critically discussed much earlier. *See, e.g.*, Howard Dubowitz et al., *A Conceptual Definition of Child Neglect*, 20 CRIM. JUST. & BEHAV. 8 (1993) (calling attention to the lack of a definition for child neglect and advancing a definition that does not center parental failure); Anna Gupta, *Poverty and Child Neglect—The Elephant in the Room?* 6 FAM. RELATIONSHIPS & SOC'YS. 21 (2017) (advancing "a more sophisticated and multidimensional analysis of poverty and parenting that incorporates both psychological and social causes in ways that challenge the polarisation of the debate on poverty and neglect"); *see also* William Elliott, *An Asset-Building Agenda for the Twenty-First Century: Giving Families Something to Live For*, 24 J. CHILD. & POVERTY 145 (2018) (discussing upward mobility, education, and wealth redistribution in the U.S.).

and families across the nation.[3] This Article aims to methodically examine child welfare law, arguing that it is in fact "criministrative" law: operating in a legal sphere that is both administrative and criminal.[4] This Article finds traits of "criministration" in three key facets of child welfare law: first, the law in the books, focusing on the language of the law; second, the "law in the banks," looking at how funding is constructed in this context; and third, the law on the ground, examining the practices surrounding report-writing and court cases. This Article then discusses the reframing of child welfare law and child protective services (CPS) as criministrative, pointing to the harms incurred by both individuals and society as a result of their criministrative character. Finally, this Article suggests a novel reconstruction of the legal treatment of children at risk of harms caused by poverty.

Theoretically, the contribution of this Article is to show and discuss the ways administrative and criminal legal aspects of the child welfare system are woven together, producing bureaucratic justifications for data-collection which is then conflated with crime-prevention justifications. Keeping the system administrative in description means that State agencies are only bound by the requirements of administrative courts, with their low evidentiary burden and looser limits to surveillance,[5] while the State simultaneously adheres to criminal logic, legitimizing widespread infringement of rights, harsh and swift legal reactions, and implementation of preventative measures. By not classifying this administrative practice of data-collection as, in fact, a punitive sanction, the legal system avoids the responsibility of coupling data-collection practices and procedure with any correlating protections.[6]

While this Article focuses on data collection—as well as its constructions and implications—it also fits into and contributes to a growing literature recognizing the myriad

3 This is especially true in urban areas. *See* ROBERTS, *supra* note 2, at 37.

4 In 2006, Juliet Stumpf suggested that immigration removal procedures be viewed through a "crimmigration" legal prism. Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006). Stumpf's article spawned a whole field of crimmigration studies. *See* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW (2015); Ramanujan Nadadur, *Beyond Crimigration and the Civil-Criminal Dichotomy: Applying Mathews v. Eldridge in the Immigration Context*, 16 YALE HUM. RTS. & DEV. L. J. 141 (2013). This Article suggests that a similar move is due in administrative welfare cases.

5 *See* Tarek Ismail, *Family Policing and the Fourth Amendment*, Cal. L.J. 1485, 1518–1527 (discussing CPS home searches, the Child Abuse Prevention and Treatment Act, and administrative search exceptions to the Fourth Amendment).

6 *See* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 792–802 (2006) (discussing "[c]onstitutional rules of policing and trial procedure" and privacy in the criminal law context).

ways in which the U.S. welfare state[7] does, in fact, act in ways that mimic carceral, penal State institutions.[8] Activists, journalists, and practitioners point to how one's experience as a welfare recipient eerily resembles the experiences of those imprisoned for or accused of crimes.[9] To emphasize the carceral nature of the welfare system, sociologist and professor Dorothy Roberts refers to the child welfare system as the "family-policing system."[10] Others like law professor Wendy Bach have recognized that, while we like to think of the services provided by the administrative welfare state as care (which is to say, as public goods to be distributed only to the deserving), they are, in fact, intertwined with punishment.[11]

Existing scholarship has drawn attention to the racialized roots and motivators of CPS. This Article adds to this scholarship by identifying poverty—particularly, the

7 This issue is not unique to the U.S. but is common to the liberal welfare-state model, as characterized by scholars like Esping-Andersen. *See* Gøsta Esping-Andersen, *The Three Political Economies of the Welfare State*, *in* WELFARE STATES: CONSTRUCTION, DECONSTRUCTION, RECONSTRUCTION II (Stephan Leibfried & Steffen Mau eds., 2008); Gøsta Esping-Andersen, *Welfare Regimes and Social Stratification*, 25 J. EUR. SOC. POL'Y 124 (2015).

8 *See* Shanta Trivedi & Matthew Fraidin, *A Role for Communities in Reasonable Efforts to Prevent Removal*, 12 COLUM. J. RACE & L. 315 (2022); Shereen A. White et al., *Help Not Hotlines: Replacing Mandated Reporting for Neglect with a New Framework for Family Support*, FAM. INTEGRITY & JUST. 132, (2022); Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIOL. REV. 610 (2020); *The Empty Promise of the Fourth Amendment*, *supra* note 2; Tina Lee, *Response to the Symposium, Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being (Foreword)*, 12 COLUM. J. RACE & L. 421 (2022); TINA LEE, CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK CITY'S CHILD WELFARE SYSTEM (2016) [hereinafter CATCHING A CASE]. While this is a growing, recent discussion, it is not entirely new. *See* MICHAEL B. KATZ, THE UNDESERVING POOR: AMERICA'S ENDURING CONFRONTATION WITH POVERTY (2013); David Garland, *The Birth of the Welfare Sanction*, 8 BRIT. J.L. & SOC'Y 29 (1981).

9 *See generally* STEPHANIE LAND & BARBARA EHRENREICH, MAID: HARD WORK, LOW PAY, AND A MOTHER'S WILL TO SURVIVE (1st ed. 2019). *See also* the activities of the activist non-profit JMACforFamilies, which works to combat "family policing" and keep children with their parents; JMACFORFAMILIES https://jmacforfamilies.org/ [https://perma.cc/AV5K-XA3E].

10 ROBERTS, *supra* note 2 *passim*.

11 Scholars have written extensively about many forms of poverty criminalization. *See, e.g.*, BACH, *supra* note 2; Monica Bell et al., *Toward a Demosprudence of Poverty*, 69 DUKE L. J. 1473 (2020). The welfare-penal continuum is described by some scholars as just that: a continuum between two extremes, one that provides state-administrated assistance or protection of rights, the other that punishes and infringes on those same rights. *But see* David Downes & Kirstine Hansen, *Welfare and Punishment in Comparative Perspective*, *in* PERSPECTIVES ON PUNISHMENT: THE CONTOURS OF CONTROL (Sarah Armstrong & Lesley McAra eds., 2006) (portraying the welfare system itself—as it is constructed and devised today—as a system of punishment targeted at people in poverty).

individualized perception of poverty—as a central focal point in the U.S. welfare context. This Article recognizes this individualized mindset as a mindset that promotes an atomic perception of the person, divorced from their realities, background, and lived experience. This atomization perpetuates the flattening of differences between people and sits at the heart of disciplines assuming-away difference in favor of generic, neutral models. It is the individualization and fragmentation of human interactions and community that enabled the State to enter the private domains of communities and families in the first place. As this Article shows, this individualized perception resides most imminently in the yoking of abuse and neglect, treated by the law—in all of its layers—as one being a more extreme version of the other rather than two distinct phenomena. This yoking both results from and reifies the individualized perception of poverty, leading to a criministrative treatment of families and children who are experiencing poverty.

It is worthwhile to note the connections between these issues and reproductive justice, which is bound up with child welfare through both theoretical framework and practical implication.[12] Arguably, the most extreme form of protecting children from their parents can be found in the anti-abortion movement.[13] Positioning the mother and her unborn baby as competing beings with competing rights and situating the fetus as needing protection from its mother's actions is the epitome of individualization and family separation. This harmful over-individualization, which is prominent in child welfare debates, is steeped in anti-poverty and racial bias. Among other effects, it pits low-income Black mothers against their own children (even those in the womb) more routinely than it does mothers who can afford safe, private, market-based solutions to their needs, from mental health support to professional abortion services.[14]

Against this backdrop, the inquiry at the heart of this Article is the examination of the

12 *See generally* Priscilla A. Ocen, *Unshackling Intersectionality*, 10 DU BOIS REV. 471 (2013); Priscilla A. Ocen, *(E)Racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors*, 62 UCLA L. REV. 1586 (2015); Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. DAVIS L. REV. 2191 (2018); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, AM. U. J. GENDER & L. 1 (1993); Melissa L. Gilliam & Dorothy E. Roberts, *Why Reproductive Justice Matters to Reproductive Ethics*, *in* REPRODUCTIVE ETHICS IN CLINICAL PRACTICE: PREVENTING, INITIATING, AND MANAGING PREGNANCY AND DELIVERY (Julie Chor & Katie Watson eds., 2021).

13 This well-documented and widely-discussed issue can be found, for example, in recent *Harvard Law Review* Forum discussions. *See generally* the papers presented in *Reproductive Justice,* HARV. L. REV., at https://harvardlawreview.org/topics/reproductive-justice/ [https://perma.cc/FK3U-GYSH].

14 *See* Michele Goodwin, *Complicit Bias and the Supreme Court Response*, 136 HARV. L. REV. F. 119 (2022).

central role individual surveillance plays in child welfare law through the individualization project, and the discussion of individualization as both the system's core organizing theory and one of its main harms. In adopting this perspective, this Article joins the broader relational scholarship (including adjacent reproductive justice scholarship) attempting to problematize welfare legal fields and institutions, and suggests moving forward on a more communitarian path.

In the final part of this Article, three points are made with regard to the future construction of child welfare law and CPS. The first, practical point, is the need to conceptually separate neglect and abuse. The second, more theoretical point, discusses an alternative paradigm through which to understand poverty, resulting in a different approach to child neglect. Finally, a third, more philosophical point, discusses the question of State-gaze and the importance of information gathering to the care of children, when done in a non-criministrative way.

I. Background and Context: The U.S. Child Welfare System and its Longstanding Relation to Poverty and Impoverished Families

In the summer of 2022, a little over 100,000 children lived in the city of Boston.[15] Over the year prior, 9,545 reports were submitted regarding allegations of parental maltreatment of those children.[16] According to state[17] and federal law,[18] each report sets an institutional domino effect in motion. The Massachusetts Department of Children and Families (MA DCF) is the first domino to topple: a report triggers a DCF screening, which leads (in the majority of cases) to the opening of a case with Child Protective Services (CPS) and the appointment of a case worker.[19] An investigation is prompted, in which a plan devised by the

15 102,161 children under the age of eighteen, constituting 15.7% of the city's population of 650,706, lived in Boston in 2022, according to the 2022 census. *QuickFacts: Boston City, Massachusetts,* U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/bostoncitymassachusetts [https://perma.cc/5PAL-DRGM] [hereinafter Boston Census].

16 *Department of Children and Families Reports and Data, Quarterly Data Profiles (FY14–Current)*, COMMONWEALTH OF MASS., https://www.mass.gov/info-details/department-of-children-and-families-reports-data#dcf-annual-reports- [https://perma.cc/99HR-U26P] (summation done by researcher, based on four Boston DFC region 2022 quarterly reports).

17 Mass. Gen. Laws ch. 119, § 51A (2020).

18 Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C §§ 5101-5119. *See infra* Section III.A for further discussion of CAPTA.

19 *See* MASS. DEP'T OF CHILD. AND FAM., ANNUAL REPORT FY 2022 30 (2022), https://www.mass.gov/doc/

case worker is presented to the court. Court decisions, by law, lead to another investigation and another decision. If a child is left at home, a social worker will have repeated meetings with the child; the family will be questioned and have their house searched over the course of a year or two before the case is closed.

That is the best-case scenario at this point. If removed from their family home, ostensibly for their protection, most children will spend more than a year away from home before it is decided that it is safe for them to be reunited with their parents.[20] According to its last statistical report, the MA DCF considered that "placement stability" had been achieved if those children, once taken out of their parents' care, were only moved between alternative "homes" (foster care or other state facilities) *twice a year*.[21] Siblings are not guaranteed to be kept together under such circumstances.[22]

Such is the system, based on federal guidelines and operating by means of federal funding, through which the state intends to protect children[23] from maltreatment by their parents. The vast majority of these children are removed from their parents' care because of a specific kind of maltreatment: neglect.[24] Before moving to discuss the specific legal treatment of neglect, a review of CPS and child welfare law's development and origin narratives is needed.

fy-2022/download [https://perma.cc/W6VW-R94S] [hereinafter MA DCF 2022 ANNUAL REPORT] (reporting a "58.7% average combined support/substantiated-concern rate for screened-in reports over the five-year time span of FY2018-22").

20 *Id.* at 16; MASS. DEP'T OF CHILD. AND FAM., QUARTERLY PROFILE – FY 2022, Q4 1 (2022) https://www.mass.gov/doc/quarterly-profile-fy22-q4/download [https://perma.cc/9HF5-CRND].

21 MA DCF 2022 ANNUAL REPORT, *supra* note 19, at xi (2022) ("placement stability (i.e., no more than two placement settings within the first 12 months of out-of-home care)").

22 *Id.* at xi ("In 77% of cases with a minimum of two siblings placed in a DFC foster home at the end of FY2022, two or more of the siblings were placed together—an increase of 3.5% compared to FY2018. Furthermore, 64% of those cases had all siblings placed in the same foster home—an increase of 14.0% compared to FY2018").

