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Marginalizing Mothers: Child Maltreatment Registries, Statutory Schemes, and Reduced Opportunities for Employment

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MARGINALIZING MOTHERS: CHILD MALTREATMENT REGISTRIES, STATUTORY SCHEMES, AND REDUCED OPPORTUNITIES FOR EMPLOYMENT

Colleen Henry & Vicki Lens[†]

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INTRODUCTION

State child welfare systems substantiate over 500,000 allegations of child maltreatment each year¹ and hold parents responsible for this maltreatment in over 75% of cases.² Parents who are substantiated for maltreatment are labeled as “perpetrators”³ and are often listed on state child maltreatment registries (“registries”) for years, if not decades.⁴ Originally designed to investigate and process allegations of child maltreatment,⁵ registries and the data they contain are now also used by state licensing agencies and public and private employers to identify perpetrators of maltreatment and essentially bar them from employment in occupations that care for children and other vulnerable populations.⁶ As a consequence of this use, thousands of parents—mostly mothers—are prevented from engaging in paid care work,⁷ undermining their ability to care for themselves and their families.

The child welfare system, like other mechanisms of state control and surveillance, is more likely to catch disadvantaged populations in its net.⁸

¹ CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2018, at 19 (2020) [hereinafter CHILD MALTREATMENT 2018], <https://perma.cc/6325-6AZV>.

² *Id.* at 57.

³ A child maltreatment allegation is substantiated or indicated if the investigating child welfare agency determines that there is sufficient evidence to meet the state’s statutory definition of child maltreatment. Substantiation is an administrative determination, not a judicial one. *Id.* at 16; see Nicholas E. Kahn et al., *The Standard of Proof in the Substantiation of Child Abuse and Neglect*, 14 J. EMPIRICAL LEGAL STUD. 333 (2017), for a longer discussion.

⁴ See OFFICE OF THE ASSISTANT SEC’Y FOR PLANNING & EVALUATION, U.S. DEP’T OF HEALTH & HUMAN SERVS., ASSESSING THE FEASIBILITY OF CREATING AND MAINTAINING A NATIONAL REGISTRY OF CHILD MALTREATMENT PERPETRATORS 24 (2012) [hereinafter ASSESSING THE FEASIBILITY], <https://perma.cc/2BQW-478N>.

⁵ *Id.* at 4.

⁶ *Id.* at 21-22.

⁷ See Colleen Henry et al., *The Collateral Consequences of State Central Registries: Child Protection and Barriers to Employment for Low-Income Women and Women of Color*, 64 SOC. WORK 373, 374 (2019). “Care work” refers to work with children and other vulnerable populations.

⁸ Reiko Boyd, *African American Disproportionality and Disparity in Child Welfare: Toward a Comprehensive Conceptual Framework*, 37 CHILD. & YOUTH SERVS. REV. 15 (2014);

Research finds that allegations against poor women, many of whom are Black, are disproportionately referred to and substantiated by child welfare systems for maltreatment.⁹ Research also indicates that poor women, particularly poor Black women, make up a disproportionate share of those working in care occupations.¹⁰ Thus, the secondary use of registries as employment screening tools falls most heavily along the fault lines of race, class, and gender. Already disadvantaged groups have a higher risk of both being placed on registries and having their employment prospects affected by it. The consequences of being listed on a registry, therefore, reverberate beyond the child welfare system, perpetuating gender- and race-based disadvantages and economic insecurity.

Given these consequences, the standards and procedures for both inclusion and expungement from registries are of paramount importance. The Fourteenth Amendment, which prohibits the government from depriving individuals of “life, liberty, or property, without due process of law,”¹¹ is one measure for assessing the fairness of a state’s statutory scheme. Due process challenges, however, have produced contradictory results, with some courts finding due process protections do not apply and others imposing strict notice, evidentiary, and timing requirements.¹² Moreover, due process, even if applicable, may not provide sufficient protection from economic and other harms incurred by registry listing.¹³

Complicating the matter is a lack of uniformity, as each state has its own statutory framework for the construction and maintenance of these registries.¹⁴ Through a review of state statutory schemes, child welfare data and policy, and practice documents, this article documents, compares, and assesses the strengths and limitations of existing statutory schemes; highlights the due process challenges they raise; considers their disproportionate impact on poor women, particularly poor Black women; and suggests statutory reforms that work to safeguard children while minimizing economic consequences to already marginalized families.¹⁵

Emily Putnam-Hornstein et al., *Racial and Ethnic Disparities: A Population-Based Examination of Risk Factors for Involvement with Child Protective Services*, 37 CHILD ABUSE & NEGLECT 33 (2013).

⁹ See Boyd, *supra* note 8; Putnam-Hornstein et al., *supra* note 8; CHILD MALTREATMENT 2018, *supra* note 1, at 57.

¹⁰ Henry et al., *supra* note 7, at 373.

¹¹ U.S. CONST. amend. XIV, § 1.

¹² See *infra* Section II.D.

¹³ See *infra* Section II.D (describing the unevenness by which such protections have been applied across the states); see also *infra* Section III.C (explaining how due process protections may be both underutilized and/or come too late to prevent employment consequences).

¹⁴ ASSESSING THE FEASIBILITY, *supra* note 4, at 12.

¹⁵ See CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., REVIEW AND EXPUNCTION OF CENTRAL REGISTRIES AND REPORTING RECORD (2018) [hereinafter REVIEW

In Part II of this article, we describe the socio-political origins, structure, and present-day uses of child maltreatment registries. In this section, we also examine the tenuous connection between a charge of maltreatment and unfitness for employment along with how registry inclusion undermines child safety. Finally, we examine how courts have considered due process in relation to registry inclusion and how due process procedures vary across the states. In Part III, we report on findings from our national review of state-level statutory schemes,¹⁶ compare and contrast

AND EXPUNCTION], <https://perma.cc/L5BX-T6B7> (reviewing state statutory provisions on a reported person's right to review and challenge records and when records may be expunged); CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., DISCLOSURE OF CONFIDENTIAL CHILD ABUSE AND NEGLECT RECORDS (2017) [hereinafter DISCLOSURE OF CONFIDENTIAL], <https://perma.cc/5PCC-CUQV> (reviewing state statutory provisions on confidentiality, persons or entities allowed access to records, when public disclosure is allowed, and use of records for employment screening); CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., ESTABLISHMENT AND MAINTENANCE OF CENTRAL REGISTRIES FOR CHILD ABUSE OR NEGLECT REPORTS (2018) [hereinafter ESTABLISHMENT AND MAINTENANCE], <https://perma.cc/JS96-CVP2> (reviewing state statutory provisions on the purpose, contents, and maintenance of registries); ASSESSING THE FEASIBILITY, *supra* note 4, at 7-8 (discussing a legal policy questionnaire—completed, at least partially, by 38 states—on existing legal or policy requirements regarding maintaining and sharing information about child maltreatment perpetrators and due process protections for such persons); *see also* Molly Greer, *Suggestions to Solve the Injustices of the New York State Central Register for Abuse and Maltreatment*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 729 (2011) (discussing New York's statutory scheme and its constitutionality, and suggesting various reforms); Kate Hollenbeck, *Between a Rock and a Hard Place: Child Abuse Registries at the Intersection of Child Protection, Due Process, and Equal Protection*, 11 TEX. J. WOMEN & L. 1 (2001) (discussing the statutory frameworks of central registries, including problems of over-inclusion and under-inclusion as implicating substantive due process and equal protection concerns, and suggesting proposals for reform); W. Todd Miller, *The Central Registry Statute for Abuse and Neglect Matters Is Constitutionally Flawed*, 8 RUTGERS J.L. & PUB. POL'Y 651 (2011) (arguing that placement on the registry is based on insufficient proof that does not consider rehabilitation, mitigation, or fitness of the parent, and hence is constitutionally unsound); Jill D. Moore, *Charting a Course Between Scylla and Charybdis: Child Abuse Registries and Procedural Due Process*, 73 N.C. L. REV. 2063 (1995) (discussing the due process interests implicated by central registries and how to balance these interests while still protecting children); Shaudee Navid, Comment, *They're Making a List, but Are They Checking It Twice? How Erroneous Placement on Child Offender Databases Offends Procedural Due Process*, 44 U.C. DAVIS L. REV. 1641, 1645, 1673 (2011) (discussing due process liberty interests implicated by central registries and the need for expeditious removal of erroneous listings); Michael R. Phillips, Note, *The Constitutionality of Employer-Accessible Child Abuse Registries: Due Process Implications of Governmental Occupational Blacklisting*, 92 MICH. L. REV. 139 (1993) (arguing that placement on registries impinges upon protected property and liberty interests in employment under the Due Process Clause); Amanda S. Sen et al., *Inadequate Protection: Examining the Due Process Rights of Individuals in Child Abuse and Neglect Registries*, 77 WASH. & LEE L. REV. 857 (2020) (describing state statutory schemes in the context of due process and suggesting various reforms).

¹⁶ Statutory reviews were augmented by reviewing publicly available policy and practice documents, including child welfare policy and procedure manuals, policy memos, practice forms (e.g., letters of notice), and child welfare reports. All statutory schemes and supporting

their strengths and weaknesses, and discuss their disproportionate impact on poor women. Specifically, we examine who is listed in these registries, for what reason, for how long, and what due process avenues are available. Lastly, in Part IV, we discuss the need for statutory reform and make recommendations.

II. BACKGROUND AND CONTEXT

A. *The Origins and Structure of Maltreatment Registries and Their Uses*

The origins of the modern child maltreatment registry (and modern child welfare system more broadly) can be traced to the medical community's "discovery" of child abuse in the 1960s. While children have long been the victims of abuse and neglect, it was the 1962 publication of *The Battered Child Syndrome* by C. Henry Kempe and others—which described an epidemic of parents injuring, maiming, and sometimes killing their children—that successfully constructed child maltreatment as a social problem and galvanized public officials to act.¹⁷ In response to this newly identified problem, state governments adopted new policies and procedures to shore up existing services to families and to systematically collect and track incidents of abuse.¹⁸ By 1967, all 50 states had adopted child abuse reporting laws,¹⁹ and by 1974, the federal government essentially mandated—through financial incentives—the development of state-level reporting and recording procedures (i.e., child maltreatment registries).²⁰

Early registries were used by both the medical and social services communities to collect, record, and investigate allegations of abuse and neglect.²¹ Over time, registries evolved into more complex information

materials were reviewed by the research team between July and December 2019. The research team included the first author, an expert in child welfare policy and practice, the second author, an expert in both social policy and administrative law, and four student research assistants from the fields of law, public policy, and social work; all research team members had prior knowledge of child welfare policy and practice [hereinafter METHODS].

¹⁷ C. Henry Kempe et al., *The Battered-Child Syndrome*, 9 CHILD ABUSE & NEGLECT 143 (1985); see also PETER J. PECORA ET AL., *THE CHILD WELFARE CHALLENGE: POLICY, PRACTICE, AND RESEARCH* 32 (3d ed. 2009); Stephen J. Pfohl, *The "Discovery" of Child Abuse*, 24 SOC. PROBS. 310 (1976).

¹⁸ Douglas J. Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 689 (1978); PECORA ET AL., *supra* note 17, at 32.

¹⁹ CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., *THE CHILD ABUSE PREVENTION AND TREATMENT ACT: 40 YEARS OF SAFEGUARDING AMERICA'S CHILDREN* 4 (2014), <https://perma.cc/K6A3-97AW>.

²⁰ Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4.

²¹ ASSESSING THE FEASIBILITY, *supra* note 4, at 4; Besharov, *supra* note 18, at 690.

and case management systems that were used by state and federal researchers to not only track incidents of child maltreatment but to also manage and monitor service delivery.²² Despite expanded use of registry data in the 1970s, the sharing of these data with other public or private agencies was relatively limited, and the tracking of maltreatment perpetrators remained a secondary function.²³

In the decades that followed, however, new concerns about child safety and rising crime—and the policy changes these concerns generated—changed how registry data were used and made perpetrator data more available to employers. Several intersecting trends likely contributed to this shift. First, increased public awareness of child maltreatment coupled with an expansion of mandated reporters, worry about infants exposed to crack cocaine, and the increasing rate of maternal incarceration led to a flood of child welfare reports and removals.²⁴ In 1985, there were 276,000 children in foster care in the United States.²⁵ By 1999, this number had more than doubled, rising to over half a million children (568,000).²⁶ Second, during this same period, new worries about rising levels of crime and increased criminality led to an expansion of punitive policies and high levels of incarceration.²⁷ Policies enacted due to the “War on Drugs” during this period led to a doubling of drug-related arrests in the 1980s and a high of 1.6 million arrests by the late 1990s.²⁸ During this same period, the enactment of enhanced penalties for those convicted of drug charges contributed to the tripling of the U.S. prison population.²⁹ Third, changing social norms, stagnating wages for men, and a rising cost of living pushed increasing numbers of women into the labor market, requiring families to rely on substitute care providers for the first time *en masse* and creating new fears about the safety of children in out-of-home care.³⁰

²² ASSESSING THE FEASIBILITY, *supra* note 4, at 5.

²³ *Id.* at 4.

²⁴ See Vincent J. Palusci et al., *Does Changing Mandated Reporting Laws Improve Child Maltreatment Reporting in Large U.S. Counties?*, 66 CHILD. & YOUTH SERVS. REV. 170, 171 (2016); Christopher A. Swann & Michelle Sheran Sylvester, *The Foster Care Crisis: What Caused Caseloads to Grow?*, 43 DEMOGRAPHY 309, 310, 321 (2006).

²⁵ OFFICE OF THE ASSISTANT SEC’Y FOR PLANNING & EVALUATION, U.S. DEP’T OF HEALTH & HUMAN SERVS., TRENDS IN THE WELL-BEING OF AMERICA’S CHILDREN AND YOUTH 50 (1999), <https://perma.cc/62A7-87LJ>.

²⁶ See Swann & Sheran Sylvester, *supra* note 24, at 309.

²⁷ MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 59-96 (2012); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009).

²⁸ DAVID GARLAND, MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 6 (2001).

²⁹ *Id.*

³⁰ See HUMAN RES. & CMTY. DEV. DIV., CONG. BUDGET OFFICE, DEMOGRAPHIC AND SOCIAL TRENDS: IMPLICATIONS FOR FEDERAL SUPPORT OF DEPENDENT CARE SERVICES FOR

Combined, these social trends—some imagined and some real—created new fears and anxieties about the safety of children and a desire to use criminal records and child maltreatment registry data to cast a wider net of protection. In 1982, President Reagan’s Task Force on Victims of Crime recommended expanded use of criminal records to identify persons who might harm children.³¹ Specifically, the Task Force recommended that legislation be enacted to allow schools, businesses, and organizations that serve children to check arrest records of current and prospective employees and to “make submission to such a check a precondition for employment.”³² The Model Child Care Standards Act was enacted in 1985 to allow the use of criminal records and child maltreatment registry data to screen child care providers and other employees for a history of child abuse and neglect.³³ The Act, along with subsequent legislation,³⁴ sought to enhance the quality of the child care workforce by conditioning financial support to states on the establishment of state-level background check procedures.³⁵ In their guidelines to the states, the Department of Health and Human Services (HHS) suggested a range of procedures that could be implemented to assure effective background checking of child care

CHILDREN AND THE ELDERLY (1983), <https://perma.cc/EYZ3-S4YQ>; Claudia Goldin, *The Quiet Revolution that Transformed Women’s Employment, Education, and Family*, 96 AM. ECON. REV. 1, 8-14 (2006) (discussing changing social norms and their relation to women’s entry into the labor market); JEFF MADRICK & NIKOLAOS PAPANIKOLAOU, THE STAGNATION OF MALE WAGES, SCHWARTZ CTR. FOR ECON. POL’Y ANALYSIS, NEW SCHOOL 1 (2008) (“For males between 25 and 44 with only a high school diploma, median wages and salaries incomes today are below their level in 1969. For males between 45 and 54, median wages and salaries are below the level of 1979. For those males who completed college but attained no advanced degrees, typical incomes have stagnated for very long intervals within the thirty-six year period, and are only modestly higher today than they were in 1969, given the length of the period.”); Deborah Phillips, *The Federal Model Child Care Standards Act of 1985: Step in the Right Direction or Hollow Gesture?*, 56 AM. J. ORTHOPSYCHIATRY 56, 56-57 (1986) (“During the spring and summer of 1984, allegations of sexual abuse in child care programs in California and New York City sent shock waves through the child care community and alarmed parents who rely on child care to support their employment.”). Many of these allegations were later discovered to be unfounded and were attributed to what sociologists call *moral panic*. See Mary deYoung, *The Devil Goes to Day Care: McMartin and the Making of a Moral Panic*, 20 J. AM. CULTURE 19 (1997).

³¹ PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 102 (1982), <https://perma.cc/G8CU-MJP5>.

³² *Id.* at 101, 32-33.

³³ Phillips, *supra* note 30.

³⁴ Child Care and Development Block Grant Act of 1990, Pub. L. No. 101-508, § 5082, 104 Stat. 1388; Child Care and Development Block Grant Act of 1996, Pub. L. No. 104-193, § 601, 110 Stat. 2105.

³⁵ Phillips, *supra* note 30, at 58.

providers. These included checks of FBI records, state and local criminal records, *and* child maltreatment registries.³⁶

Two decades later, Congress mandated that registry data be used to screen all child care providers. Per the 2014 reauthorization of the Child Care Development Block Grant (CCDBG), states receiving CCDBG funds must now conduct “comprehensive criminal background checks” on all providers who are “licensed, regulated, or registered in a state.”³⁷ These background checks include a search of state and federal criminal databases, including state criminal and sex offender registries, the National Crime Information Center, the FBI, the National Sex Offender Registry, and a search of non-criminal child abuse and neglect registries.³⁸ While the CCDBG does not explicitly prevent the hiring of persons with criminal records or maltreatment histories, the law prohibits employment of providers who refuse to consent to a background check or knowingly make false statements on their check.³⁹

In addition to child care providers, prospective foster parents (including kin), adoptive parents, and those working in institutions that care for dependent children must also submit to extensive background checks.⁴⁰ Federal law, as amended by the Adam Walsh Child Protection and Safety Act of 2006, now requires that states conduct comprehensive background checks on any prospective foster parent, adoptive parent, or other adult living in the home prior to foster care licensure, certification, or approval; bars persons with specified felonies from approval; and allows states to disqualify prospective caregivers if they have a substantiated allegation of child abuse or neglect.⁴¹ The law mandates that states comply with any request for a registry check received from another state and prohibits licensure of any person convicted of felony child maltreatment, domestic violence, or other specified crimes.⁴² To date, there are no studies that

³⁶ ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH & HUMAN SERVS., BACKGROUND CHECKS, HEALTH AND SAFETY REQUIREMENTS, CCDF PLAN (2011), <https://perma.cc/M552-MWTK>.

³⁷ KAREN E. LYNCH, CONG. RESEARCH SERV., IF10416, CCDBG ACT OF 2014: KEY PROVISIONS AND IMPLEMENTATION STATUS 2 (2016), <https://perma.cc/92QA-DK8N>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., BACKGROUND CHECKS FOR PROSPECTIVE FOSTER, ADOPTIVE, AND KINSHIP CAREGIVERS (2019) [hereinafter BACKGROUND CHECKS], <https://perma.cc/KC8E-J85L>; Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 152, 120 Stat. 587, 608-10; Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949; Family First Prevention Services Act, Pub. L. No. 115-123, § 50745, 132 Stat. 64, 261 (2018).