23 Referred to in the MA DCF's Annual Report as "consumers." *Id.* at 52.

24 Of the "23,653 children (unduplicated child count) [in Massachusetts] found to have experienced maltreatment in FY2022 . . . 86.7% were victims of neglect." *Id.* at xiii.

A. The Origin Narratives of the Child Welfare System

Three origin stories of the current child welfare legal regime can be found in existing literature. While these origin stories offer different, sometimes competing narratives, a closer reading shows how they weave together, creating the organizing notion behind the child-neglect monitoring net.

First, the *medically-informed story* points to 1962 as the origin of the child welfare system, when "battered child syndrome" was first defined.[25] By 1966, all states had responded to this newly identified syndrome by enacting rules concerning its prevalence, monitoring, and prevention—all of which relied on reporting.[26] Even though the original syndrome described only severely abused children who were physically assaulted by their parents, the medical prism was applied more broadly.[27] Even as the definition of the syndrome expanded to include all harms suffered by children—emotional abuse, neglect, and so on—the baseline approach remained harsh and judgmental toward parents and focused on individual separation as treatment, as it was in the case of the original syndrome.

Second, the *welfare origin story* grounds surveillance and reporting on children in poverty in fact-finding procedures intended to validate (or disallow) welfare eligibility applications. The need to check that there are, in fact, as many dependent children in the household as stated in a welfare application and only one provider (the so-called "man in the house" policy), prompts in-person visits from state officials, information-collection from state agencies, and other means of surveilling and reporting on the family unit's day-to-day life.[28] This framework ties in with the foundational conceptualization of children experiencing poverty as blameless and innocent victims; these characteristics were important in justifying welfare support for low-income parents, who were not conceptualized in the same way. Since the U.S. welfare state was built on the corollary of victimhood and blamelessness,[29] children were the ideal beneficiaries. But, when parents

25 Jane M. Spinak, *The Road to a Federal Family Court*, 58 CT. REV. 8, 8 (2022).

26 *Id.*

27 *See id.* at 8–9; *see also* Michael S. Wald, *Taking the Wrong Message: The Legacy of the Identification of the Battered Child Syndrome,* in C. HENRY KEMPE: A 50 YEAR LEGACY TO THE FIELD OF CHILD ABUSE AND NEGLECT 91 (Richard D. Krugman & Jill E. Korbin eds., 2012).

28 *See* Ismail, *supra* note 5, at 1505; *see generally* JOHN GILLIOM, OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE AND THE LIMITS OF PRIVACY (2001).

29 *See* MICHELE LANDIS DAUBER, *Building the Sympathetic State*, in THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE 17 (2013).

ask for government support, calling upon the "hungry children" image,[30] the State is framed as justified in entering the family home and, in an important way, disqualifying parents.

Lastly, the *family law origin story* foregrounds the legal institutional involvement in discussions of how children were cared for, by which parent, and in what material conditions they lived before family fragmentation (more commonly discussed in this legal realm regarding parental separation).[31] Here, again, we find the notion that the State is justified in taking it upon itself to know what the children's "best interests" are and in telling parents how and/or how not to care for their children. This is the same perception of the State's place that is echoed—and distorted, due to anti-poverty and racial biases—in discussions regarding reproductive justice (broadly) and child welfare (specifically). While not overtly directed at people experiencing poverty, this prism originating in family law supports the harmful atomization of the family unit into its smaller components, which leads to discussions of family members' interests as not necessarily mutually dependent.

Together, the three origin stories capture and cement the State's perception of children as vulnerable, blameless victims of parental malfunction. But, while children might indeed be vulnerable in their dependency,[32] the incorporation of such a perception into welfare

30 *See* Joy Duva & Sania Metzger, *Addressing Poverty as a Major Risk Factor in Child Neglect: Promising Policy and Practice*, 25 PROT. CHILD. 63 (2010); Marjorie L. DeVault & James P. Pitts, *Surplus and Scarcity: Hunger and the Origins of the Food Stamp Program*, 31 SOC. PROBS. 545 (1984). This narrative goes back to the 1960s fight for economic and racial justice. *See* Trina Jones, *Occupying America: Dr. Martin Luther King, Jr., the American Dream, and the Challenge of Socio-Economic Inequality*, 57 VILL. L. REV. 339 (2012).

31 Halley and others discuss this in their typology of the "normative levels" in family law. *See* Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J. L. & HUMAN. 1 (2011); Janet Halley, *What Is Family Law?: A Genealogy Part II*, 23 YALE J. L. & HUMAN. 189, 236 (2011). *See also* Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 761 (2010) (collecting reports about the welfare of children and their physical conditions in cases of separation, which exist in the "Family Law (FL) 1" category, but the implication for children's presence in the family home as a variable dependent on the economic ability of the parent is an "FL2" category question).

32 Sociologists and historians, too, contest such a blanket conceptualization, developed only relatively recently, in which childhood is portrayed as a social construct. *See generally* JESSICA BALANZATEGUI ET AL., MISFIT CHILDREN: AN INQUIRY INTO CHILDHOOD BELONGINGS (2016); J. Marshall Beier, *Ultimate Tests: Children, Rights, and the Politics of Protection*, 10 GLOB. RESP. TO PROT. 164 (2018); J. Marshall Beier, *Children, Childhoods, and Security Studies: An Introduction*, 3 CRITICAL STUD. ON SEC. 1, (2015); Dustin Ciufo, *Navigating the Identity Constructions—Lived Realities Nexus of International Child Protection: The Global-Local Production of Childhood, Child Rights and Child Domestic Labour in Haiti* (Ph. D. dissertation, University of Guelph, 2015) (on file with author); Nadine Benedix, *Shaping Subjectivity: Locating the Agency of Bolivian Working Children*

law has constantly been distorted by stigma and biases stemming from capitalist (and, later, neo-liberal) conceptualizations and racial prejudice. At different times, these origin stories were also the bedrocks upon which the child-neglect legal structure was built. Starting with Title IV of the Social Security Act of 1935, titled Aid to Dependent Children (ADC), the State's own perceptions and family values were infused into the financial aid given to children and their parents.[33] Later, the support program morphed from ADC to Aid to Family with Dependent Children (AFDC) and then to Temporary Assistance for Needy Families (TANF).[34] The focus on individual responsibility, however, remained firm and even grew, as evident in the name of the 1996 Personal Responsibility and Work Opportunities Reconciliation Act (PRWORA).[35] The search for the "deserving poor" sustained the narrative of vulnerable children in need of protection from their parents' bad fortune, laziness, incompetence, or other limitations (rooted in racial prejudice), as opposed to the hardships of poverty itself justifying State assistance for their families.[36]

II. Methodological Overview

This Article now moves into a presentation and discussion of findings related to surveillance and individualization in the legal treatment of child neglect. It is important to note two things in advance: first, the importance of connecting law on the ground and law in the books, and second, the limitations and obstacles faced by scholars researching areas of law concerning children and families.

Adopting a critical approach to legal research, this Article pulls on both law as it is

in Narrative Practices, 9 EUR. REV. INT'L STUD. 431 (2022).

33 Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 COLUM. J. RACE & L. 767, 771–72 (2021) (internal citations omitted). "A guiding principle of federal family regulation system policy during the Progressive Era was that government funded financial support for single mothers living in poverty would help minimize the need for children to be removed from their families and placed in orphanages and asylums." *Id.* (internal citation omitted).

34 Andrew Hammond, *Litigating Welfare Rights: Medicaid, SNAP, And the Legacy of the New Property*, 115 NW. U. L. REV. 361, 371 (2020).

35 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

36 *See* Mack, *supra* note 33, at 781 ("Myopically focusing on alleged 'parental defects,' prevents the federal family regulation system from addressing the structural factors that produce marginalized families' adversities. In other words, instead of focusing on structural issues of racism, poverty, housing- and food-insecurity, the family regulation system only focuses on the parent") (internal citations omitted).

framed in legal documents and law as it is practiced and experienced. Focusing on either in isolation would not enable this Article to discuss how written statutory language materializes in court, or to explain how core notions reflected in the framing of regulations affects evidence rules as practiced by judges. Thus, while this Article is not a classically empirical piece, it weaves examples from all layers of the law to lead to the theoretical claim it forwards.

Another methodological issue is the lack of judicial review on a higher level, which de facto impedes public knowledge and scholarly attention. Very few cases in this area of law are heard by the Supreme Court—a reality replicated on the state level.[37] Family court hearings themselves are closed to the public, and the decisions are not published. The only published decisions concerning child welfare law or CPS investigations are those that make it to appellate courts, when the family or CPS challenges the original decision of the lower court. This "ring-fencing" of these cases—out-of-sight in terms of accessibility to scholars and litigators—might seem, at first glance, in contrast with the notion that "the law is all over," as Sarat observed over three decades ago.[38] But it is, in fact, in complete accordance with Sarat's description, creating a sphere in which some, the surveilled, are under constant and complete exposure to the law, while others who have the will and the capacity to study and improve neglected fields of law are met with a wall of secrecy.

This Article is therefore primarily based on extensive review of legal documents. The author reviewed and analyzed all federal laws and Massachusetts state laws regarding child protection. The author also read and analyzed 119 cases and eleven MA DCF documents, as well as advisory documents and manuals for families available at the Juvenile Court's website and the Children's Bureau's website. However, the experiences of people engaged with the child welfare system were not personally collected for this study, and references thereto are based on secondary sources such as ethnographies and self-reporting on social media, as specified in Section III. In a method of reverse engineering, the organizing ideas and core values of child welfare law and CPS are derived from their performance as a coherent operating system.

37 In Massachusetts, as of February 2023, 154 cases had been put before the state's Supreme Judicial Court. Of these, only nine challenged the decision of lower courts in any significant way. Search of Westlaw database by author (conducted Feb. 2023).

38 Austin Sarat, *". . . The Law Is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J. L. & HUMAN., 343, 374 (1990).

III. Findings: The Individualization of Surveillance in Three Layers

A. Law in the Books: The Language of Child Neglect

The federal law currently presiding over the legal regime of CPS and related administrative agencies in the U.S. is the Child Abuse Prevention and Treatment Act (CAPTA).[39] According to federal law, each state must enact state rules defining and regulating the legal treatment of child abuse and neglect.[40] This Article will investigate the language of the law, both federal and state, using Massachusetts as an example.[41]

As a matter of both federal and state law, child abuse and neglect are defined and dealt with together.[42] The federal definition, which has been adopted by the states with some minor changes,[43] reads as follows:

39 Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. §§ 5101-5119.

40 *See What is Child Abuse and Neglect? How Does My State Define Child Abuse and Neglect?*, CHILDREN'S BUREAU (Jul. 18, 2013) https://www.acf.hhs.gov/cb/faq/can1 [https://perma.cc/35P5-QEPB] ("Within [CAPTA's] guidelines, each state is responsible for providing its own definitions of child abuse and neglect. Most states recognize four major types of maltreatment: physical abuse, neglect, sexual abuse, and emotional abuse. Additionally, many states identify abandonment, parental substance use, and human trafficking as abuse or neglect").

41 While less in the spotlight of the child welfare system's critics, Massachusetts is an important and interesting case to observe. With high inequality indicators, it is one of the wealthiest states in the U.S. (it ranked second in median family income, surpassed only by Washington, D.C., for a family of four. U.S. DEP'T OF JUST., CENSUS BUREAU MEDIAN FAMILY INCOME BY FAMILY SIZE (2022) https://www.justice.gov/ust/eo/bapcpa/20220401/bci_data/median_income_table.htm [https://perma.cc/QJJ8-C8TW]. But Massachusetts also presents severe racial poverty, with 24% of Black children and 29% of Latine children living in poverty—rates that are higher than that of those collectives in New York. *2022 Kids Count Report Highlights Highs and Lows for Massachusetts Children*, CHILDREN'S LEAGUE OF MASSACHUSETTS (Sept. 2, 2022), https://www.childrensleague.org/2022-kids-count-report-highlights-highs-and-lows-for-massachusetts-children/ [https://perma.cc/F6K4-X49E]. The income gap in Massachusetts was the fourth highest in the U.S. in the mid-2000s, and the third most increased between the late 1980s and mid-2000s. BENITA DANZING & JETTA BERNIER, CHILD POVERTY IN MASSACHUSETTS: A TALE OF TWO STATES 17 (2008), https://www.masslegalservices.org/system/files/library/Child_Poverty_in_Massachusetts.pdf [https://perma.cc/DNW3-WZ3F].

42 Sometimes under the term "maltreatment." *See, e.g.*, Michelle Johnson-Motoyama et al., *Differential Response and the Reduction of Child Maltreatment and Foster Care Services Utilization in the U.S. From 2004 to 2017*, 28 CHILD MALTREATMENT, 152 (2022).

43 While the practices of states differ with regard to child protection policies and agencies' internal rules and operations, the definitions of child maltreatment have little variation. *See* Kendra Kumor, *Systemic Inequality, Systemic Racism in Child Neglect Laws*, 89 FORDHAM L. REV. 113, 117 (2020).