⁴¹ *See* 42 U.S.C. § 671(a)(20) (2018) (effective Oct. 1, 2019).

⁴² *Id.*

examine the rate of disqualification,⁴³ but anecdotal accounts from social service agencies and family attorneys suggest that disqualification of prospective caregivers with child maltreatment or criminal histories is routine.⁴⁴

In sum, over the last 50 years, changes to federal and state laws have expanded the use of registry data to better identify persons substantiated for maltreatment and essentially ban them from child care-related occupations. Federal and state laws have increasingly allowed public and private child care facilities to access and use registry data to screen current and potential employees; and in recent years, lawmakers have called for the creation of a national maltreatment registry to facilitate data sharing across the states.⁴⁵ As a consequence of these changes, low-income women and Black women, who comprise both a disproportionate share of substantiated persons and child care employees, are likely denied or dismissed from thousands of jobs each year.

B. Inclusion on the Registry Is Not Necessarily an Indication of Unfitness for Employment

One of the assumptions underlying registry checks is that parents who are substantiated for maltreatment are unfit for child care-related employment. However, there may be a tenuous connection between a charge of maltreatment and unfitness for employment. To date, there are no studies that demonstrate an adverse relationship between maltreatment substantiation and fitness for child care employment or employment in other occupations. Similarly, there are no studies that show that the use of registry data in employment screening has reduced child care-based maltreatment. Moreover, substantiation may be a poor indicator of parental behavior. Studies have found that the use of substantiation significantly varies across child welfare workers and agencies, and that substantiation *itself* is a poor predictor of future maltreatment.⁴⁶

⁴³ Review of the literature found no studies on rates of disqualification.

⁴⁴ Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of 'Jane Crow,'* N.Y. TIMES (July 21, 2017), <https://perma.cc/EC4X-FJ2D>; Chris Gottlieb, *Major Reform of New York's Child Abuse and Maltreatment Register,* N.Y.L.J., (May 26, 2020, 10:30 AM), <https://perma.cc/GQV2-TTJM>.

⁴⁵ Adam Walsh Child Protection and Safety Act § 633, 120 Stat. at 642-43. Concerns about variation in state evidentiary standards and due process violations have stalled the creation of a national registry. ASSESSING THE FEASIBILITY, *supra* note 4, at 12.

⁴⁶ Stoddart, J.K. et al., *Substantiated Child Maltreatment: Which Factors Do Workers Focus on When Making This Critical Decision?*, 87 CHILD. & YOUTH SERVS. REV. 1, 2; Patricia L. Kohl et al., *Time to Leave Substantiation Behind: Findings from a National Probability Study*, 14 CHILD MALTREATMENT 17, 23 (2009). Numerous studies have found that the rates of re-referral to child protective services—an indicator of harm to children or risk of harm—for unsubstantiated and substantiated referrals are significantly indistinguishable. Brett Drake

In addition, the vast majority of persons substantiated for maltreatment are substantiated for neglect, not abuse. Substantiated allegations of neglect comprise over 70% of all substantiated allegations.⁴⁷ The categorical use of neglect as a type of maltreatment has been criticized as overly broad and highly subjective.⁴⁸ While statutory definitions of neglect vary across the states, neglect is typically defined as a failure to provide adequate food, shelter, medical care, or supervision, or a failure to protect a child from harm or risk of harm.⁴⁹ Failure to provide or protect may range from minor to more serious. Parents—disproportionately mothers—have been substantiated for exposing their children to illicit substances,⁵⁰ for failing to protect their children from the violence of others,⁵¹ or for leaving their children alone without adequate supervision or provisions.⁵² Some substantiated allegations of neglect are indeed severe, resulting in high risk of or actual harm and raising valid concerns about caregiving capacities. But many substantiated cases present relatively low risk, as indicated by their low rate of court action,⁵³ and safety concerns can be mitigated by referral to community services through alternative response programs.⁵⁴ The labeling of *all* substantiated parents as perpetrators

et al., *Substantiation and Recidivism*, 8 CHILD MALTREATMENT 248, 258 (2003) (“The *substantiation* label is not an accurate indicator of risk of harm to children.”); Diana J. English et al., *Causes and Consequences of the Substantiation Decision in Washington State Child Protective Services*, 24 CHILD. & YOUTH SERVS. REV. 817, 837 (2002) (noting that substantiation itself has little to do with the likelihood of recidivism).

⁴⁷ CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2016, at 20 (2016) [hereinafter CHILD MALTREATMENT 2016], <https://perma.cc/PMX2-D3PW>.

⁴⁸ E.g., KAREN J. SWIFT, MANUFACTURING ‘BAD MOTHERS’: A CRITICAL PERSPECTIVE IN CHILD NEGLECT (1995).

⁴⁹ CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., DEFINITIONS OF CHILD ABUSE AND NEGLECT 1, 2 (2019) [hereinafter DEFINITIONS OF CHILD ABUSE], <https://perma.cc/8JA5-DKYJ>; Howard Dubowitz et al., *A Conceptual Definition of Child Neglect*, 20 CRIM. JUST. & BEHAV. 8, 11 (1993).

⁵⁰ Colleen Henry et al., *Parental Substance Use: How Child Welfare Workers Make the Case for Court Intervention*, 93 CHILD. & YOUTH SERVS. REV. 69, 73-74 (2018).

⁵¹ Colleen Henry, *Exposure to Domestic Violence as Abuse and Neglect: Constructions of Child Maltreatment in Daily Practice*, 86 CHILD ABUSE & NEGLECT 79, 84 (2018); Colleen Henry et al., *Substantiated Allegations of Failure to Protect in the Child Welfare System: Against Whom, in What Context, and with What Justification?*, 116 CHILD. & YOUTH SERVS. REV. 1, 3 (2020).

⁵² Carol Coohy, *Making Judgments About Risk in Substantiated Cases of Supervisory Neglect*, 27 CHILD ABUSE & NEGLECT 821, 822 (2003).

⁵³ CHILD MALTREATMENT 2018, *supra* note 1, at 81.

⁵⁴ See Gila R. Shusterman et al., OFFICE OF THE ASSISTANT SEC’Y FOR PLANNING & EVALUATION, U.S. DEP’T OF HEALTH & HUMAN SERVS., ALTERNATIVE RESPONSES TO CHILD MALTREATMENT: FINDINGS FROM NCANDS 1, 13, 20 (2005), <https://perma.cc/3LBC-6HEJ>.

masks the true nature of most parental acts or omissions and likely serves as a poor indicator of fitness for employment.⁵⁵

Moreover, neglect is highly correlated with poverty, which suggests that many of the factors that contribute to neglect are consequences of structural inequities rather than personal risk factors.⁵⁶ Known risk factors for referral to child welfare systems include financial problems, inadequate housing, and lack of family resources, none of which can be easily rectified by parents.⁵⁷

Other confounding risk factors, such as domestic violence (DV), may render some parents—especially women—vulnerable to charges of maltreatment, specifically failure to protect, which is construed as a type of neglect in many states.⁵⁸ Both victims and perpetrators of DV are routinely referred to child welfare agencies for exposing their children to DV, and victims are sometimes substantiated for maltreatment.⁵⁹ For example, a population-based study of substantiated allegations found that 20% of substantiated reports involved child exposure to DV and that both victims and perpetrators of DV were frequently substantiated for neglect.⁶⁰ A recent study of child welfare cases that involved substantiated allegations of failure to protect found that women were much more likely to be substantiated for failure to protect than men were (65% vs. 24%), and vastly more likely to be substantiated for failure to protect than men were in cases that involved DV (84% vs. 5%).⁶¹

In addition, perpetrators of DV sometimes falsely report their victims to child welfare systems in an effort to punish and control them. This type

⁵⁵ To date, we have found no studies that link being substantiated for child maltreatment and/or being listed on registries to subsequent acts of maltreatment in the workplace.

⁵⁶ Kathryn Maguire-Jack et al., *Geographic Variation in Racial Disparities in Child Maltreatment: The Influence of County Poverty and Population Density*, 47 CHILD ABUSE & NEGLECT 1, 10-11 (2015).

⁵⁷ In 2016, 30 states reported financial problems as a risk factor for 15.5% of victims, and “in 34 reporting states, 10.0% of victims had a caregiver who lived in inadequate housing.” CHILD MALTREATMENT 2016, *supra* note 47, at 21; *see also* CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., ACTS OF OMISSION: AN OVERVIEW OF CHILD NEGLECT 4 (2018) [hereinafter ACTS OF OMISSION], <https://perma.cc/8RGJ-V7JB>.

⁵⁸ *See* *Nicholson v. Scopetta*, 3 N.Y.3d 357 (2004), for an example of a federal class action lawsuit on behalf of mothers who were separated from their children because of domestic violence under the charge of “failure to protect”; *see* Colleen Henry, *Expanding the Legal Framework for Child Protection: Recognition of and Response to Child Exposure to Domestic Violence in California Law*, 91 SOC. SERV. REV. 203, 220 (2017).

⁵⁹ *See* *Nicholson v. Scopetta*, 3 N.Y.3d at 357; Justine A. Dunlap, *Judging Nicholson: An Assessment of Nicholson v. Scopetta*, 82 DENV. U. L. REV. 671, 672 (2005); Henry, *supra* note 51, at 83; Bryan G. Victor et al., *Child Protective Service Referrals Involving Exposure to Domestic Violence: Prevalence, Associated Maltreatment Types, and Likelihood of Formal Case Openings*, 24 CHILD MALTREATMENT 299, 306 (2019).

⁶⁰ Victor, *supra* note 59, at 306.