> [T]he term "child abuse and neglect" means, at a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation . . . or an act or failure to act which presents an imminent risk of serious harm.[44]

It is worth mentioning that this is civil law. States' criminal codes adopt different language to address criminal allegations of child abuse.[45]

Initially passed in 1974,[46] CAPTA's first move was bureaucratic, establishing an office devoted to issues of child abuse and neglect at the federal Department of Health and Human Services.[47] CAPTA went on to establish a national clearinghouse, or gateway, for information relating to child abuse and neglect.[48]

Despite the prevalence of the term, federal welfare law does not contain a coherent, distinct, definition of child neglect. Moreover, out of the 403 times the word "neglect" appears in the language of the law, only twice is it *not* paired with the term "abuse" (in phrases such as "abuse and neglect" or "abuse or neglect").[49]

On the state level, definitions of neglect vary in detail but mostly share common aspects. Neglect is the failure to provide food, clothing, shelter, and medical care[50]—material things that are, by definition, missing or challenging to reliably secure for people experiencing severe poverty. Some states, however, have modified the wording they use vis-à-vis child neglect over the years. Specifically, twenty-seven states now include a "poverty exemption"

44 42 U.S.C. § 5101 note (Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. no. 104-235, 110 Stat 3063).

45 *See, e.g.*, Mass. Gen. Laws ch. 265 § 13B (2008); Mass. Gen. Laws ch. 265 § 22A (2008); Mass. Gen. Laws ch. 265 § 23 (2008); Mass. Gen. Laws ch. 265 § 24B (1998); Mass. Gen. Laws ch. 260 § 4C 1/2 (2014).

46 CHILD WELFARE INFORMATION GATEWAY, CHILDREN'S BUREAU, ABOUT CAPTA: A LEGISLATIVE HISTORY 1 (2019), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/about.pdf?VersionId=y7C6qleUR3mZJ_UJ5t_dnzCNfO6HPcPs [https://perma.cc/K5T9-N9ET].

47 42 U.S.C. §5101(a).

48 42 U.S.C. §5104.

49 42 U.S.C. §§ 5101–5119 (search conducted by researcher).

50 CHILD WELFARE INFORMATION GATEWAY, CHILDREN'S BUREAU, DEFINITIONS OF CHILD ABUSE AND NEGLECT 3 (2022), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/define.pdf?VersionId=P2GBlQKK7w_ohrCN3oV2TiD6QIkkEjIP [https://perma.cc/S4JF-D49W].

in their definition of neglect.[51] In these states, the law explicitly holds that financial inability to provide for one's child does not fall within the definition of neglect. In the remaining twenty-five states, poverty remains an indicator of child neglect.

Massachusetts's laws on child abuse and neglect are found in Chapter 119 of the General Laws of Massachusetts.[52] Massachusetts has a poverty exemption in its legal definition of child abuse and neglect,[53] which is also affirmed in case law.[54] MA DCF states that neglect will be declared "provided that such inability [to provide minimum care] is not due solely to inadequate economic resources or solely to the existence of a handicapping condition."[55]

However, despite the poverty exemption, Chapter 119 also includes provisions that widen the net. For example, the law makes reference to "neglect, including malnutrition."[56] Article 24 very broadly defines neglect as a situation where a child:

> (a) is without necessary and proper physical or educational care and discipline; (b) is growing up under conditions or circumstances damaging to the child's sound character development; (c) lacks proper attention of the parent, guardian with care and custody or custodian; or (d) has a parent, guardian or custodian who is unwilling, incompetent, or unavailable to provide any such care, discipline, or attention.[57]

Thus, by bundling abuse and neglect together, sometimes under the general umbrella term "maltreatment," the law—both at the federal and the state level—immediately

51 Alaska, Arkansas, Connecticut, Delaware, Florida, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Pennsylvania, Rhode Island, South Carolina, Texas, Washington, West Virginia, and Wisconsin. *Id.* at 6.

52 *See* Mass. Gen. Laws ch. 119, § 51A (2020).

53 Kumor, *supra* note 43, at 119 n.68.

54 *See* Adoption of Yvonne, 170 N.E.3d 1178, 1185 (2021) ("poverty or homelessness are not per se indicative of child abuse or neglect, 110 Code Mass. Regs. § 1.11 (2008), nor may they serve as the sole basis for children's removal"); Adoption of Linus, 73 Mass. App. Ct. 815, 821, 902 N.E.2d 426 (2009).

55 MA DCF 2022 ANNUAL REPORT, *supra* note 19, at 23.

56 *See* MASS. GEN. LAWS ch. 119, § 51A (2020) (reporting of suspected abuse or neglect; mandated reporters; collection of physical evidence; penalties; content of reports; liability; privileged communication).

57 MASS. GEN. LAWS ch. 119 § 24 (2008).

designates the parent as the party responsible for creating the circumstances of the child. Neglect equates to the *failure* of the caretaker. While neglect lacks the intention of harm found in abuse, it nonetheless announces that the problem lies with the parent—be it their unwillingness or their inability to rise to the standards of care set by the state.

Rules and regulations stem from and are dictated by the linguistic choices in these legal definitions. Most importantly for our purposes, these linguistic choices set the reporting standard for all mandated reporters and welfare workers. They portray every indication of problems faced by children as a signal of parental failure. Even in places with financial exemptions like Massachusetts, such exemptions are considered only *after* a case has begun to form against the parent and enough evidence to substantiate an exemption claim has been gathered.

B. Law in the Banks: The Funding and Regulation of Responses to Child Neglect

While the law can be declarative and reflect important organizing ideas, it is programs' funding schema that shifts and forms State actions with regard to families. Section III.B turns to the construction of federal funding and how funding molds the perception of child neglect and surveillance nationwide.

1. Funding for "Prevention"

As is the case with many other welfare programs, federal funding for the child welfare system is funneled through the Social Security Act, Title IV. Title IV sets many policy guidelines to which states must adhere if they wish to be federally funded. Following growing criticism of child welfare services, Congress amended Sections B and E of the Social Security Act to reflect a renewed commitment to family integrity.[58] The Family First Prevention Services Act (FFPSA) of 2018[59] was hailed by some as a new way forward, signifying a commitment to the preservation of families and setting new priorities for child protection at the federal level.[60]

58 Mack, *supra* note 33, at 785.

59 Bipartisan Budget Act of 2018, H.R. 1892, 115th Cong. §§ 50702–50783 (2018).

60 *See, e.g.*, Nora Neus, *Five Years in with Millions Unclaimed, Is Family First Helping Kids and Families Yet?*, YOUTH TODAY (2023), https://youthtoday.org/2023/05/five-years-in-with-millions-unclaimed-is-family-first-helping-kids-and-families-yet/ [https://perma.cc/HP7M-QJES] (recounting the "slow[] but stead[y]" implementation of the FFPSA); Fabiola Villalpando, *Family First Prevention Services Act: An Overhaul of National Child Welfare Policies*, 39 CHILD. LEGAL RTS. J. 283 (2019) (commending the FFPSA's focus on preventative care while addressing factors that will make meaningful implementation a "long and challenging process"); Jeffrey Waid & Mimi Choy-Brown, *Moving Upstream: The Family First Prevention Services Act and Re-Imagining Opportunities for Prevention in Child Welfare Practice*, 127 CHILD. AND YOUTH SERV. REV. 106098 (2021) (reviewing the "landmark" FFPSA and its "possible implementation challenges and opportunities").

The FFPSA was the most recent move in what is perceived by many as a long, slow shift in the legal perception and treatment of child abuse and neglect. It declares a switch of emphasis in favor of prevention, replacing the treatment-focused programs that were traditionally at the center of government thinking. Yet despite the alleged refocus, from treatment after the fact to measures designed to prevent abuse and neglect, the new law still constructs a funding scheme that channels money to state programs—some estimate as much as $33,000 a year per child in the system[61]—and not to families in need. This reflects the belief that the parents are themselves the potential risk to children. Thus, the funding is focused on preventing child removal as much as possible but keeps to the initial premise that child safety is a parental maltreatment problem. Because of such premise, the programs funded by the FFPSA are designed to assist parents in educating their children and learning how to maintain discipline in the house.[62] That is, they take for granted that the problem that needs fixing is parental incompetence.[63]

61 ANDREA ELLIOTT, INVISIBLE CHILD: POVERTY, SURVIVAL & HOPE IN AN AMERICAN CITY 405 (2021) [hereinafter INVISIBLE CHILD].

62 See, for example, the definition of "[c]hild requiring assistance" in Mass. Gen. Laws ch. 119, § 21 (2020):

> [A] child between the ages of 6 and 18 who: (i) repeatedly runs away from the home of the child's parent, legal guardian or custodian; (ii) repeatedly fails to obey the lawful and reasonable commands of the child's parent, legal guardian or custodian, thereby interfering with their ability to adequately care for and protect the child; (iii) repeatedly fails to obey the lawful and reasonable regulations of the child's school; (iv) is habitually truant; or (v) is a sexually exploited child.

63 For further criticism, see generally Sean Hughes & Naomi Schaefer Riley, *Five Years On, the Family First Act Has Failed in Its Aims*, THE HILL (Apr. 18, 2023), https://thehill.com/opinion/civil-rights/3951473-five-years-on-the-family-first-act-has-failed-in-its-aims/ [https://perma.cc/S5UM-9NDA]; Charity Carmody, *Evidence-Based Practice Criteria's Effect on the Implementation of the Family First Prevention Services Act in Nebraska and Colorado*, (Aug. 22, 2022) (DLP. dissertation, Northeastern University) (on file with author); Mark F. Testa & David Kelly, *The Evolution of Federal Child Welfare Policy Through the Family First Prevention Services Act of 2018: Opportunities, Barriers, and Unintended Consequences*, 692 ANNALS AM. ACAD. POL. AND SOC. SCI. 68 (2020).

2. Funding for Data-Collection

We cannot fully appreciate the workings of criministrative surveillance without discussing the federal data-collection incorporated into programs funded by the Social Security Act. Since prevention has become the prevailing concept, any information that could be deemed to contribute to or indicate where action should be taken or where neglect is more likely to occur is considered relevant data.

Among the channels designed to process such data is the National Child Abuse and Neglect Data System (NCANDS).[64] The information gathered by NCANDS (and by other channels) is fed into a system designed to predict contributing factors of child abuse or neglect, operating from a preventive paradigm. In Massachusetts, risk assessment is conducted via a Structured Decision Making (SDM) system, through which relevant criteria are graded and aggregated, culminating in an assessment of the level of risk the child faces and the appropriate measures that need to be taken by state agencies to protect them.[65] But the fact that abuse and neglect are graded and assessed on the same spectrum frames neglect as a form of abuse, simultaneously positioning the parent as the risk factor and the State as the accountable preventer. This framing creates a justification for even more assessment, data-collection, and interference, with authorities intruding on family life at increasingly early stages, before any abuse or neglect has actually occurred.

For example, the law provides federal funds for "evidence-based" plans intended to support families and prevent unnecessary child removal to foster care.[66] One of the

64 *National Child Abuse and Neglect Data System (NCANDS)*, CHILDREN'S BUREAU (May 19, 2022), https://www.acf.hhs.gov/cb/data-research/ncands [https://perma.cc/5GA4-6EGY].

65 *See* MASSACHUSETTS DEP'T CHILD. AND FAM., FIVE-YEAR PREVENTION PLAN, NOVEMBER 2022 5, 58, https://www.mass.gov/doc/ma-title-iv-e-prevention-plan/download [https://perma.cc/83YZ-2HDP] [hereinafter MA Five-Year Prevention Plan] (explaining the state's plans to implement SDM in June 2023 and train social workers on its use). *But see* ADMIN. FOR CHILD. AND FAM., CHILDREN'S BUREAU, CHILD AND FAMILY SERVICES REVIEW: MASSACHUSETTS FINAL REPORT 2023 4 (2023) https://www.acf.hhs.gov/sites/default/files/documents/cb/ma-cfsr-r4-final-report.pdf [https://perma.cc/LV2S-JA85] ("According to information in the [Massachusetts] Statewide Assessment, these new [SDM] tools were implemented in June and July of 2023. The [Children's Bureau] would like to know more how the use of the SDM tool is affecting the agency's ability to appropriately assess and manage child safety").

66 *See* CAPACITY BUILDING CENTER FOR STATES, CHILDREN'S BUREAU, PROGRAMS AND SERVICES IN APPROVED STATE PREVENTION PROGRAM PLANS (2024) https://capacity.childwelfare.gov/states/resources/programs-and-services-in-approved-state-prevention-program-plans [https://perma.cc/5SW5-QPJS] (presenting data on states' evidence-based programs, which are reimbursable under FFPSA Title IV-E).

interventions specified in the FFPSA is the Early Childhood Home Visitation Program.[67] With the threat of child removal at the end of the line as a very real possibility, the practice of gathering information becomes, in itself, a punitive measure. This program punishes families in poverty when no allegation of neglect had been made, let alone proven, by marking them as suspicious due to low-income status alone, causing a chain reaction of suspicion in other institutions (such as the child's school), and harming the child's relationship with their parents and their feeling of safety in the home.

In response to the FFPSA, states are encouraged to build an "evidence-based program" to limit children's removal from their homes. Massachusetts presented such a program in February 2022, with the MA DCF asking for federal funding to support three programs: therapy, family therapy, and "Intercept."[68] Another example of the presumption that an individual's lack of personal responsibility (or willpower) lies at the heart of the problem of child neglect can be found in the incorporation of so-called "motivational interviews" by service providers, which are stipulated in Massachusetts regulations according to the requirements of FFPSA.[69] The very name betrays the conviction that a lack of motivation is the crime committed by an uncaring parent who finds themselves interviewed by the service provider—as opposed to myriad systemic injustices and structural obstacles that impede a parent's ability to care for their children as they would if given access to resources and State support.

C. Law on the Ground: Legal Engagement with Child Neglect

Since federal law prohibits child abuse and neglect, and states' receipt of federal funding for welfare programs is dependent on monitoring and preventing child abuse and neglect, states have responded by enacting an intricate web of laws and regulations. Some differ in specifics, but most follow the same construction: the conflation of neglect with abuse, combined with surveillance practices justified by the policy shift toward prevention. Section III.C demonstrates the workings of the law on the ground in this context by

67 Pub. L. No. 115-123, 132 Stat. 64 § 50605. For more information, see *Home Visiting*, OFFICE OF CHILD CARE, https://www.acf.hhs.gov/occ/home-visiting [https://perma.cc/62HH-UGR2].

68 *See* MA Five-Year Prevention Plan, *supra* note 65, at 43–45, 64 ("The goal of Intercept is to reduce the utilization of foster care by preventing entry into care, reducing the time spent in care, and/or reducing the risk of re-entry").

69 *See id.* at 69–70 ("delivery of MI [motivational interviewing] with fidelity will yield improvements in the engagement of families and in the retention of families through the full course of a service. Use of MI will influence the desired impact/service outcomes, but those results cannot necessarily be fully attributed to MI").

reviewing Massachusetts laws on the reporting of child neglect and the judicial review of these reports and investigations.

1. Reporting: The Rules Regarding 51A Reports

Stemming from the federal laws and the funding schemes structuring child protection programs, state rules are devised to operate on the state level under the same operational organizing idea: to protect children from their parents' failure to care for them.

In all U.S. states, child protection laws require agencies to set up and regulate an elaborate web of family surveillance, in which children are deemed at risk of abuse and neglect. Importantly—since, according to federal guidelines, poverty is a major risk factor in neglect[70]—the rules regarding mandatory reporting are, in fact, regulating and standardizing the surveillance of families in poverty.[71]

To review the law on the ground, Section III.C examines Massachusetts state laws and regulations, starting with those concerning the stage preceding a court case: the reporting process. A "51A report" can be filed and submitted to the MA DCF by anyone mandated by law to report risks relating to child abuse or neglect.[72] These reports account for 99% of the caseload at the MA DCF.[73] The MA DCF then "screens-in" those reports (and other calls or complaints, amounting to all intakes received) and undertakes an initial sift to decide which ones warrant a DCF response.[74] Those cases deemed as justifying a response are then screened again, this time through an initial investigation, to decide which are

70 CHILD WELFARE INFORMATION GATEWAY, CHILDREN'S BUREAU, ACTS OF OMISSION— AN OVERVIEW OF CHILD NEGLECT 9 (2001), https://ocfcpacourts.us/wp-content/uploads/2020/06/Acts_of_Omission_000978.pdf [https://perma.cc/M4G6-XPXK] [hereinafter ACTS OF OMISSION].

71 John Eckenrode et al., *Income Inequality and Child Maltreatment in the United States*, 133 PEDIATRICS 454 (2014).

72 Mass. Gen. Laws ch. 119, § 51A(a) (2020).

73 MA DCF 2022 ANNUAL REPORT, *supra* note 19, at 25. The DCF received 91,427 case references in 2022, 99% of which (90,558) came via 51A reports. *Id.* The drop in case numbers caused by the COVID-19 pandemic has eased back almost entirely: the number of 51A reports made in 2022 was 5.3% less than those made in 2019. *Id.* at 26.

74 Of the 90,558 so-called "protective intakes" (51As) received in 2022 alleging child maltreatment, 49,067 (54.2%) were "screened-in" for a CPS response. *Id.* at 26.

supported or substantiated and which are unsubstantiated.[75] The investigation is immediate and mandatory, with DCF personnel conducting a home visit with a very open mandate.[76] Each of these steps involves at least one person within the MA DCF scrutinizing the report, sometimes collecting more data to support or disprove the allegation submitted. The data, of all cases and reports, are collected and kept by the DCF.

51A reports are mostly submitted by professionals in the child's environment.[77] Among mandated reporters, the most prolific reporters are law enforcement professionals (who submitted 21.8% of all reports in 2021), educational personnel (15.4%), and medical professionals (12.6%).[78] Laws and regulations construct a very low threshold for reporting and impose no liability for false reporting.[79] Furthermore, financial disincentives are

75 *Id.* at 28. "[T]he Department completed 39,571 responses involving one or more children in FY2022. Of these, there were 16,151 (40.8%) support decisions and 6,806 (17.2%) substantiated concern decisions. The remaining 16,614 (42.0%) were unsupported." *Id.* at xiii. Thus far, 2023 seems to be following along similar lines: out of 19,890 51A reports made in the first quarter of FY2023, 10,723 (54%) were screened-in for a response. MASS. DEP'T CHILD. AND FAMILIES, QUARTERLY PROFILE—FY 2023, Q1 (07/01/2023-09/30/2023) 1, https://www.mass.gov/doc/quarter-1/download [https://perma.cc/9F3W-QVP3]. Of all cases screened in for a response, including those coming from 51A reports and hotline calls, 40% were found to be unsupported. *Id.* According to the 2023 quarterly profile, court referrals have risen slightly, while protective reporting has declined from 99% to 96%. *Compare id.* at 1–2 *with* MA DCF 2022 ANNUAL REPORT, *supra* note 19, at 25.

76 Mass. Gen. Laws ch. 119, § 51B (2013):

> (a) Upon receipt of a report filed under section 51A, the department shall investigate the suspected child abuse or neglect, provide a written evaluation of the household of the child, including the parents and home environment . . . (b) The investigation shall include: (i) a home visit at which the child is viewed, if appropriate; (ii) a determination of the nature, extent and cause or causes of the injuries; (iii) the identity of the person or persons responsible therefore; (iv) the name, age, and condition of other children in the same household; (v) an evaluation of the parents and the home environment; and (vi) all other pertinent facts or matters.

77 "The vast majority of 51A reports are filed by mandated reporters, including first responders, school personnel, and health care professionals who are required by law to report suspected child abuse and neglect to DCF." MA DCF 2022 ANNUAL REPORT, *supra* note 19, at vi. In 2021, more than two-thirds (67%) of reports alleging child abuse or neglect nationwide were submitted by professionals. CHILDREN'S BUREAU, CHILD MALTREATMENT 2021 xi [hereinafter CB CHILD MALTREATMENT REPORT], https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2021.pdf [https://perma.cc/T7PG-2WDN].

78 "Nonprofessionals, including friends, neighbors, and relatives, submitted fewer than one-fifth of reports (17.1%) [in 2021]. Unclassified sources submitted the remaining reports (16.0%). Unclassified includes anonymous, 'other,' and unknown report sources. States use the code 'other' for any report source that does not have an NCANDS designated code." CB CHILD MALTREATMENT REPORT, *supra* note 77, at xi.

79 C. M. v. Commissioner of Department of Children and Families, 169 N.E.3d 466 (2021).

set to ensure reporting; for example, fines are set for failing to report.[80] And, in certain circumstances, it is a criminal offense *not* to report.[81]

The outlook of professionals when it comes to the children in their care is shaped, then, by the legal definitions of neglect, the legal inseparability of abuse and neglect, and a fear of under-reporting (coupled with no consequences for over-reporting). Since there is no separate process for abuse versus neglect, 51A reports are a catch-all, and all reports initiate the same DCF response, even though most reports raise concerns about neglect and not abuse.[82]

The reporting process is also highly skewed by stigma and bias. This can be seen most strikingly in the over-reporting of cases involving children of color. Only 11% of reports submitted to the DCF in 2022 in the Boston area involved white children, even though 50.1% of Boston's population is white.[83]

Not all reports made to the MA DCF reach the courts. When a DCF case is opened, the state has essentially two options: to remove the child immediately or to leave the child in their parent(s)' care, but the investigation continues. In both scenarios, the parents are

80 Mass. Gen. Law ch. 119, §51A(c) (2020):

> . . . whoever violates this section shall be punished by a fine of not more than $1,000. Whoever knowingly and willfully files a frivolous report of child abuse or neglect under this section shall be punished by: (i) a fine of not more than $2,000 for the first offense; (ii) imprisonment in a house of correction for not more than 6 months and a fine of not more than $2,000 for the second offense; and (iii) imprisonment in a house of correction for not more than 2½ years and a fine of not more than $2,000 for the third and subsequent offenses.

81 Reporting of Child Abuse, 18 U.S.C. § 1169; Failure to Report Child Abuse, 18 U.S.C. § 2258.

82 In Massachusetts in 2022, the most frequent allegation type in 51A reports was neglect (73.1%). The most frequent allegation in 51B supported responses also pertained to neglect (86.6%). In total, there were 23,653 children (unduplicated child count) found to have experienced one or more types of maltreatment in Massachusetts in 2022. Of these, 86.7% were found to have experienced neglect. MA DCF Annual Report, *supra* note 19, at 32.

83 Boston Census, *supra* note 15. In Massachusetts in 2022, Latine children had a Rate of Disproportionality (RoD) indicator of 1.7. Black children had a ROD of 1.4, both indicating overrepresentation. White children had a RoD of just 0.6, indicating underrepresentation. *Id.* at 4.

expected to accept any assistance plan offered, including training.[84] According to the MA DCF's definition of "substantiated" claims:

> At the conclusion of the CPS Response, a "determination" is made. A "substantiated concern" finding means that there is "reasonable cause to believe" that the child was neglected, the actions or inactions by the parent(s)/ caregiver(s) create the potential for abuse or neglect, but there is no immediate danger to the child(ren)'s safety or well-being.[85]

Thus, a finding of "substantiated concern" and the resulting continuation of criministrative surveillance of the family are the result of an *administrative* threshold ("reasonable cause to believe") that might result in drastic state action (child removal and/or parental rights termination) that is more reminiscent of *criminal* proceedings. This criministrative surveillance can include the collection of incriminating data, the state's right to enter the home and to contact all potential witnesses, and eventually the removal of children from their parents' custody, even against the child's express wishes.[86]

According to the guidelines reinforced under Title IV of the FFPSA, each ongoing case in the MA DCF is conducted under a "prevention plan."[87] The family assessment is undertaken by the Department and is organized around five "protective factors": knowledge of parenting and child development; social and emotional competence of the children; parental resilience; social connection; and concrete support in time of need.[88] The plan is updated or revisited every six months (or upon a major change of circumstances in the family, such as loss of housing, death, or birth).[89] Part of the state's assessment is based on

84 Mass. Gen. Laws ch. 119, § 51B(g) (2013):

> The department shall offer appropriate services to the family of any child which it has reasonable cause to believe is suffering from any of the conditions described in the report to prevent further injury to the child, to safeguard his welfare, and to preserve and stabilize family life whenever possible. If the family declines or is unable to accept or to participate in the offered services, the department or any person may file a care and protection petition under section 24.

85 MA DCF 2022 ANNUAL REPORT, *supra* note 19, at 28.

86 For description of these events, see generally Fong, *supra* note 8; INVISIBLE CHILD, *supra* note 61; ROBERTS, *supra* note 2; BARBARA KINGSOLVER, DEMON COPPERHEAD (2022).

87 *See* MA Five-Year Prevention Plan, *supra* note 65.

88 *Id.* at 4.

89 *Id*. at 11.

the choice the family makes to "become and stay involved" with prevention programs.[90]

The report is submitted to the MA DCF to be analyzed and substantiated. According to the rules and regulations of the MA DCF,[91] its mission is to balance two mandates: to "protect children" and to "respect the right of families to be free from unwarranted state intervention."[92] Yet the primary principle of service is to "ensure the safety of the children."[93]

2. Judicial Review of the Administrative System

It is important to stress that the process described above and hereinafter is constructed under administrative law.[94] Nonetheless, in Massachusetts, it is the Juvenile Court that deals with cases of child abuse and neglect—the same court that deals with young offenders, meaning that its judges are used to employing the logic of criminal law and a criminal law approach to cases and parties.[95] If a case involves issues of parental substance misuse, the Juvenile Court convenes under a "family treatment court," which is framed as a specialized therapeutic-oriented, collaborative setting that "focuses on issues of parental abuse and neglect raised through the filing of a care and protection [case] in the Juvenile Court by treating the parents' underlying substance use disorder."[96]

While this is framed as a judicial decision (the court is the only actor responsible for making determinations concerning parental rights, not the MA DCF), this is actually a process of judicial review of a decision already made by the administrative agency—starting with the decision to open an investigation and followed by the family plan and

90 *Id*. at 6.

91 110 CMR 1.00: Principles and Responsibilities of the Department of Social Services.

92 *Id*. at 1.01.

93 *Id*. at 1.02.

94 *See generally* MASS. GEN. LAWS ch. 119, §§ 1–182.