⁶¹ Henry et al., *supra* note 51, at 3, 4.

of behavior, known as *systems abuse*,⁶² increases the likelihood that victims of DV will be substantiated for child maltreatment and placed on a registry. Advocates have described the substantiation of victims of DV as a *double victimization*: Women are victimized first by their partners and then by the child welfare system.⁶³ Victims of DV should not be subjected to a third victimization by being prevented from obtaining work in their chosen fields.

Finally, poor people—particularly poor Black people—are more likely to be surveilled by state agents, making them more vulnerable to scrutiny and substantiation than the more affluent.⁶⁴ As a result of this surveillance and other structural risk factors, Black caregivers are significantly more likely to be referred to child welfare systems, to be substantiated for maltreatment, and to have their children enter foster care than are white families.⁶⁵ A population-based birth-cohort study from California found that Black children were more than twice as likely as white children to be referred to the child welfare system, substantiated, and placed in foster care by age five.⁶⁶ Additionally, a 2014 study found that by age 18, Black children were nearly twice as likely as white children to be the subject of a substantiated allegation (20.9% vs. 10.7%).⁶⁷

Gendered and racialized expectations of care can affect how parental acts and omissions are judged by child welfare agencies and may make low-income women—and particularly Black women—more vulnerable to substantiation and registry listing than other groups.⁶⁸ Critics have described the child welfare system as one designed to punish mothers who

⁶² Heather Douglas & Emma Fell, *Malicious Reports of Child Maltreatment as Coercive Control: Mothers and Domestic and Family Violence*, 35 J. FAM. VIOLENCE 827, 827 (2020).

⁶³ Henry, *supra* note 58, at 222-23 (explaining that child welfare systems sometimes recast adult victims of domestic violence as abusive or neglectful parents). Adult victims are often mandated to services and blamed for their inability to protect their children from the violence of others or extract themselves from violent relationships. *Id.* See also ABIGAIL KRAMER, CHILD WELFARE WATCH, BACKFIRE: WHEN REPORTING DOMESTIC VIOLENCE MEANS YOU GET INVESTIGATED FOR CHILD ABUSE 3 (2020).

⁶⁴ Sanford F. Schram et al., *Deciding to Discipline: Race, Choice, and Punishment at the Frontlines of Welfare Reform*, 74 AM. SOC. REV. 398, 413 (2009).

⁶⁵ Boyd, *supra* note 8; CHILD MALTREATMENT 2018, *supra* note 1.

⁶⁶ Putnam-Hornstein et al., *supra* note 8, at 33, 41.

⁶⁷ Christopher Wildeman et al., *The Prevalence of Confirmed Maltreatment Among U.S. Children, 2004 to 2011*, 168 JAMA PEDIATRICS 706, 709 (2014).

⁶⁸ Henry et al., *supra* note 51, at 3, 4 (finding that substantiations of allegations for failure to protect varied across gendered and racialized groups, that women and Black caregivers were disproportionately substantiated, and that substantiation reflected gendered and racialized expectations of care).

do not conform to normative, white, middle-class parenting standards.⁶⁹ As overworked and overburdened child welfare workers strive to protect children, they may be reluctant to challenge or even acknowledge their implicit biases or negative stereotypes.⁷⁰ Consequently, disadvantaged groups who enter the child welfare system already burdened by structural obstacles may be unfairly labeled as dangerous or dysfunctional,⁷¹ with the now added disadvantage of being banned from occupations they rely on to support their families.

C. *Inclusion on the Registry May Prevent Families from Becoming Economically Stable and Increase Risk of Child Maltreatment*

Parents often retain custody of their children even after they are substantiated for child maltreatment.⁷² When parents do not maintain custody and children are removed from their care, economic stability is often a prerequisite to reunification.⁷³ Use of registry data in employment screenings may thus increase the risk of poverty-related maltreatment and reduce rates of reunification by limiting employment options for parents. Paradoxically, the registry's primary goal—to protect children—can be undermined by labeling their parents as unfit for the types of occupations many of them rely on for economic stability. Moreover, if parents are banned from earning income in the formal economy, they may seek work

⁶⁹ JENNIFER A. REICH, *FIXING FAMILIES: PARENTS, POWER, AND THE CHILD WELFARE SYSTEM* (2005); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 *UCLA L. REV.* 1474 (2012).

⁷⁰ Terry L. Cross, *Disproportionality in Child Welfare*, 87 *CHILD WELFARE* 11, 13 (2008).

⁷¹ The overrepresentation of the poor and people of color has been attributed to a myriad of reasons, “from structural forces such as poverty and geographic disadvantages, to family and individual-level characteristics, including substance abuse and mental illness, to institutional factors, including dysfunctional agencies with too few internal and external resources to meet service needs.” Vicki Lens, *Judging the Other: The Intersection of Race, Gender, and Class in Family Court*, 57 *FAM. CT. REV.* 72, 74 (2019). For additional examination of racial disproportionality in child welfare, see Boyd, *supra* note 8; JOHN FLUKE ET AL., *AM. HUMANE ASS'N, RESEARCH SYNTHESIS ON CHILD WELFARE DISPROPORTIONALITY AND DISPARITIES* (2011), <https://perma.cc/84KV-RFNR>; Alan J. Dettlaff & Joan R. Rycraft, *Deconstructing Disproportionality: Views from Multiple Community Stakeholders*, 87 *CHILD WELFARE* 37 (2008); Keva M. Miller et al., *Dynamics that Contribute to Racial Disproportionality and Disparity: Perspectives from Child Welfare Professionals, Community Partners, and Families*, 34 *CHILD & YOUTH SERVS. REV.* 2201 (2012).

⁷² *CHILD MALTREATMENT* 2018, *supra* note 1, at 71.

⁷³ Kathleen Wells & Robert Shafran, *Obstacles to Employment Among Mothers of Children in Foster Care*, 84 *CHILD WELFARE* 67, 68, 87-88 (2005) (finding that women with less cash support are slower to reunify with their children). Systematic review of judicial orders for family reunifications found that “[j]udicial orders sometimes included statements like ‘parent is to obtain housing’ or ‘parent to find employment.’” Amy C. D’Andrade & Ruth M. Chambers, *Parental Problems, Case Plan Requirements, and Service Targeting in Child Welfare Reunification*, 34 *CHILD & YOUTH SERVS. REV.* 2131, 2133 (2012).

in the underground economy—work that is often accompanied by vulnerability and stigmatization⁷⁴—which can pose its own risks to children (e.g., lack of workplace protections for parents, vulnerability to parental arrest, and ineligibility for occupational or government benefits).

Estimating the magnitude of economic harm caused by registry inclusion is a difficult task. To date, the authors have not found any studies that have examined the scope of registry listings or their impact on employment and economic stability. Several intersecting trends, however, suggest that employment opportunities for substantiated parents are likely affected by registry inclusion and employment screening protocols. These trends include increasing use of registry data to screen potential employees⁷⁵ and matching demographic profiles of child welfare-involved parents with those individuals most likely to seek child care-related employment.⁷⁶

As noted above, low-income families and Black families are disproportionately referred to and substantiated for maltreatment by child welfare systems.⁷⁷ Research finds that families from low-income neighborhoods are significantly more likely to be referred to the child welfare system than families from more affluent neighborhoods.⁷⁸ In the U.S., due to structural racism, Black families are significantly more likely to live in poverty and to live in neighborhoods with high concentrations of poverty than are white families.⁷⁹ In addition, as noted before, Black parents are disproportionately referred to and substantiated for maltreatment. In 2016, Black people comprised 13.8% of the U.S. population, but Black children were indicated as victims in 20.7% of child maltreatment cases.⁸⁰

⁷⁴ *Informal Economy: A Hazardous Activity*, INT'L LAB. ORG., <https://perma.cc/DC2F-MQRM> (last visited Oct. 15, 2020) (“High exposure to risks combined with low coverage of social protection place most informal economy workers in a very vulnerable situation.”); see also DEMETRA NIGHTINGALE & STEPHEN WANDNER, THE URBAN INSTITUTE, *INFORMAL AND NONSTANDARD EMPLOYMENT IN THE UNITED STATES: IMPLICATIONS FOR LOW-INCOME WORKING FAMILIES 2* (2011) (“Social insurance benefits are premised on work in the formal sector, and the pathways to improved earnings and occupational upward mobility value sustained formal work experience.”).

⁷⁵ *Id.* at 1.

⁷⁶ *Id.*

⁷⁷ See *supra* text accompanying note 71.

⁷⁸ Mark E. Courtney et al., *Involvement of TANF Applicant Families with Child Welfare Services*, 79 SOC. SERV. REV. 119 (2005); Claudia J. Coulton et al., *How Neighborhoods Influence Child Maltreatment: A Review of the Literature and Alternative Pathways*, 31 CHILD ABUSE & NEGLECT 1117 (2007); Claudia J. Coulton et al., *Understanding Trends in Neighborhood Child Maltreatment Rates: A Three-Wave Panel Study 1990-2010*, 84 CHILD ABUSE & NEGLECT 170 (2018); Maguire-Jack et al., *supra* note 56.

⁷⁹ Maguire-Jack et al., *supra* note 56, at 2-3.

⁸⁰ CHILD MALTREATMENT 2016, *supra* note 47, at 20; see Boyd, *supra* note 8; see also FLUKE ET AL., *supra* note 71.

In addition, due to sex-based discrimination and gendered expectations, women with children experience higher rates of poverty and are at greater risk for substantiation than are men.⁸¹

Similarly, the categories of jobs requiring registry checks are disproportionately occupied by these same groups. Women make up 98.7% of preschool and kindergarten teachers, 93.4% of child care workers, 89.7% of teacher's assistants, 85.6% of personal care aides, 88.3% of nursing, psychiatric, and home health aides, and 81.9% of social workers.⁸² In 2019, Black adults occupied between 13% and 37% of these women-dominated occupations.⁸³ Finally, because some of these jobs (such as child care workers, home health aides, and personal care aides) require little education and offer low pay,⁸⁴ they provide employment opportunities and income-generating potential for women who may have difficulty securing employment elsewhere.