95 COMMONWEALTH OF MASS. JUV. CT. DEP'T, R. 1, JUVENILE COURT RULES FOR THE CARE AND PROTECTION OF CHILDREN (2018), https://www.mass.gov/juvenile-court-rules/rules-for-the-care-and-protection-of-children-rule-1-scope-of-rules [https://perma.cc/55X5-JFUT] [hereinafter MA JUVENILE COURT RULES].

96 COMMONWEALTH OF MASS. JUV. CT. DEP'T, JUVENILE COURT STANDING ORDER 2-23: ACCESS TO RECORDS AND THE ROLE OF THE JUDGE IN FAMILY TREATMENT COURT (2023), https://www.mass.gov/juvenile-court-rules/juvenile-court-standing-order-2-23-access-to-records-and-the-role-of-the-judge-in-family-treatment-court [https://perma.cc/JVA4-JHEJ].

decisions around whether, and to what extent, parents comply with the plan.

Court cases concerned with child protection are only the tip of the iceberg when it comes to the MA DCF's engagement with families and its power to decide that a child needs to be removed from his or her home. Most often, a case starts with a petition submitted under Massachusetts General Law Chapter 119 to hold an emergency hearing.[97] Such a hearing for emergency removal is conducted ex-parte, with only the MA DCF in the courtroom.[98] The petition is supposed to be filed with an affidavit.[99] Once a petition is filed, there is a summons (just like in criminal cases).[100]

The evidence presented in court can vary but must include an affidavit with every motion,[101] a report that the MA DCF is required to submit with every court hearing (but this requirement does not preclude the judge's discretion to proceed with the trial without receiving this report),[102] and an investigator's report made by a court-appointed investigator.[103]

The investigator's report is framed on the most basic, core understanding that submitting information about the family is the best way to assist the judge in deciding the cases: "Supplied with this information, a judge is better able to undertake the challenging task of deciding the outcome of a care and protection case"; "The Report will assist the court to determine the case management plan, with a focus on achieving timely permanency for

97 The "reasonable cause" standard has been described as a "threshold determination," implying "a relatively low degree of accuracy."' Care and Protection of Robert, 408 Mass. 52, 54–64 (1990).

98 According to MASS. GEN. LAWS ch. 119, § 24 (2008), a "care and protection" petition may be filed on behalf of any child under the age of eighteen who:

> (a) is without necessary and proper physical or educational care and discipline; (b) is growing up under conditions or circumstances damaging to the child's sound character development; (c) lacks proper attention of the parent, guardian with care and custody or custodian; or (d) has a parent, guardian or custodian, unwilling, incompetent, or unavailable to provide any such care, discipline or attention.

99 MA JUVENILE COURT RULES, *supra* note 95, at R. 7B.

100 *Id.* at R. 5.

101 *Id.* at R. 7B.

102 *Id.* at R. 10.

103 *Id.* at R. 11.

the child, and to decide the outcome of the case in a fair and prompt manner."[104] The report is supposed to be neutral and unbiased, and the investigators are specifically instructed to avoid language that could skew the court's opinion of the family.[105]

But in practice, the reports produced by investigators are allowed as evidence even if they contain hearsay[106]; though they play an important role in the court's decisions, the information in them is usually not challenged by the courts or the parties. Indeed, these reports amplify family surveillance, since investigators collect data from all potential mandated reporters and others surrounding the family.[107] Even family members who chose, at an earlier time, not to provide the information they had to the social worker because they feared how it could be interpreted are required to pass it on to the court investigator.

The investigator also visits extended family members and any other child, if age appropriate, of the parent who is not named in the petition.[108] This practice deepens the individualizing of the family into ostensibly independent members, dividing parents and marking them as potentially dangerous to other children who were not the focus of the case in question.

The investigator is party to otherwise privileged information.[109] Importantly, the investigative report and the process of data collection are classified in very neutral terms and are intended to gather only "factual information."[110] More than that, the interview with the parents is framed as protective, "an opportunity to provide information that they would

104 COMMONWEALTH OF MASS. JUV. CT. DEP'T, GUIDELINES FOR COURT INVESTIGATIONS AND REPORTS, sections I and II (2020) https://www.mass.gov/guides/guidelines-for-court-investigation-reports [https://perma.cc/25WK-L4C8] [hereinafter MA COURT INVESTIGATION & REPORT GUIDELINES].

105 *See id*. section V. "Example #1: An improper evaluative statement would be 'The apartment was filthy.' A proper descriptive statement would be 'The kitchen sink was filled with dishes covered with dried food and there were dozens of flies and roaches in the apartment.' Example #2: An improper evaluative statement would be 'Father is a well-known drunk.' A proper descriptive statement from an identified source would be 'I saw father yesterday on the street; he was unable to stand and was slurring his words.'"

106 *Id.* at section I*; see* Custody of Michel, 549 N.E.2d 440, 442.

107 MA COURT INVESTIGATION & REPORT GUIDELINES, *supra* note 104, at section IV. R. A(2)–(3).

108 *Id.* at section IV. R. A(4).

109 "The court investigator's appointment form . . . grants the court investigator access to both statutorily privileged and otherwise restricted information." *Id.* at section IV. Rule A(6).

110 *Id.* at section II. *See* Custody of Tracy, 31 Mass. App. Ct. at 484.

like the court to know about themselves and their child."[111] Yet, the investigator's mandate to ask certain questions and collect certain information is highly judgmental and based on the premise of individual responsibility and capability. The resulting language used in the inquiry—including an interest in the "parent's understanding of each child's personality and needs, what [the] parent wishes for the child and how [the] parent would like to see [the] child's situation change"—thus appears "soft," yet presumes that parents are free to choose their life circumstances.[112]

While the interviewees are told there can be no "off the record" discussion in the interviews, this is a relatively mild, administrative, "*Lamb*-type warning"[113] and not a *Miranda*-like warning against self-incrimination.[114]

Following the emergency hearing, a further hearing is scheduled within seventy-two hours, during which it will be decided whether the child should be left with the MA DCF.[115] The parents, who are represented if they are indigent and have specified their implicit will to have a counsel,[116] need to "show cause why the child should not be committed to the custody of the department."[117] Therefore, the presumption is already that the child should be removed from the family home, and the judge must justify writing a decision to the contrary.[118]

111 *Id.* at section IV. R. B(1).

112 *Id*. at section IV. R. B(6).

113 *Id*. at section IV. R. D. The warning is based on the court ruling in *Commonwealth v. Lamb*, 303 N.E.2d 122 (Mass. 1973).

114 There have been activist efforts to promote such reforms. *See, e.g.*, *Active Campaigns: Family Miranda Rights*, JMACFORFAMILIES, https://jmacforfamilies.org/active-campaigns [https://perma.cc/5UU4-HVEP].

115 MA JUVENILE COURT RULES, *supra* note 95, at R. 9 note.

116 Appointed based on MASS. GEN. LAWS ch. 119, § 29 (2011). "A parent must first come forward and appear, or in some way indicate a desire to be heard or to contest the petition, and must demonstrate his or her indigence." *In re* Adoption of Holly, 738 N.E.2d 1115, 1120 (Mass. 2000). *See also* Sara Tiano, *Most States Now Access Federal Funds for Family Court Lawyers*, THE IMPRINT (Feb. 27, 2024) https://imprintnews.org/top-stories/states-access-federal-funds-for-family-court-lawyers/247752 [https://perma.cc/87JZ-D694] (describing the increase in federal funding for parents' counsel yet the lack of a federal mandate for parents' counsel).

117 MASS. GEN. LAWS ch. 119, § 24 (2008).

118 *Id*. The judge must then make the written certification and determinations required by MASS. GEN. LAWS ch. 119, § 29C (2011) (contrary to the welfare certification and reasonable-efforts determination). *See* Care and Protection of Walt, N.E.3d 803 (Mass. 2017).

Finally, ninety days after the opening of the case, a status hearing is scheduled to consider the court-appointed investigator's report and any social worker reports that were asked for in discovery.[119] According to the rules, the mandate of the court is loosely defined and broadly structured:

> Unless previously addressed and resolved, at the status hearing the court shall address but is not limited to addressing: the process of the court investigation or the report; service of process in accordance with Rule 5; discovery motions; child identification; the Indian Child Welfare Act; any special evidentiary issues; the Department's plan to achieve permanence; any issues regarding services being offered or delivered to the family pending trial; the scheduling of a pretrial conference; and compliance with the standing order regarding time standards. Nothing in this rule shall preclude the court from hearing motions, including discovery motions, at other times in the interests of justice.[120]

The last major example of criministrative surveillance that this Article will highlight here is the legal threshold of evidence. In the criminal system, the burden of proof is relatively heavy for the state, whereas in the administrative legal context, the burden of proof is rather low.[121] In fact, the initial assumption of the administrative legal system is to accept the administrative agency's claim.[122] A short discussion of the administrative judicial system is needed to understand its prevailing reasoning and notions, in contrast to those of the criminal system.

As a branch of law, administrative law was mostly developed as a response to the development of the administrative state.[123] As disputes arose regarding the decisions of

119 MA JUVENILE COURT RULES, *supra* note 95, at R. 13 and 14.

120 *Id*. at R. 14B.

121 The burden of proof gets heavier as the trial goes on, and higher in some instances. *See* Adoption of Quan, 21 N.E.3d 182 (Mass. 2014); *see also* Adoption of Yvonne, 170 N.E.3d 1178 (Mass. App. Ct. 2021).

122 For a general discussion of the burden of proof in administrative law, see Anthony Michael Bertelli & Fiona Cece, *Comparative Administrative Law and Public Administration*, *in* THE OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW 174 (Peter Cane et al. eds., 2020).

123 *See generally* Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1983); Michael Asimow, *A Comparative Approach to Administrative Adjudication*, *in* THE OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW 577 (Peter Cane et al. eds., 2020).

state authorities, a need emerged for intervention, regulation, and oversight, which was provided by the judicial branch.[124]

While administrative law differs considerably between jurisdictions and is somewhat hard to define,[125] some similarities exist across the board. One particularly interesting common feature is the tendency of administrative courts to look less at facts and more at how those facts were collected, considered, and treated by the administrative agency in question. The courts may demand, for instance, that an administrative agency provide justification or reasoning for its decision, or show that it has a bureaucratic process in place to collect pertinent and relevant information for the decision-making process.

On one hand, the objectivity of judges is strongly challenged by some scholars; but, on the other, they are considered more objective than juries. This opposite tendency—fearing over-politicized decisions but trusting the ostensibly apolitical, neutral judge—is salient in the general guidelines given to judges in administrative proceedings, as opposed to criminal procedural law.[126] Most evidentiary procedure is constructed with juries in mind and is intended to prevent them from being swayed by unsubstantiated yet appealing narratives.[127] In contrast, the professional judge is assumed to assess the credibility and reliability of information presented to them without too many outside constraints on their judgment.

In the context of child protection cases, the legal threshold of "reasonable cause" refers to a collection of facts, knowledge, or observations that tend to support or are consistent with the allegations made. When viewed in light of the surrounding circumstances and the credibility of persons providing relevant information, such information should be that which will lead any "reasonable" person to conclude that a child has been abused or neglected.

124 *See generally* Peter Cane, *Administrative Fact-Finding and Policy-Making*, *in* CONTROLLING ADMINISTRATIVE POWER: AN HISTORICAL COMPARISON 238 (2016); Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469 (1986); Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965); Gillian E. Metzger, *Legislatures, Executives, and Political Control of Government*, *in* THE OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW 696 (Peter Cane et al. eds., 2020); Li-Ann Thio, *Courts and Judicial Review*, *in* THE OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW 721 (Peter Cane et al. eds., 2020).

125 *See* Bertelli & Cece, *supra* note 122; Asimow, *supra* note 123.

126 For a discussion of the burden of proof in this field, see generally Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE L. J. 1254 (2012); Edward K. Cheng & G. Alexander Nunn, *Beyond the Witness: Bringing a Process Perspective*, 97 TEX L. REV. 1077 (2019).

127 *See* sources cited *supra* note 126.

This low threshold is combined with judges' almost blanket deference to professionals in the administrative context—a phenomenon in administrative judicial review at-large that is particularly salient in child protection cases.[128] In contrast to parents' and children's testimonies, which are regarded with suspicion by judges and face substantial judgment and scrutiny, experts are assumed to be submitting "objective" reports.[129] Moreover, child protection agencies are regarded as neutral, providing a baseline for the judges' decisions.

Parents are therefore punished twice. First, by being assigned a lower epistemic position and facing a lower burden of proof. Second, by facing the yoking of neglect and abuse and their reification as a parental behavioral issue. Discussions of the latter can be found in the way the courts refer to parental behavior when discussing poverty. A parent's "lack of [a] 'stable home environment"' may be considered in assessing parental fitness.[130] In one case, a "mother's frequent moves with the child" was considered as weighing against her parental fitness.[131] Attempts to address poverty-related conditions, such as housing, in child welfare cases are viewed as not addressing the "real" issue at hand.

128 *See generally* Testa & Kelly, *supra* note 63; Megan Gilligan, Amelia Karraker, & Angelica Jasper, *Linked Lives and Cumulative Inequality: A Multigenerational Family Life Course Framework*, 10 J. FAM. THEORY REV. 111 (2018); Spinak, *supra* note 25.

129 MASS. GEN. LAWS ch. 119, § 21A (2020):

> Evidence in proceedings under sections 21 to 51H, inclusive, shall be admissible according to the rules of the common law and the General Laws and may include reports to the court by any person who has made an investigation of the facts relating to the welfare of the child and is qualified as an expert according to the rules of the common law or by statute or is an agent of the department or of an approved charitable corporation or agency substantially engaged in the foster care or protection of children. Such person may file with the court in a proceeding under said sections 21 to 51H, inclusive, a full report of all facts obtained as a result of such investigation. The person reporting may be called as a witness by any party for examination as to the statements made in the report. Such examination shall be conducted as though it were on cross-examination. Evidence may include testimony of foster parents or pre-adoptive parents concerning the welfare of a child if such child has been in the care of the foster or pre-adoptive parents for 6 months or more, and may include the testimony of the child if the court determines that the child is competent and willing, after consultation with counsel, if any, to testify.

130 *See* Adoption of Oren, 141 N.E.3d 114, 117 (Mass. App. Ct. 2020) (quoting Petitions of the Dep't of Social Serv. to Dispense with Consent to Adoption, 503 N.E.2d 1275, 1282 (Mass. 1987)).

131 *See* Care and Protection of Lillith, 807 N.E.2d 237, 240 (Mass. App. Ct. 2004).

IV. Discussion: Identifying Criministrative Law and Its Roots

A. The Individualized Perception of Poverty and Its Implications

Ideally, according to the capitalist liberal welfare-state argument, the capitalist market is the preferable route by which to allocate resources and fix crises. It is reasoned that the person who does not have enough money to meet their basic needs can head out into the labor market and earn a salary to pay for food and accommodation. The person who cannot find a job that pays enough to cover such needs can simply attend professional training in line with their abilities and thus will be able to mobilize in the labor market. Those dealing with different life challenges, such as raising children, can readily access professional help. People dealing with complex parenting issues—coping with substance abuse or struggling to find the time (or capability, or desire) to play with their child, attend to their emotional needs, or even feed them properly—can always turn to the open market for help.

In the liberal model,[132] the welfare state only steps in when the individual does not have the wherewithal to access the market to fulfill those needs—and it is justified in doing so. Housing Aid rules ostensibly support individuals who are unable to secure housing by private means; income supplements and schemes such as Aid to Families with Dependent Children (AFDC) or the Supplemental Nutrition Assistance Program (SNAP) are meant to sustain those who cannot earn enough income to sustain themselves through the wage market; and CPS protects minors whose parents are financially unable to provide their children with proper care through the service and consumer markets. Incorporating "neglect" into the definition of the issues under the CPS mandate and devoting most of the service's resources and budget to this issue[133] renders parenting (in the sense of caring for one's child) just another essential utility provided by the welfare state.

Tying the concept of childcare (traditionally viewed as a market-based system) to the welfare state support system merges the organizing ideas of both. In the U.S., this entails a penalized version of welfare, in which individuals' (poor) choices are assumed to be the cause of all their woes, and welfare recipients are seen as the victims of their own (deficient,

132 According to the typology of welfare state models (the most popular being that of Esping-Andersen), the U.S. is categorized as a liberal welfare state. *See* sources cited *supra* note 7.

133 As mentioned above, the vast majority of the cases under investigation by CPS are concerned with neglect, not abuse. *See* MA DCF 2022 ANNUAL REPORT, *supra* note 19, at 36. The *Guide for Caseworkers* also makes reference to "[c]hild neglect, the most common form of child maltreatment." *See* Diane DePanfilis, *Child Protective Services: A Guide for Caseworkers*, U.S. DEP'T OF HEALTH AND HUM. SERV. ADMIN. FOR CHILD. AND FAM., 2018, at 32.

questionable) decisions. In this paradigm, by "earning" the status of welfare assistance eligibility, the individual essentially relinquishes at least some of their agency.[134] In the case of parents, this organizing idea supports child removal and the broader conception of State surveillance and/or intervention to protect children from their parents' neglect.

The arguments presented in Part IV are built around two core themes: the concept of surveillance and the modern capitalist State's focus—obsession, perhaps—with individual choices and behaviors. It was Foucault who first drew our attention to the importance of data-collection to the act of governing,[135] which helps control the subjects of State power. But the importance of reporting and information-gathering in the context of child welfare is not only about what information is available to the State and the lack of privacy for people in need of state assistance. It is also about the complete disconnect between information and voice. While the State seems to be getting better and better at gathering information about families who are living in poverty and are thus at risk of falling into the category of neglect, there is still no room for their lived experiences to be heard or their needs to be self-expressed anywhere in the process.

B. The Law of Overlap: Features of Criministrative Law

Two distinct kinds of legal rationales are identifiable in the findings described above. While the term "overlap" might hint to thicker protection of the law, here the overlap leads to losing both forms of protection found in each field of law. That is to say, criministrative surveillance strips parents and children from both the balances provided in administrative law and the constitutional protections provided in criminal law.

Formally, as mentioned above, child protection is framed using the administrative legal rationale. The law is discussed and formulated as a judicial review of an administrative decision. Similar to the usual routine in administrative courts, there is visible bias toward the state's arguments, and the courts tend to accept the state's claims.

The data collection allowed by the courts is wide, unrestricted, and exploratory in nature. It is driven by an assumption of the State as a caring body; the gathering of

134 This phenomenon is not exclusive to child welfare, but rather characterizes the attitude towards people in poverty more generally. *See generally* Yael Cohen-Rimer, *What's Choice Got to Do with It? Addressing the Pitfalls of Using Choice-Architecture Discourse Within Poverty Law*, 86 MOD. L. REV. 951 (2023).

135 Michel Foucault, *Governmentality*, *in* THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 106 (Graham Burchell, Colin Gordon, & Peter Miller eds., 1991) [hereinafter *Governmentality*].

information is portrayed as facilitating assistance and aid, and thus there is no need—unlike in the criminal system—to curtail it.

Because of those premises and tendencies, there are no protection measures provided to parents and families against the collection of data. No search warrant is needed to enter the home, no rules against self-incrimination apply, and welfare recipients generally lack any constitutional protections enjoyed by criminal defendants.

At the same time—and importantly, not formally so—the law of child protection functions as criminal law. Four elements comprise this comparison. First, the individualized condemnation of parents by the courts is similar to that of a criminal defendant. Even outside of the courts, the mere definition of neglect is formulated as a parental failure, not as an objective situation of impoverished conditions endured by the children. Second, removal of children from the home is perceived as punishment for non-compliance. This final punishment "floats" in the background of the whole process, compelling the obedience and cooperation of parents. Third, similarly to criminal procedure, merely entering the formal legal process causes stigma, denunciation, and fragmentation of the parent-child bond. The process places parents in a liminal situation of "semi-guilty,"[136] as they are punished by the process itself even before considering the end result.

In fact, the welfare system in the U.S. is so similar to the criminal system that it can be discussed through the lens of the five generational justifications (or "myths")[137] of the criminal system: (i) it is meant to ensure that people in poverty *repay* their debt to society by "giving back" their autonomy and agency in raising their children (which they must renounce when they take public money);[138] (ii) it is meant to reform the poor via "choice architecture," teaching them to better care for their children (because their poverty is taken as an indication that they do not know how to parent to begin with); (iii) it works to remove ostensibly dangerous actors from society, thereby cementing people in deeper poverty, and, by removing children, it adds to their parents' exclusion (for example, the law

136 *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 42 (Alan Sheridan trans., 1995) [hereinafter DISCIPLINE AND PUNISH].

137 *See* Jonathan S. Simon, *Millennials and the New Penology: Will Generational Change in the U.S. Facilitate the Triumph of Risk Rationality in Criminal Justice*, *in* CRIMINAL JUSTICE, RISK AND THE REVOLT AGAINST UNCERTAINTY 319 (John Pratt & Jordan Anderson eds., 2020).

138 And not only that: parents must also repay the financial costs of foster care for their children. See, for example, recent reports such as that by Joseph Shapiro, *In Some States, an Unpaid Foster Care Bill Could Mean Parents Lose Their Kids Forever*, NPR (Jan. 19, 2023) https://www.npr.org/2023/01/19/1148829974/foster-care-parental-rights-child-support [https://perma.cc/WF4R-U6JP].

restricts the ability of parents whose names are on child abuse registers—which include cases of neglect—to work in any "child-care institutions and other group care settings");[139] (iv) it reinforces public perceptions and norms, flooding impoverished communities and communities of color with mandated reporters who follow parents' every move; and (vi) it relates to the racial threat-to-society notion, leading to egregious stereotypes such as that of the ill-equipped Black mother who is only fit to be a worker but not to bring up children, or the stigma of the "welfare queen" who only brings children into the world to gain a free ticket to state handouts.[140]

V. The Problem with Criministrative Law

We have seen that criministrative surveillance is salient in all aspects of the law, from its organizing idea, history, and language to its foundational schema and its work on the ground, in courts and in society. What follows is an outline of the practical-material and social-rhetorical harms inflicted by criministrative surveillance. This categorization is somewhat artificial, since the two types of harms trigger and perpetuate one another, but analyzing them separately enables us to better understand the layers of damage caused by criministrative surveillance.

A. Practical-Material Harms

1. Destabilization and Strain on Families' Material Resources

The first and arguably most visible harm caused by the child protection process and its threat of child removal is the fracturing of the family and the despair and suffering caused by this separation for parents and children alike.[141] The experience requires parents to devote all their personal resources and energy to legal battles,[142] while the temporary

139 Bipartisan Budget Act of 2018, H.R. 1892, 115th Cong. § 45 (2018).

140 *See generally* ANGE-MARIE HANCOCK, THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN (2004).

141 For documentation of this harm, see Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 527–34 (2019).

142 While parents' counsel is provided in most states, the time, labor hours, travel costs, and other material resources are funneled into the long judicial procedure of reuniting children with their parents. Moreover, the quality, efficacy, and availability of state-provided counsel varies. *See* Vivek Sankaran, *In Child Welfare Cases, Just Any Old Lawyer Won't Do*, THE IMPRINT (Apr. 28, 2020) https://imprintnews.org/child-welfare-2/in-child-welfare-cases-just-any-old-lawyer-will-not-do/42826 [https://perma.cc/8YP2-FLAT] (calling attention to the lack of "high quality legal representation" in child welfare cases); *see also* STATE OF NEW YORK UNIFIED COURT SYSTEM COMMISSION ON PARENTAL LEGAL REPRESENTATION, INTERIM REPORT TO CHIEF JUDGE DIFIORE 6 (2019) https://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR_Commission-Report.pdf [https://perma.cc/2LQX-59M7] ("For decades, reports have chronicled the crisis in parental representation, particularly regarding child welfare proceedings. Instances of inadequate representation, delays in access to representation, and the outright denial of representation, are all too frequent").

loss of their children can trigger or exacerbate mental health crises, substance abuse, and other trauma-induced behaviors.[143] For women in particular, personal resources are aptly described in the literature as being dedicated to dealing with the challenges of "system-impacted" mothering.[144] Once a case is opened, it creates a ripple effect, draining resources that the family now has to channel into preventing the dreaded end result of permanent removal or fighting tooth-and-nail to be reunited with their children.

But the effect begins even before a case is "caught" (to rephrase Lee's apt description).[145] Due to the struggle that living in poverty entails, the resources available (mental, emotional, monetary, temporal, among others) to these families are already stretched to their limit. Now, layered upon this daily struggle, the family finds itself having to navigate the system of criministrative surveillance in order to prevent reporting.[146] Much needed healthcare is not sought because it might lead to reporting. Welfare benefits are not fully utilized because disclosure of private matters will be demanded. Children learn early on not to ask for the assistance they need and to which they are entitled because they know the repercussions might lead to the dismantling of their family. The mental load of navigating the survivalist labyrinth of poverty is exacerbated by the constant shadow of possibly

143 *See generally* INVISIBLE CHILD, *supra* note 61; Sarah Katz, *We Need to Talk about Trauma: Integrating Trauma-informed Practice into the Family Law Classroom*, 60 FAM. CT. REV. 757 (2022); Sarah Lorr & L. Frunel, *Lived Experience and Disability Justice in the Family Regulation System*, 12 COLUM. J. RACE & L. 477 (2022).

144 A term coined by Katherine L. Maldonado-Fabela. *See* Katherine L. Maldonado-Fabela, *"In and Out of Crisis": Life Course Criminalization for Jefas in the Barrio*, 30 CRIT. CRIM. 133 (2022).

145 *See* CATCHING A CASE, *supra* note 8.

146 *See* Kelly Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers' Institutional Engagement*, 97 SOC. FORCES 1785 (Jun. 2019) ("[low-income] [m]others recognized CPS reports as a risk in interactions with healthcare, educational, and social service systems legally mandated to report suspected child abuse or neglect . . . mothers' practices of information management, while perhaps protecting them from CPS reports, may preclude opportunities for assistance and reinforce a sense of constraint in families' institutional interactions"); Carrie Lippy et al., *The Impact of Mandatory Reporting Laws on Survivors of Intimate Partner Violence: Intersectionality, Help-Seeking and the Need for Change*, 35 J. FAM. VIOLENCE 255 (finding that mandatory reporting laws likely "reduce help-seeking for over a third of [intimate partner violence] survivors").

triggering the invisible fault lines of the criministrative surveillance system surrounding people in poverty.