Although there are no comprehensive data on either the number of employment screens conducted annually or the number of substantiated parents denied employment after screening, available state-level data suggest the potential for widespread, albeit not uniform, effects. As an example, Texas, the second most populous state in the nation,⁸⁵ conducted over 250,000 background checks for child care licensing in 2015.⁸⁶ In New York, over 200,000 background checks were requested for in-home and out-of-home child care in 2007,⁸⁷ and in Wyoming, the least populous

⁸¹ See CHILD MALTREATMENT 2016, *supra* note 47, at 23 (“[Seventy] percent of victims were maltreated by a mother, either acting alone (40.3%) or with a father and/or nonparent (28.4%).”).

⁸² BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY 3, 5 (2020), <https://perma.cc/643H-MNRX>.

⁸³ *Id.*

⁸⁴ The typical entry-level education for a child care worker is a high school diploma or its equivalent. The median pay in 2019 was \$24,230 per year. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, CHILDCARE WORKERS (2020), <https://perma.cc/A777-GJAA>. The typical entry-level education for a home health or personal care aide is a high school diploma or its equivalent, and the median pay in 2019 was \$25,280 per year. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, HOME HEALTH AIDES AND PERSONAL CARE AIDES (2020), <https://perma.cc/KYU7-YEEY>; DIV. OF OCCUPATIONAL EMP’T STATISTICS, U.S. DEP’T OF LABOR, OCCUPATIONAL EMPLOYMENT AND WAGES, CHILD CARE WORKERS (2018), <https://perma.cc/3ARU-UZBZ>.

⁸⁵ In 2019, Texas was the second most populous state in the nation, with a 2019 Census population estimate of 28,995,881. U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2010 TO JULY 1, 2019 (2020).

⁸⁶ TEX. DEP’T OF FAMILY & PROTECTIVE SERVS., DFPS 2015 DATA BOOK 88 (2015), <https://perma.cc/ZB29-AZP2>.

⁸⁷ GLADYS CARRIÓN, N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., FEASIBILITY STUDY OF FAMILY AND SUPREME COURT ACCESS TO THE STATEWIDE CENTRAL REGISTER OF

state in the nation,⁸⁸ 23,456 employment screens were conducted in 2017.⁸⁹

In sum, registry data have increasingly been used to screen potential employees. A wide range of employers are now required by law to check registries before hiring or are given the option to do so.⁹⁰ Given the economic consequences and potential harm to families, particularly to marginalized women, it is imperative to consider what protections are afforded to people who are listed on these registries.

D. Courts Are Not Uniform in Their Approaches to Due Process Protections and Registries

Placement on registries brands individuals as child abusers and interferes with their ability to secure and maintain employment. The harm to both reputation and employment implicates the Due Process Clause of the Fourteenth Amendment, which prohibits the government from depriving individuals of a liberty or property interest without following fair procedures.⁹¹ A substantial body of case law in both state and federal courts has laid out the contours of this right.⁹² Key questions examined by the courts include evidentiary standards, such as what standard of proof should be used for placement on the registry, notice and appeal rights, and whether individuals have a right to notice and/or a hearing before being placed on the registry.⁹³ As described next, a patchwork of court decisions has resulted in inconsistent standards for what constitutes the process that is due. Thus, while there is a consensus that placement on registries implicates the Due Process Clause, what procedures are required and when they apply vary across states.

The primary test applied by courts for determining whether a fundamental liberty interest is at stake when a parent is placed on a registry is the *stigma-plus* test.⁹⁴ The stigma-plus test requires an injury into both one's reputation and the actual consequences, such as losing a job in a child care-related field or not being able to obtain one.⁹⁵ *Valmonte v.*

CHILD ABUSE AND MALTREATMENT: INTERIM REPORT TO THE GOVERNOR AND THE NEW YORK STATE LEGISLATURE 15 (2009), <https://perma.cc/48UA-MC87>.

⁸⁸ According to a 2019 U.S. Census estimate, Wyoming was the least populated state in the nation, with 578,759 people. U.S. CENSUS BUREAU, *supra* note 85.

⁸⁹ THOMAS O. FORSLUND, WYO. DEP'T OF FAMILY SERVS., ANNUAL REPORT, STATE FISCAL YEAR 2018, at 10 fig.7 (2018).

⁹⁰ DISCLOSURE OF CONFIDENTIAL, *supra* note 15, at 3.

⁹¹ U.S. CONST. amend. XIV, § 1.

⁹² For an exhaustive review of the relevant case law, see ASSESSING THE FEASIBILITY, *supra* note 4, at app. D-4.

⁹³ *Id.* at app. D, D-4 to -6.

⁹⁴ *Valmonte v. Bane*, 18 F.3d 992, 999 (2d Cir. 1994).

⁹⁵ *Id.* at 1001.

Bane, decided by the Second Circuit Court of Appeals, illustrates how this test has been applied.⁹⁶ The court reasoned that being placed on a registry labels one a child abuser and is hence stigmatizing.⁹⁷ It also meets the *plus* part of the test because “it places a tangible burden on [plaintiff’s] employment prospects,” since potential employers would be notified of her inclusion on the registry by law and may fail to hire her.⁹⁸ Many courts have followed this reasoning and recognized the liberty interest involved in registry listings.⁹⁹ However, while courts have agreed that a fundamental liberty interest is at stake, what comprises a fair procedure under the Due Process Clause in such cases is less clear.

1. Evidence Thresholds

There is some consensus that a preponderance of the evidence is required under the Due Process Clause before an individual can be listed on the registry.¹⁰⁰ However, even this consensus has been blurred by the dual nature of registries as both an investigative tool for addressing child maltreatment and a tool to protect children in the general public from harm. This results in a desire for lower standards of proof and the ability to challenge such a determination in a timely and effective manner to avoid any collateral consequences. In *Lee TT v. Dowling*, the New York Court of Appeals held that while the fair preponderance standard had to be applied when individuals challenged their placement on the registry at a fair hearing,¹⁰¹ New York’s lower “credible evidence” standard was sufficient for initial placement.¹⁰² Thus, if a listing goes unchallenged, as data suggest many do,¹⁰³ a parent’s inclusion on the registry can be released to potential employers based only on the “some credible evidence” standard.¹⁰⁴

⁹⁶ *Id.* at 999-1102.

⁹⁷ *Id.* at 1000.

⁹⁸ *Id.* at 1001. *See also* *Lee TT v. Dowling*, 87 N.Y.2d 699 (1996) (reaffirming the *Valmonte* court’s holding that placement on the registry met the stigma-plus test under the Due Process Clause).

⁹⁹ ASSESSING THE FEASIBILITY, *supra* note 4, at app. D.

¹⁰⁰ *Id.* at D-4 (first citing 18 F.3d at 992; then citing *Jamison v. State, Dep’t of Soc. Servs.*, 218 S.W.3d 399 (Mo. 2007); then citing *In re W.B.M.*, 690 S.E.2d 41 (N.C. Ct. App. 2010); and then citing *In re Preisendorfer*, 719 A.2d 590 (N.H. 1998)).

¹⁰¹ 87 N.Y.2d at 712. Other states similarly require the preponderance of evidence standard. *Jamison*, 218 S.W.3d at 412; *In re W.B.M.*, 690 S.E.2d at 51-52.

¹⁰² 87 N.Y.2d at 712. Two years earlier, in *Valmonte v. Bane*, the court held that the “some credible evidence” standard carries an “unacceptably high risk of error” in violation of due process, but it did not explicitly require the standard be used at substantiation. 18 F.3d at 1004.

¹⁰³ Data prepared by the BUREAU OF RES., EVALUATION & PERFORMANCE ANALYTICS, N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS. (2020) and obtained through a FOIA request made by Legal Services NYC revealed that only 13% of substantiated individuals requested an administrative review between 2014 and 2017.

¹⁰⁴ Greer, *supra* note 15, at 732; N.Y. SOC. SERV. LAW § 424-a(1)(e)(v) (McKinney 2019).

Similarly, in *Lyon v. Department of Children & Family Services*, an Illinois court allowed a weaker standard of evidence when a parent is first placed on the registry and even upon a first appeal, as long as a second appeal is not delayed and uses the higher preponderance of evidence standard.¹⁰⁵ In *Dupuy v. Samuels*, a federal circuit court went even further and found that the credible evidence standard is sufficient for initial listing on the registry, as long as investigators also consider any exculpatory evidence.¹⁰⁶

2. Right to Notice

The right to notice—a mainstay of due process—has also produced conflicting holdings. Without it, the entire edifice of due process can fail because it triggers the opportunity to contest an adverse governmental action. Equally as relevant is its timing; as the Supreme Court explained in *Goldberg v. Kelly*, some deprivations may be so severe that they require notice and an opportunity to be heard prior to any action being taken.¹⁰⁷ In *Kindler v. Manheimer*, a California appellate court held that notice is not required until *after* a person's name is placed on a registry, thus exposing an individual to potential harm in employment among other consequences.¹⁰⁸ Two other state courts, in Missouri and North Carolina, held the opposite, requiring that notice be provided before an individual is placed on the registry.¹⁰⁹

3. Timely Hearings & Expungement

The timing of hearings has also resulted in contradictory holdings. A South Dakota state court held that individuals who exercise their right to appeal are not entitled to a pre-deprivation hearing before being placed on the registry.¹¹⁰ In contrast, state courts in Missouri and North Carolina required pre-deprivation hearings, noting that the failure to provide speedy hearings leaves individuals in a precarious position as they apply for jobs.¹¹¹ And in *Lee TT v. Dowling*, the New York Court of Appeals held that individuals who choose to appeal their placement are entitled to

¹⁰⁵ *Lyon v. Dep't of Children & Family Servs.*, 807 N.E.2d 423, 436 (Ill. 2004).

¹⁰⁶ *Dupuy v. Samuels*, 397 F.3d 493, 505-06 (7th Cir. 2005).

¹⁰⁷ *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (“[W]hen welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process.”).

¹⁰⁸ *Kindler v. Manheimer*, No. A114626, 2007 WL 61889, at *3 (Cal. Ct. App. Jan. 10, 2007).

¹⁰⁹ *Jamison v. State, Dep't of Soc. Servs.*, 218 S.W.3d 399, 402 (Mo. 2007); *In re W.B.M.*, 690 S.E.2d 41, 51 (N.C. Ct. App. 2010).

¹¹⁰ ASSESSING THE FEASIBILITY, *supra* note 4, at app. D-5 (citing *Red Willow v. Ellenbecker*, Civ. 94-5088 (D.S.D. 1995)), <https://perma.cc/8FUP-VDN6>.

¹¹¹ 218 S.W.3d at 417; 690 S.E.2d at 49.

have their hearings held before a registry listing was released to an employer. As the Court explained:

The deprivation of a constitutionally protected property interest may be remedied *post hoc* by monetary damages but the injury inflicted on one's reputation cannot be so easily overcome. The damage to the subject following publication of an unsubstantiated report of child abuse [at the preponderance of evidence threshold] may be irreversible.¹¹²

In sum, this contradictory case law has created an uneven landscape of due process protections for substantiated parents. Through review of existing state-level statutory schemes, registry policy and practice documents, and publicly available child welfare data, the following section provides an overview and analysis of how registry practices and due process protections vary across the United States. In addition, in the absence of national data on the scope and scale of registry inclusion, the following section provides a more detailed understanding of who is listed in these registries, for what, for how long, and how inclusion on these registries can be challenged.

III. REGISTRY STATUTORY SCHEMES IN PRACTICE: VARIATION ACROSS THE STATES

Our review of registry-related statutes, policies, and practice documents reveals significant variation in statutory schemes and registry practices across the states. As a consequence of this variation, whom states define as perpetrators of abuse and neglect, whom they include on their registries, and how long perpetrators must remain on registries vary significantly by case and place.

State statutes and policies allow for a range of caregivers and non-caregivers to be identified as perpetrators of child maltreatment. While perpetrator categories vary by state, all state registries include substantiated parents.¹¹³ This study focuses on the statutory criteria states use to substantiate, give notice, and expunge parents from child maltreatment registries and explores the potential impact of these statutory decisions.¹¹⁴

A. Defining Maltreatment: Acts, Omissions, and Evidence Thresholds

Child welfare agencies are charged with the task of investigating allegations of maltreatment and determining if a child has been abused or

¹¹² Lee TT v. Dowling, 87 N.Y.2d 699, 713 (1996).

¹¹³ See ESTABLISHMENT AND MAINTENANCE, *supra* note 15, at 2.

¹¹⁴ See *infra* Table 1.

neglected based on statutory definitions and associated standards of proof.¹¹⁵ If the child welfare worker (“worker”) determines there is sufficient evidence of maltreatment, the allegation and the parent associated with the allegation are *substantiated*.¹¹⁶ Substantiation is an administrative determination, not a judicial one.¹¹⁷ It is made after a child welfare report has been filed, and its initial purpose is to document in the case record whether abuse or neglect occurred.¹¹⁸ Few substantiated cases come before a judge; thus, the majority of maltreatment findings are made by workers, not the judiciary.¹¹⁹ Statutory definitions of abuse and neglect vary across the states but include a range of parental acts and omissions that fit into four broad categories of maltreatment: physical abuse, sexual abuse, emotional abuse, and neglect.¹²⁰

Standards of proof also vary across the states, meaning that evidence of maltreatment that is deemed sufficient and results in the labeling of a parent as a perpetrator in one state may be insufficient in another.¹²¹ We characterized states as having either a “high” or “low” standard of proof based on the typology developed by Nicholas E. Kahn and others for their study on the effects of proof standards on rates of substantiation.¹²² A standard was considered high if it was based on clear and convincing evidence, preponderance of evidence, or its equivalent (e.g., more likely than not).¹²³ A standard was considered low if it was based on some credible evidence, probable cause, reasonable cause, or their equivalent.¹²⁴

Standards of proof range from a low of “some credible evidence” or its equivalent standard in 15 states (30%) to a high of “preponderance of evidence” or its equivalent standard in 35 states (70%).¹²⁵ The lower standard of some credible evidence requires the factfinder to consider

¹¹⁵ CHILD MALTREATMENT 2018, *supra* note 1, at 5, 16.

¹¹⁶ *Id.* at 16.

¹¹⁷ Kahn et al., *supra* note 3, at 334.

¹¹⁸ *Id.*

¹¹⁹ CHILD MALTREATMENT 2018, *supra* note 1, at 81 (finding only 28.6% of substantiated cases were subject to court action in 2018).

¹²⁰ See DEFINITIONS OF CHILD ABUSE, *supra* note 49, at 2-4, for a full overview of state statutory definitions of child abuse and neglect.

¹²¹ See *infra* Table 1.

¹²² Kahn et al., *supra* note 3.

¹²³ See *Evidentiary Standards and Burdens of Proof*, JUSTIA, <https://perma.cc/39SP-4DJQ> (last updated May 2019); Kahn et al., *supra* note 3, at 336.

¹²⁴ See ASSESSING THE FEASIBILITY, *supra* note 4, at app. D-4 (“Many cases have held that due process requires at least a preponderance of the evidence standard (more evidence supporting substantiation than not supporting it) be used before an individual’s name can be placed on a State data repository.”); Kahn et al., *supra* note 3, at 336.

¹²⁵ See *infra* Table 1.

only evidence that supports the allegation, whereas the higher preponderance of evidence standard requires the factfinder to consider all available evidence, including evidence that refutes the allegation.¹²⁶

Table 1. Characteristics of Child Maltreatment State Statutory Schemes¹²⁷

State	Standards of Proof for Substantiation ¹²⁸	Substantiated Maltreatment Types Included in Registry	Notice of Substantiation & Registry Listing	Notice Includes Employment Consequences	Window for Initial Appeal of Substantiation	Length of Time on Registry
AL	High	All	Yes	Unclear	20 days or less	Life
AK	Low	All	Yes	Unclear	20 days or less	Life
AZ	Low	All	Yes	Unclear	30 days	Set or Variable Period
AR	High	Some	Yes	Yes	30 days	Set or Variable Period
CA	High	Some	Yes	Yes	30 days	Life
CO	High	All	Yes	Unclear	90 days	Life
CT	Low	Some	Yes	Yes	30 days	Life
DE	High	Some	Yes	Yes	30 days	Set or Variable Period
FL	High	All	Yes	Unclear	60 days	Set or Variable Period
GA	High	All	Yes	Yes	30 days	Life
HI	Low	All	Yes	Unclear	90 days	Life
ID	High	All	Yes	Unclear	20 days or less	Set or Variable Period
IL	Low	All	Yes	Yes	60 days	Set or Variable Period
IN	High	All	Yes	No	30 days	Life
IA	High	Some	Yes	Yes	90 days	Set or Variable Period

¹²⁶ Kahn et al., *supra* note 3, at 337.

¹²⁷ Data in Table 1 is based on the authors' review and analysis of state child abuse and neglect statutory schemes and public policy and practice documents, including child welfare policy and procedure manuals, policy memos, practice forms (e.g., letters of notice), and child welfare reports. *See also* METHODS, *supra* note 16.

¹²⁸ A standard was considered high if it was based on clear and convincing evidence, preponderance of evidence, or its equivalent (e.g., more likely than not). A standard was considered low if it was based on some credible evidence, probable cause, credible evidence, reasonable cause, or their equivalent. *See* Kahn et al., *supra* note 3.

State	Standards of Proof for Substantiation ¹²⁹	Substantiated Maltreatment Types Included in Registry	Notice of Substantiation & Registry Listing	Notice Includes Employment Consequences	Window for Initial Appeal of Substantiation	Length of Time on Registry
KS	High	All	Yes	Yes	30 days	Set or Variable Period
KY	High	All	Yes	Unclear	30 days	Set or Variable Period
LA	Low	Some	Yes	Unclear	30 days	Set or Variable Period
ME	High	Some	Yes	Yes	20 days or less	Life
MD	High	All	Yes	Unclear	60 days	Life
MA	Low	Some	Yes	Unclear	30 days	Set or Variable Period
MI	High	Some	Yes	Yes	90+ days	Set or Variable Period
MN	High	Unclear	Yes	Yes	20 days or less	Life
MS	Low	Some	Yes	Unclear	20 days or less	Life
MO	High	All	Yes	Unclear	60 days	Life
MT	High	All	Yes	Yes	30 days	Life
NE	High	All	Yes	Unclear	90+ days	Unclear
NV	High	All	Yes	Unclear	20 days or less	Set or Variable Period
NH	High	All	Yes	Unclear	30 days	Set or Variable Period
NJ	High	Some	Yes	Unclear	20 days or less	Life
NM	Low	All	Yes	Unclear	20 days or less	Unclear
NY	Low	All	Yes	Yes	90 days	Set or Variable Period
NC	High	Some	Yes	Yes	20 days or less	Life
ND	High	Some	Yes	Unclear	30 days	Set or Variable Period
OH	Low	All	Yes	Unclear	30 days	Unclear
OK	Low	All	Yes	Unclear	20 days or less	Life
OR	Low	All	Yes	No	30 days	Set or Variable Period

¹²⁹ A standard was considered high if it was based on clear and convincing evidence, preponderance of evidence, or its equivalent (e.g., more likely than not). A standard was considered low if it was based on some credible evidence, probable cause, credible evidence, reasonable cause, or their equivalent. *See* Kahn et al., *supra* note 3.