For children, the damage caused by being removed from the home includes physiological and behavioral harms linked to the anxiety and insecurity caused by separation or the threat of separation. Children's well-being also suffers when they witness their parents' distress.[147] While these harms are evidently intensified when separation actually occurs, they are also likely to have an effect on children whose parents are "merely" under investigation or on those children with other adults in their lives who constitute a risk factor for their parents instead of providing them with assistance.

2. Tainted Systems of Care

In addition to the resources wasted or invested by family members in attempting to avoid the system of criministrative surveillance at all costs, this system's overlap with welfare systems that are formally meant to provide care (housing, healthcare, and so on) limits the true availability of these services for families. Since a call for help can (and, in many cases, most likely *will*) culminate in "catching a case,"[148] parents are reluctant to approach agencies and programs meant to assist them in areas such as domestic violence,[149] substance abuse,[150] housing, or nutrition security.[151] In other words, the overlap between the

147 *See generally* Julie Poehlmann-Tynan et al., *The Health and Development of Young Children Who Witnessed Their Parent's Arrest Prior to Parental Jail Incarceration*, 18 INT'L. J. ENV'T. RES. PUB. HEALTH 4512 (2021); Sherryl H. Goodman et al., *Maternal Depression and Child Psychopathology: A Meta-Analytic Review*, 14 CLIN. CHILD FAM. PSYCH. REV. 1 (2011); Lior Abramson, Yael Paz & Ariel Knafo-Noam, *From Negative Reactivity to Empathic Responding: Infants High in Negative Reactivity Express More Empathy Later in Development, with the Help of Regulation*, 22 DEV. SCI. 1 (2018).

148 CATCHING A CASE, *supra* note 8.

149 *See* Adoption of Yvonne, 170 N.E.3d 1178 (Mass. App. Ct. 2021).

150 *See* Kathryn A. Thomas et al., *The Impact of State-Level Prenatal Substance Use Policies on Rates of Maternal and Infant Mortality in the United States: A Legal Epidemiology Study*, MEDRXIV (2022), https://doi.org/10.1101/2022.11.16.22282429 [https://perma.cc/8CVH-TJAL].

151 *See* Eckenrode et al., *supra* note 71; ACTS OF OMISSION, *supra* note 70. The instructions of the U.S. Department of Health and Human Services clearly state that the very fact of applying for state assistance constitutes an indicator of a potential situation of neglect. The first item on the list of parental "behaviors" that social workers should look out for is employment status. In other words, poverty is considered a "risk factor" in child neglect. *See* Diane DePanfilis, *Child Neglect: A Guide for Prevention, Assessment, and Intervention*, U.S. DEP'T OF HEALTH AND HUM. SERV. 47 (2006); *see also* Hina Naveed, *If I Wasn't Poor, I Wouldn't Be Unfit*, HUM. RTS. WATCH (Nov. 17, 2022), https://www.hrw.org/report/2022/11/17/if-i-wasnt-poor-i-wouldnt-be-unfit/family-separation-crisis-us-child-welfare [https://perma.cc/72LP-GTJL].

two systems means that state care is "tainted," leaving these families in a bind.

The fact that *any* call for help draws attention or more surveillance to the home is a major problem: the more eyes that scrutinize a family, the more the threat of judgment, criticism, and sanctions increases, hampering the immediate assistance needed by the families. Note that, while some legal protection is available to people in criminal procedures in terms of privacy and data-sharing, the fact that surveillance is characterized as administrative prevents these protections from being used.[152]

In addition to the material-practical impacts of criministrative surveillance and the threats it imposes on the family unit, the very approach of the state to that unit—fragmenting it into isolated individuals for the purpose of analysis—constitutes a further harm.

Such fragmentation is destabilizing. It entails an invasion of privacy since it mandates that all details of family life be discussed and judged on an ongoing basis. It also causes a split between children and parents, starting when a social worker first sets foot into the home, charged with protecting children from their own parents.

This process not only paints the responsibility of parenting as an individual endeavor as opposed to a communitarian effort but also arguably renders it such. In the legal system, it pits the parents against each other, against their children, and against their extended family and community. The adversarial aspect of the legal treatment is a part of individualization. Indeed, while potentially positive in some ways, the lawyers representing the children are part of this process of atomizing the family. It is a form of mental removal, individualizing the child and their care as a separate problem divorced from the surrounding problems of poverty. Such compartmentalizing creates the illusion that one can care for a child as an isolated "unit" while living in poverty, as if poverty and isolation are not *both* detrimental to child welfare. Failing in this task—almost impossible to fulfill to begin with—is thus framed as a personal failure, both in the parents' eyes and the eyes of the law (and society at large).

152 *See generally* Ismail, *supra* note 5.

B. Socio-Rhetorical Harms

1. Harms Directed at Families: "Legal Gaslighting"

Another problem with far-reaching consequences is that caused specifically by the mismatch of legal definitions, which blurs the lines between the administrative and the criminal. Essentially, the expressive message conveyed by the melding of the two legal systems is a mixed one. On the one hand, non-criminal language is used to convey that the law is conceived and constructed to assist families, protect children, and, more recently, prevent harm to children. On the other hand, non-criminal language is interwoven with the message that parents are unfit, potentially dangerous, and, crucially, unimportant when it comes to deciding what they need to best parent their children.

The contradictory messages sent through the law—one through its language and formal construction and one through its actual practices—creates confusion and distrust, since the law "talks" in one voice but "acts" in another manner. As is the case with forms of gaslighting, this confusion leaves parents unable to pinpoint the problem with child protection law, adding to the obstacles faced by anyone seeking to change the system.[153]

Teachers, medical professionals, and law enforcement actors are all considered by the law to be better placed to know what the children need, what is in their best interests, and how to best serve these. Parents are expected to cooperate with those professionals, primarily with social workers, since they are constructed as care-providing and not punitive. As such, and in stark contrast to the criminal system, the lack of legal protections for parents is not only accepted by the child welfare system, but parents who attempt to assert their rights or push back against the system can face repercussions.[154] Even emotions are held against parents who express them, as one can see in court cases where mothers are reprimanded by judges for expressing their anger, anguish, or fear in the face of their children being taken from them.[155] At the other extreme, mothers' shock at the decision to

153 For an example of a parent attempting to actively push back at the system, see Joyce McMillan's Twitter account: @JmacForFamilies, TWITTER, https://twitter.com/i/flow/login?redirect_after_login=%2Fjmacforfamilies [https://perma.cc/7W6F-U9WW].

154 *The Empty Promise of the Fourth Amendment*, *supra* note 2, at 1064 n.27 (discussing the negative consequences for parents who assert their rights, both in and out of court).

155 Adoption of Yvonne, 170 N.E.3d 1178, 1184 (Mass. App. Ct. 2021) ("These considerations were entirely proper, as was the judge's conclusion that these 'very concerning behaviors … speak to her parenting abilities.'"). A parent's behavior during trial and her ability to manage anger are relevant to parental fitness. *See* Adoption of Querida, 119 N.E.3d 1180, 1185–86 (2019) (judge could consider mother's "volatile" behavior in court room in assessing fitness); Adoption of Ulrich, 119 N.E.3d 298, 308 (2019) (mother's difficulty "managing her anger" deemed relevant to fitness).

have their children removed can render them temporarily incapable of expressing anything other than practical concerns, such as whether housing assistance will also be taken away. Such pragmatic reactions are viewed as signs that the mother is not emotionally involved *enough*, again calling into question her parental abilities.[156] Thus, parents quickly learn that they must relinquish their perspective on their own reality and, instead, submit to the interpretations of experts. Subsequently, they can internalize the view that they have failed, that they *are* failures, rather than that there is a wider political and societal context to their supposed "errors," not least of which being poverty.

The confusion created by the language and practices of the law is related to poverty. On the one hand, as shown above, material conditions resulting from poverty are weighted against parents as individual failing. On the other hand, the question of poverty is removed from the discussion in the courtroom due to the poverty exemption. Thus, attempts to address the problem of poverty itself—to find a stable home, for example—are criticized by courts, which suggest that the parents do not understand the real issue at hand. For example, the Massachusetts Appellate Court once wrote accusingly that "[t]he parent aide noted that the mother 'would often fixate on a frustrating issue such as housing, rather than trying to accomplish the tasks that were asked of her.'"[157]

Reporting with no voice afforded to parents is a specific kind of punishment. Note, for example, the form that parental participation takes in "best interest" hearings: when parents want to be involved in the placement of their removed children, they are often barred from doing so.[158] Furthermore, in the current system's construction, there is no place for the voices of the children themselves;[159] their specific requests to be reunited with family hold little to no weight in the decisions.[160]

156 *See* Adoption of Darlene, 171 N.E.3d 199, 203 (Mass. App. Ct. 2023) ("It was the mother's responsibility to plan each visit, a task she found 'overwhelming.'").

157 *Id.* at 203.

158 *See* Adoption of Quan, 21 N.E.3d 182 (Mass. 2014).

159 *See, e.g.*, Care and Protection of Georgette, 785 N.E.2d 356 (Mass. 2003); Adoption of Erica, 686 N.E.2d 967 (Mass. 1997); In re Lydia, 714 N.E.2d 351 (Mass. 1999).

160 *See*, *e.g.*, Care and Protection of Sophie, 865 N.E.2d 789 (Mass. 2007) (accepting the children's statements into evidence while their specified wish in the trial was to be reunited with their father upon appeal after the Juvenile Court failed to include them in the record).

One of the most damaging aspects of legal gaslighting is the constant dissonance these families experience, shifting between being overly visible, relentlessly observed by the system, and feeling *invisible*—unheard, unrepresented, or misunderstood. This dissonance occurs in the tension between what a person knows to be true and how the law treats their situation, which is entirely at odds with that truth. It is most evident in two particular dynamics, starting with the fact that families in poverty in the U.S. are more likely to be families of color.[161] The parenting culture that parents of color tend to practice is usually more communal and based on extended family structures than white middle-class parenting.[162] This reality creates a gap between what Black parents know as good care and the state's notion of what care should look like; that gap may stray, if misinterpreted, into the law's definition of child *neglect*. The second dynamic in which dissonance and gaslighting are prevalent has to do with poverty more than race: the social construction, supported by the legal language, of parenting as an individual effort (or, at most, a couple's effort), distracts from the fact that, in reality, no one parents alone. While upper- and middle-class parents can purchase market-based solutions to their childcare, healthcare, educational, or therapeutic needs, families in poverty are left to fend for themselves. But when low-income parents approach the state for support—when they "come out" as poor and demand the assistance that is their right—they are punished by being cast into the criministrative net.

In Foucauldian terms, this is governmentality at play—masking the use of legal punitive force to control people in poverty by controlling their reproduction and their attempts at seeking aid for their families. The collection of statistical data, which Foucault identifies as an important aspect of the modern state,[163] is labeled merely administrative and is discussed in the language of care and prevention of harm. The apparent neutrality of data-collection, then, is masking the project of control.

161 *See* Regina S. Baker & Heather A. O'Connell, *Structural Racism, Family Structure, and Black–White Inequality: The Differential Impact of the Legacy of Slavery on Poverty Among Single Mother and Married Parent Households*, 84 J. MARRIAGE & FAM. 1341 (Oct. 2022) (finding that poverty rates were higher for Black families than white families, regardless of family structure); Areeba Haider, *The Basic Facts About Children in Poverty*, CENTER FOR AMERICAN PROGRESS (Jan. 12, 2021) https://www.americanprogress.org/article/basic-facts-children-poverty/ [https://perma.cc/BUC6-597R] (reporting that children of color are disproportionately represented among children in poverty).

162 *See generally* ROBERTS, *supra* note 2.

163 *See Governmentality*, *supra* note 135, at 87–104.

2. Harms Directed at the Public: Reifying Individualized Perceptions of Poverty

Lastly, the law and legal system's treatment of child neglect is harmful since it carries the public declarative force of reinforcing the "individual choice" perception of poverty. This perception, which prevails despite apparent moves toward "prevention" attempts, is that parents in poverty need to be "educated" or somehow "fixed" in order to be able to properly care for their children in their given situation. Recall that the last amendments to the child welfare system, through the FFPSA, are still taking the same approach, providing individual services such as mental health and substance abuse programs or parenting-skills services and training. Motivational interviews are conducted, on the premise that non-cooperation with programs is a personal motivation issue or stems from individual character traits, rather than a reflection of the system's failings. These failings can include ill-fitting programs, for instance, or interviewers (usually external personnel hired by the organization providing the program) who are racist, anti-poor, or otherwise biased.

The insistence on protecting children from poverty through a system that seeks to protect them from their parents fits into a broader public perception of those caregivers. The treatment of child poverty through child protection law serves to sustain the stigma incorporated within the notion of the undeserving poor. We should not channel funding toward the parents, so the popular argument goes, because they will not know how to use it to best care for their children. They will use it for drugs or criminal activity, or waste it in some other way.