State	Standards of Proof for Substantiation ¹³⁰	Substantiated Maltreatment Types Included in Registry	Notice of Substantiation & Registry Listing	Notice Includes Employment Consequences	Window for Initial Appeal of Substantiation	Length of Time on Registry
PA	High	All	Yes	Yes	90 days	Set or Variable Period
RI	High	All	Yes	Yes	30 days	Life
SC	High	All	Yes	Yes	30 days	Life
SD	High	All	Yes	Unclear	30 days	Unclear
TN	High	All	Yes	Unclear	30 days	Unclear
TX	High	All	Yes	Unclear	30 days	Life
UT	Low	Some	Yes	Yes	90+ days	Life
VT	Low	All	Yes	Yes	20 days or less	Life
VA	High	All	Yes	Unclear	30 days	Life
WA	High	All	Yes	Unclear	30 days	Life
WV	High	All	Yes	Yes	30 days	Unclear
WI	High	Some	Yes	Unclear	20 days or less	Unclear
WY	High	All	Yes	Unclear	20 days or less	Life

Kahn and his co-authors found that states that utilize lower standards of proof have higher substantiation rates than do states that utilize higher standards of proof.¹³¹ Some child welfare scholars argue that substantiated cases capture only the “tip-of-the-iceberg” and that use of a lower evidentiary standard ensures that child welfare systems can protect more children from harm.¹³² But scholars also argue that use of a lower standard substantially increases the risk of Type I errors or false positives.¹³³ Risk of false positives is exacerbated by the fact that many child welfare workers are overworked and underpaid.¹³⁴ The concern for such errors led the

¹³⁰ A standard was considered high if it was based on clear and convincing evidence, preponderance of evidence, or its equivalent (e.g., more likely than not). A standard was considered low if it was based on some credible evidence, probable cause, credible evidence, reasonable cause, or their equivalent. See Kahn et al., *supra* note 3.

¹³¹ *Id.* at 357.

¹³² Barbara Fallon et al., *Methodological Challenges in Measuring Child Maltreatment*, 34 CHILD ABUSE & NEGLECT 70, 70-71 (2010) (“There is agreement only that the true extent of child maltreatment is unknown. The scope of this problem is estimated from self-report surveys or reports to child welfare services and/or police, but many incidents of abuse or neglect are never admitted or reported. Estimates indicate that between half to four fifths of all victims of maltreatment are not known to child protection services. The tip-of-the-iceberg analogy easily comes to mind when one thinks of the scope of child maltreatment.”) (citations omitted); see also Kahn et al., *supra* note 3, at 337.

¹³³ Kahn et al., *supra* note 3, at 334.

¹³⁴ See Frank Edwards & Christopher Wildeman, *Characteristics of the Front-Line Child Welfare Workforce*, 89 CHILD. & YOUTH SERVS. REV. 13 (2018); Jessica S. Strolin et al.,

authors of a feasibility report to Congress on the creation of a national child maltreatment registry to conclude, in part, that the likelihood of false positives warranted caution about instituting such a registry.¹³⁵ Reversal rates of substantiation upon administrative appeal confirm this concern. For example, an investigative report found that in Texas, 42% of challenged substantiations were overturned on appeal in 2013.¹³⁶ A Freedom of Information Act request found that in New York, 25.6% of challenged substantiations were overturned in 2017.¹³⁷

Use of low evidentiary standards to substantiate allegations of maltreatment likely results in both higher rates of registry listings and higher rates of erroneous listings. As a consequence of these statutory decisions, more parents are likely excluded from employment opportunities in states that utilize low standards. The consequences are likely more profound for cases involving neglect. Determinations of neglect are highly subjective: They allege omissions, rather than acts, and often involve risk of, rather than actual, harm.¹³⁸ In cases involving allegations of physical or sexual abuse, the physical nature of these acts makes them easier to prove.¹³⁹ Neglect is more difficult to capture. In neglect cases, the worker must look for evidence of a parental omission and make a subjective judgment about the acceptability of that omission or the adequacy of the parent's care.¹⁴⁰ In sum, the use of low evidentiary standards coupled with an expansive

Causes and Effects of Child Welfare Workforce Turnover: Current State of Knowledge and Future Directions, 1 J. PUB. CHILD WELFARE 29, 41-42 (2006).

¹³⁵ ASSESSING THE FEASIBILITY, *supra* note 4, at 38.

¹³⁶ Andrea Ball, *Overturned Child Abuse Rulings Point to Problems, Advocates Say*, STATESMAN (Sept. 25, 2018, 9:03 AM), <https://perma.cc/6SBN-DDKG>.

¹³⁷ BUREAU OF RES., EVALUATION & PERFORMANCE ANALYTICS, *supra* note 103.

¹³⁸ Statutory definitions of neglect often use vague terminology, such as "adequate" or "necessary" care. For example, an Alabama statute defines neglect as "[n]egligent treatment or maltreatment of a child, including the failure to provide *adequate* food, medical treatment, supervision, clothing, or shelter." ALA. CODE § 26-14-1(2) (2020) (emphasis added); an Alaska statute defines neglect as "the failure by a person responsible for the child's welfare to provide *necessary* food, care, clothing, shelter, or medical attention for a child." ALASKA STAT. § 47.17.290(11) (2020) (emphasis added); and in Colorado, neglect includes "[a]ny case in which a child is a child in need of services because the child's *parents, legal guardian, or custodian fails . . . to provide adequate* food, clothing, shelter, medical care, or supervision *that a prudent parent would take.*" COLO. REV. STAT. § 19-1-103(1)(a)(III) (2020) (emphasis added).

¹³⁹ For example, children who are victims of physical abuse may exhibit injuries such as bites, burns, bruises, or broken bones; children who are victims of sexual abuse may exhibit genital injuries or contract a sexually transmitted disease. For an overview of signs and symptoms of physical and sexual abuse, see CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., WHAT IS CHILD ABUSE AND NEGLECT? RECOGNIZING THE SIGNS AND SYMPTOMS (2019) [hereinafter RECOGNIZING THE SIGNS AND SYMPTOMS], <https://perma.cc/DD4H-7LVQ>.

¹⁴⁰ *Id.* at 3, 6.

and subjective definition of neglect can greatly expand the number of people listed on registries, and hence lead to employment consequences.

B. Types of Substantiated Maltreatment that Trigger Registry Listing

Classifying which acts render a parent more likely to maltreat children in the workplace is largely based on suppositions, not evidence. There are no studies that link being substantiated for child maltreatment to subsequent acts of child maltreatment in the workplace. Moreover, as described, the majority of child maltreatment charges can have a tenuous connection to workplace behavior.¹⁴¹ Given this, one way to ensure that central registries are not overinclusive or punitive towards parents is to distinguish between severe acts of maltreatment and less serious ones. Our review, however, found that few states make such a distinction.

Most states (68%, or 34 states) list all substantiated parents on their registries.¹⁴² A smaller set of states (30%, or 15 states) list only those parents who were substantiated for a type of maltreatment deemed severe (e.g., physical or sexual abuse) or high risk.¹⁴³ For example, in California, a state statute mandates that all reports of substantiated child abuse and severe neglect are submitted to and listed on the state's registry, the Child Abuse Central Index (CACI).¹⁴⁴ Reports of substantiated *general* neglect, which account for 71% of substantiated cases in the state,¹⁴⁵ are not included in the CACI;¹⁴⁶ thus, only a fraction of substantiated parents are included in the state's registry. In Michigan, only substantiated cases that are classified as Category I or Category II—higher risk designations—are added to the state's registry.¹⁴⁷

¹⁴¹ See *supra* Section II.B.

¹⁴² See *supra* Table 1. One state, Minnesota, was not included in this tally, as it was unclear from the state's statute what types of maltreatment are included in their registry.

¹⁴³ See *supra* Table 1.

¹⁴⁴ CAL. PENAL CODE § 11170(a)(1)-(2) (West 2020).

¹⁴⁵ *Substantiated Cases of Child Abuse and Neglect, by Type of Maltreatment*, KIDSDATA.ORG, <https://perma.cc/889S-R877> (last visited Nov. 19, 2020).

¹⁴⁶ CAL. PENAL CODE § 11170(a)(1)-(2) (West 2020).

¹⁴⁷ MICH. COMP. LAWS § 722.622(d) (2020); *Id.* § 722.628d. A substantiated case is classified as Category I if “[t]he department determines that there is evidence of child abuse or child neglect and 1 or more of the following are true: (i) A court petition is required under another provision of this act. (ii) The child is not safe and a petition for removal is needed. (iii) The department previously classified the case as category II and the child's family does not voluntarily participate in services. (iv) There is a violation, involving the child, of a crime listed or described in section 8a(1)(b), (c), (d), or (f) or of child abuse in the first or second degree as prescribed by section 136b of the Michigan penal code, 1931 PA 328, MCL 750.136b.” *Id.* § 722.628d(1)(e). A substantiated case is classified as a Category II if “[t]he department determines that there is evidence of child abuse or child neglect, and the structured decision-making tool indicates a high or intensive risk of future harm to the child. The department shall open a protective services case and provide the services necessary under this act.”

These differentiated or tiered responses to who is listed on the registry and for what types of maltreatment and associated risks suggest that use of substantiated allegations alone is insufficient to estimate the number of substantiated parents added to registries each year. While over 400,000 parents were substantiated for maltreatment in 2018,¹⁴⁸ review of state statutory schemes suggests that many parents—particularly those in populous states like California or Michigan—may be excluded from registries despite substantiation. In addition, the exclusion of select substantiated parents from registries suggests an acknowledgement by some states that substantiation itself does not translate to unfitness for employment.