Since poverty is so intricately related to race, reifying public perceptions of people in poverty as individuals who have made poor choices is strongly connected to perceptions of racially-marginalized communities. In the child protection context, this unjustified link is strong and disheartening. It is even more of a concern as one moves "upstream," from actual child removal to the initial mandatory reporting and investigations. The racial disparities in reporting mean that a shockingly higher percentage of children of color are monitored and criministratively surveilled than white children. Research also shows the damaging effect of unequal bias on the rest of the process, due to the tendency to "find once you're looking."[164] Such bias, coupled with the recognized economic racial inequality

164 *See, e.g.*, Karla K. Evans & Anne Treisman, *Perception of Objects in Natural Scenes: Is It Really Attention Free?,* 31 J. EXPERIMENTAL PSYCH. 1476 (2005); K. Amano et al., *Finding Keys Under a Lamppost: A Scene-Specific Bias for Target Detection*, 38 PERCEPTION 180 (2009); Julie A. Nelson, *The Power of Stereotyping and Confirmation Bias to Overwhelm Accurate Assessment: The Case of Economics, Gender, and Risk Aversion*, 21 J. ECON. METHODOLOGY 211 (2014).

in the U.S., reinforces the vicious cycle of public opinion and lawmakers' opinion: since poverty equals neglect, and more families of color are poor, parents of color must be bad parents.

Let us return to the specific case of Massachusetts to see how this plays out. Socio-demographically, Massachusetts is overwhelmingly wealthy and white. Recent data show that, while, in absolute numbers, there are more low-income white children in the state than children of color,[165] children of color are disproportionately represented among low-income and impoverished children.[166] If we look at mandatory reporting locales such as public schools, the numbers are even more racially skewed: only 23% of public school students in the Boston area are white.[167] In the major area of mandatory reporting that is public education, reporters mostly see children of color who, as the statistics show, mainly live in poverty. The net of criministrative surveillance is thus cast in a very active manner.

VI. Initial Solutions: Moving Forward from Criministrative Surveillance

As a closing argument, this Article now turns to suggested solutions to the problem of criministrative law, specifically criministrative surveillance. Starting with a practical, almost technical solution, it then moves to a paradigmatic shift, and finally points to a theoretical, somewhat philosophical idea with the potential to better protect children and families.

A. Practical Solutions

First and foremost, the legal concept of child neglect should be divorced from child abuse. Doctrinally, child abuse, like other forms of assault, should be dealt with through the criminal system—ensuring the protections as well as the repercussions that this system is equipped to deliver. Since cases of alleged neglect concerning children living in poverty

165 DANZING & BERNIER, *supra* note 41, at 26 (reporting that "[t]here are more low-income White children (197,674) in Massachusetts than African American (58,150) and Latino (108,502)").

166 *Id.* (finding that "[a] higher proportion of African American and Latino children under 18 live in families who are poor (29% and 36% respectively) than White children (7%). A higher proportion of African American and Latino children under 18 live in low-income families (53% and 69% respectively) than White children (18%)").

167 This statistic includes students attending Boston's Commonwealth charter schools. PETER CIURCZAK, ET AL., KIDS TODAY: BOSTON'S DECLINING CHILD POPULATION AND ITS EFFECT ON SCHOOL ENROLLMENT 1, 34 (Sandy Kendall ed., The Boston Foundation, 2020), https://files.eric.ed.gov/fulltext/ED606397.pdf [https://perma.cc/V3NV-DCT7].

constitutes most of the caseload of the child welfare system, there is a need to properly construct child neglect, not as parental failure related to poverty. Child poverty should be dealt with as a social problem that has little to do with parents' individual choices or behaviors.[168]

Second, this Article proposes the separation of care and punishment. In her seminal book, Bach warns against precisely this conflation, pointing to the dangers of providing care through the criminal system and criminalizing the care system.[169] This Article follows that argument. True care, and the watchful eye that is required to provide it, is possible only in the presence of mutual trust and in the absence of stigma, judgment, and othering. Decriminalizing the administrative welfare state is the only way toward developing a universal, solidarity-based care net.

B. The Poverty-Aware Paradigm: Poverty as a Human Rights Violation

Poverty-Aware Paradigm (PAP) was developed in the social work field and is designed to frame discussions of how social workers can better assist service users.[170] The paradigm is critical in its thinking, perceiving poverty as a human rights violation (not the result of parental failure) and insisting on the development of the theoretical discourse of agency,[171] while simultaneously engaging in agency-based practices.[172] Under PAP, people living in poverty are described as "agents who resist poverty under conditions of severely lacking

168 Kumor, *supra* note 43, at 122.

169 For a thorough discussion of the dangers of providing care through the "pure" criminal system, see generally BACH, *supra* note 2.

170 *See* MICHAL KRUMER-NEVO, RADICAL HOPE: POVERTY-AWARE PRACTICE FOR SOCIAL WORK (2020) (outlining the new paradigm and its implications for professionals at the field of social work) [hereinafter RADICAL HOPE].

171 *See generally* Ruth Lister, *"Power, Not Pity": Poverty and Human Rights*, 7 ETHICS SOC. WELF. 109 (2013); Lucie White, *Human Rights Testimony in a Different Pitch: Speaking Political Power*, *in* THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 470 (Katharine G. Young ed., 2019); Bruce Porter, *Claiming Adjudicative Space: Social Rights, Equality and Citizenship*, *in* POVERTY: RIGHTS, SOCIAL CITIZENSHIP, AND LEGAL ACTIVISM 77 (Margot Young ed., 2007); MARGOT YOUNG ET AL., POVERTY: RIGHTS, SOCIAL CITIZENSHIP, AND LEGAL ACTIVISM (2011); Iris Marion Young, *From Personal to Political Responsibility*, *in* RESPONSIBILITY FOR JUSTICE (2011).

172 For examples of such participatory development, see generally Michal Krumer-Nevo, *From Voice to Knowledge: Participatory Action Research, Inclusive Debate and Feminism*, 22 INT. J. QUAL. STUD. EDUC. 279 (2009); DEEPA NARAYAN, VOICES OF THE POOR: CAN ANYONE HEAR US? (2000); Shireen Y. Husain, *A Voice for the Voiceless: A Child's Right to Legal Representation in Dependency Proceedings Note*, 79 GEO. WASH. L. REV. 232 (2010); *Giving Poverty a Voice*, ATD FOURTH WORLD UK, https://atd-uk.org/projects-campaigns/giving-poverty-a-voice/ [https://perma.cc/SB2M-43RA].

economic and symbolic capital."[173] The epistemology underlining PAP is critical and relational, whereby information regarding preferred interventions and strategy is obtained through an ongoing dialog with the welfare service-users, placing the emphasis on recognition and solidarity.

Mainly, such a paradigmatic shift from the existing perception of poverty as an individual failure to the suggested perception of poverty as a human rights violation lends weight to the argument that financial support should be delivered directly to families in poverty for them to spend as they deem fit. PAP advocates that the State provide direct financial support to families because it perceives that families are best placed to understand their own needs and evaluate their options. In addition, PAP believes concrete support in areas such as housing, health (including mental health and substance abuse), and nutrition security are essential to any process of protection of the children within the family.[174]

Viewed from such a paradigm, neglect can be understood as a result of the human rights violation that is poverty. It should therefore be treated as such, not by focusing on individual "fixes" such as therapy and coaching to improve parenting skills, but by providing children with practical protection from poverty. Such a perception of situated knowledge treats people in poverty and their lived experiences with dignity. Importantly, it also renders surveillance and reporting unnecessary, since the information is already in the hands of the most relevant decision-makers with regard to providing sustainable care for the children (in "neglect" cases): the parents themselves, and the children. Importantly, such a paradigmatic shift can enlist the subjects currently on opposite sides of the legal case—the social workers and the parents—into a joint operation. Taking on PAP professional training can change the way social workers perceive their own position as well as that of the parents. Subsequently, PAP has the potential to lessen parents' suspicion of and mistrust directed at social workers, leading to cooperation for the sake of the actual wellbeing of the child. As PAP challenges concepts such as power (who holds it, who wields it), knowledge (who is the expert and what knowledge is valued), and choice (what alternatives are given and who chooses), PAP provides a promising change in the field of child welfare.

173 RADICAL HOPE, *supra* note 170, at 32.

174 *See* Michal Krumer-Nevo, *Poverty, Social Work, and Radical Incrementalism: Current Developments of the Poverty-Aware Paradigm*, 56 SOC. POL'Y & ADMIN. 1090 (2022); Shachar Timor-Shlevin, *Contextualised Resistance: The Mediating Power of Paradigmatic Frameworks*, 55 SOC. POL'Y & ADMIN. 802 (2021).

C. A Multi-Directional Panopticon: Protective Attention

Building on the previous theoretical shift and adding to it, it is important to note that adults in poverty do need assistance in important aspects of parenting. *All* parents need help: no one parents alone. Parents in all social classes collect information about their children from different sources and share the care burden with family, community members, educators, medical staff, and care workers. The main difference in the case of parents living in poverty is the criministrative aspect of their relations with these sources of support. Building on the idea of the *panopticon*, a relational, non-criministrative, multi-caring approach to gathering information and seeing the actual needs of the family is best, instead of the assuming the needs of an imagined "typical" family.

The concept of the panopticon is perhaps best known as it was understood by Foucault: to explain and exemplify methods of control and surveillance.[175] Earlier scholars, including Rousseau, had used the concept of the "gaze" and mutual "exposure" to the "daylight" that is public attention as a communitarian ideal, for sunlight is the best antiseptic.[176] In contrast, the Foucauldian reading of Bentham's original idea of a central control tower overseeing all inmates in a prison setting, twenty-four seven, was that it created among the prisoners an internalized, self-censuring notion of being watched, for they lived under the permanent threat of having any misstep observed and punished.[177] Conceptually, it does not require a big leap to see the panopticon as a fitting description of the current systematic result of criministrative surveillance. The modern, benevolent panopticon that I propose here is a two-way street: all are watching all, in a spirit of care and concern, and all perceptions are of equal importance in deciding plans, needs, and avenues of assistance.

If the gaze does not entail punishment, it can theoretically be equal between all actors, dyadic and caring. In fact, such a dyadic system based on a shared gaze is already in place when caring for children of families *not* in poverty, when parents consult with pediatricians and teachers about their offspring. To some extent, such dyadic care exists also in communities in poverty, in alternative (and often multi-parenting) avenues of care. When family members take on the role of traditional parents, when communities notice a member in need (to pay off creditors, supervise children, or provide assistance for food and clothing), they do so because they *watch out for* each other. When this watching is

175 DISCIPLINE AND PUNISH, *supra* note 136, at 200–01.

176 Michel Foucault, *Eye of Power*, *in* MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 146, 152 (Colin Gordon ed., 1980).

177 *Id.* at 155.

performed outside of the criministrative surveillance net, it is positive, uplifting, and reassuring. In contrast, when such relations are strained by mandatory reporting and its punitive results, the watching is tainted as well.

Let us now consider what adopting the protective panopticon that I envision might look like in practice, instead of the criministrative system in place today. In short, I suggest that the punitive system remain operational only for (the much rarer) cases of abuse, and that—through lawmaking, policy reform, and training of social workers, lawyers, and judges—a non-punitive approach be implemented, embedded in an institutional mindset of supportive watchfulness rather than surveillance: one that does not seek to punish and ensures that care is not conditioned on cooperation with unwarranted investigations and imposed plans.

CONCLUSION

It is harmful for children to grow up in poverty, and the deeper the poverty, the deeper the harm. But the bundling together of this notion with the current perception of parental neglect is not helpful. It is a legal construction that emanates from the individual choice ethos, reflecting neoliberal and conservative perceptions of mothers, families, and people in poverty.

Examining the laws governing the treatment of child neglect reveals troubling conclusions. It is not only the operationalization of the laws that is called into question by many scholars. It is also, as discussed in this Article, the welfare state's racist, classist, and neo-liberal perceptions of parents and families that keep them trapped in poverty. The law operates through different avenues to control and subjugate people in poverty and marginalized groups by wielding as a constant threat the power to dismantle the family and sever what is perhaps the most sacred human bond: the bond between parent and child.

This Article is agenda-setting in two important senses. First, it aims to provide a new language with which to talk about the system in a way that will illuminate its legal flaws, including the terms "criministrative law" and "legal gaslighting." Adding these concepts to our lexicon can begin to deepen the semantic discussion around poverty and the State's engagement with it, overlapping with discussions on racial biases and discrimination.

Second, it aims to draw attention to harms that, to date, have not been articulated, even as the field of scholars, activists, and advocates addressing and problematizing child protection laws grows. Focusing on the problems caused by constant surveillance and what

I call socio-rhetorical damages makes an important contribution to a bourgeoning field.

Lastly, while I wholeheartedly agree with the spirit of ambitious calls for the outright abolishment of the child protective system nationwide,[178] this Article offers one possible practical step in this direction that could be more readily achieved. Removing neglect allegations from the mandate of CPS by shifting the legal framework from punitive perceptions of poverty to PAP, as suggested here, would remove the bulk of the caseload, reporting, and operation of CPS. Those resources would then be freed up to build a system dedicated to anti-poverty support and protection from poverty for children and their parents.

Of course, for such a paradigm to be adopted, there is a need for profound change in the perception—and pursuit—of individual choice, a concept that stands at the heart of American politics and ethos. It requires no less than a shift from gaze-as-control to gaze as mutual, communal care. The call is therefore not for families to be left alone, but to be held instead of oppressed. To be *seen*, not surveilled. Until it is uprooted from its present positioning in the eyes of the law, child neglect will continue to operate as a legal construct that gaslights and punishes parents in poverty and hampers the *true* protection of children and their welfare.

178 *See, e.g.*, ROBERTS, *supra* note 2.