C. *Due Processes: Notice, Length of Time on Registries, Appeal, and Expungement Processes*

1. Notice

A keystone of procedural due process is the right to be notified when the government deprives a person of a property interest.¹⁴⁹ As described in Section II.D, courts have found that placement on state registries implicates both liberty and property interests, thus requiring notice. Our review of state statutes found that all states require written notice of placement on registries, although the method of delivery—in person, mail, or certified mail—varies.¹⁵⁰ Our review also found that the content of notices, including potential employment consequences, is not regularly noted in state statutes, and review of publicly available notices indicates that the content of notices varies significantly.¹⁵¹

For example, New York and California statutes both require that all parents who are the subjects of a child welfare investigation be notified of the determination of that investigation and registry listing, but they do not stipulate in detail the types of information that must be included in that notice.¹⁵² In at least 20 states (40%), the consequences or potential consequences to employment were described in notices that advised individuals that either a child maltreatment investigation had begun or about

Id. § 722.628d(1)(d). See also CONN. AGENCIES REGS. § 17a-101k-3 (2020) and DEL. CODE ANN. tit. 16, § 923 (2020), for more examples of a tiered response.

¹⁴⁸ CHILD MALTREATMENT 2018, *supra* note 1, at 66 tbl.5-5.

¹⁴⁹ *Goldberg v. Kelly*, 397 U.S. 254, 266-70 (1970).

¹⁵⁰ See *supra* Table 1.

¹⁵¹ *Id.*

¹⁵² N.Y. COMP. CODES R. & REGS. tit. 18, § 432.3(k) (2020); CAL. DEP'T OF SOC. SERVS., CHILD WELFARE SERVICES: MANUAL OF POLICIES AND PROCEDURES § 31-020.6 (1993).

the outcome of that investigation.¹⁵³ However, the information in these notices is often technical and vague (or as one scholar noted, “unclear and confusing,”)¹⁵⁴ making it difficult for readers to understand the full scope of potential employment consequences, including the specific types of employment affected.

In New York, for example, the notice advises the substantiated individual that “an indicated report may affect your ability to work or be licensed in the child care field or adopt a child or become a foster parent,” but does not explain what the child care field is or how the individual’s ability to work may be impacted.¹⁵⁵ Kansas provides more specificity in its notice of determination of the outcome of an investigation, stating that “[p]ersons whose names appear on the Central Registry are not permitted by law to work, reside, or regularly volunteer in child care homes or facilities licensed or regulated by the Kansas Department for Health and Environment (KDHE) or the Kansas Department for Children and Families (DCF) Foster Care and Residential Facility Licensing.”¹⁵⁶ However, it did not further explain or provide a description of the types of facilities that are licensed or regulated by the state, which could include a wide range of workplaces such as day care centers, schools, and summer camps. California’s notice informing individuals that an investigation has been completed likewise notes that its state registry is used “by licensing agencies and county welfare agencies to investigate persons who apply for licenses or employment to care for children in licensed facilities” without indicating what type of facilities it licenses.¹⁵⁷

¹⁵³ See *supra* Table 1. Websites of state and local child welfare agencies were reviewed for registry notice guidelines and templates. Publicly available templates for registry placement notice were identified for 22 states. We were unable to locate publicly available notices for 28 states (56%), so the types of information that are provided in those notices remain unclear. In at least two states—Oregon and Indiana—notice of investigation outcome did not list employment consequences. OR. DEP’T OF HUMAN SERVS., POLICY NO. I-A.6.1 413-010-0700 THRU 0750, NOTICE AND REVIEW OF CPS FOUNDED DISPOSITIONS – OAR (2012); IND. DEP’T OF CHILD SERVS., CHILD WELFARE POLICY, ADMINISTRATION OF CHILD WELFARE, NOTICE OF ASSESSMENT OUTCOME (6th ed. 2014).

¹⁵⁴ Greer, *supra* note 15, at 755.

¹⁵⁵ Greer, *supra* note 15, at 768; N.Y. OFFICE OF CHILDREN & FAMILY SERVS., NOTICE OF INDICATION (FAMILIAL).

¹⁵⁶ KAN. DEP’T FOR CHILDREN & FAMILIES, NOTICE OF DEPARTMENT FINDINGS (2020), <https://perma.cc/TTF8-L68V>.

¹⁵⁷ CAL. DEP’T OF SOC. SERVS., SOC 832, NOTICE OF CHILD ABUSE CENTRAL INDEX LISTING (2013), <https://perma.cc/ZUV3-PK52>.

Standard practice for such notices is to also advise individuals of their right to appeal the decision to place them on the registry.¹⁵⁸ However, as described next, the timing and nature of the appeal process makes exercising this option difficult or opaque.

2. Appeal and Expungement Processes

Administrative hearings are the primary mechanism for rectifying errors or arbitrary actions by state actors for low-income people.¹⁵⁹ As described in Section II.D, they are a crucial component of due process.¹⁶⁰ Such hearings, as enunciated in the seminal case on administrative hearings, *Goldberg v. Kelly*, “must be tailored to the capacities and circumstances of those who are to be heard.”¹⁶¹ As noted previously, low-income people are overrepresented in the child welfare system and hence may lack the resources and education necessary for navigating adversarial proceedings.¹⁶² They may also be hesitant to appeal, as studies have found in analogous contexts.¹⁶³ While we don’t know of any studies on appeal rates in the context of registries, data from New York and elsewhere suggest they are exceedingly low.¹⁶⁴

For example, in New York, an average of 53,067 unique individuals were substantiated for child maltreatment each year between 2014 and 2017.¹⁶⁵ During this same period, an average of approximately 7000

¹⁵⁸ Our review of state notice documents found that appeal information was regularly included in notices. See Greer, *supra* note 15, at 768.

¹⁵⁹ See Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 30 J. NAT’L ASS’N ADMIN. L. JUDICIARY 601, 603 (2010) (stating that hearings are the “primary social justice system for poor people in the United States”).

¹⁶⁰ *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (“The fundamental requisite of due process of law is the opportunity to be heard.” (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914))).

¹⁶¹ *Id.* at 268-69.

¹⁶² For the analogous context of welfare fair hearings, which also involve low-income individuals, see Brodoff, *supra* note 159, at 644-59 (noting that the vast majority of people who appear at welfare fair hearings are not represented by counsel and that serious disadvantages exist that make hearings difficult for appellants, including poverty, physical or mental disabilities, low education, and language barriers). Few states guarantee indigent parents the right to counsel in registry-related administrative hearings. See *N.J. Dep’t of Children & Families v. L.O.*, 213 A.3d 187 (N.J. Super. Ct. App. Div. 2019), for an exception.

¹⁶³ Vicki Lens & Susan Elizabeth Vorsanger, *Complaining After Claiming: Fair Hearings After Welfare Reform*, 79 SOC. SERV. REV. 430, 438-39 (2005) (reporting appeal rates for denials, reductions, and discontinuances of welfare grants of 0.29% in Texas, 4.6% in New York, and 0.46% in Wisconsin).

¹⁶⁴ BUREAU OF RES., EVALUATION & PERFORMANCE ANALYTICS, *supra* note 103. Fewer than 3% of the 40,000 substantiated cases in Texas are appealed each year. Ball, *supra* note 136.

¹⁶⁵ CHILD MALTREATMENT 2018, *supra* note 1, at 60; BUREAU OF RES., EVALUATION & PERFORMANCE ANALYTICS, *supra* note 103.

unique requests for administrative review were made per year.¹⁶⁶ While unique persons requesting administrative review and unique persons substantiated for child maltreatment are not the same, the discrepancy between the two figures suggests that only a fraction (13%) of substantiated persons appeal their substantiation in an average year. One reason for a low appeal rate may be the timing and circumstances of a finding of substantiation. Individuals are notified when a substantiation finding has been made, informed of their right to appeal, and sometimes, as described above, informed about potential employment consequences.¹⁶⁷ However, at that time, or in the future, employment consequences may be of secondary concern. Parents are likely to be preoccupied with defending against the charge of maltreatment and engaging in mandated services to either prevent their children from being removed or to ensure their return.¹⁶⁸ They may also erroneously conclude that a successful family court adjudication will automatically remove their name from the registry.¹⁶⁹

Further, although the employment consequences may persist for years and even decades, the window for an appeal is often narrow. The window for an initial appeal of substantiation in nearly half the states (24) is within 30 days of receiving notice; in 14 states, it is 20 days or fewer. Only eight states offer 90 or more days for appeal.¹⁷⁰ Some state statutes address this concern by allowing a second opportunity to appeal upon learning about an employer inquiry or substantiated report. For example, in New York, if an employer-requested background check confirms a parent has been substantiated for maltreatment, but that finding was not previously upheld on administrative appeal at the preponderance standard, the substantiated person must be notified of their right to appeal and has 90 days to make that request.¹⁷¹ In California, a person has 30 days to

¹⁶⁶ BUREAU OF RES., *supra* note 103.

¹⁶⁷ *See supra* Table 1.

¹⁶⁸ Greer, *supra* note 15, at 755.

¹⁶⁹ In some states, such as New York, adjudication does not automatically result in removal from the registry. Gottlieb, *supra* note 44.

¹⁷⁰ *See supra* Table 1.

¹⁷¹ As of 2020, the threshold for substantiation in New York at time of investigation was “some credible evidence.” N.Y. SOC. SERV. LAW § 412(6)-(7) (McKinney 2019) (outlining the “some credible evidence” threshold and defining an “indicated report” as a “report made pursuant to this title if an investigation determines that some credible evidence of the alleged abuse or maltreatment exists”); Greer, *supra* note 15, at 739 (“[I]f the ninety-day window expires without the subject challenging her indicated case, but an employer or licensing agency covered by § 424-a of the New York Social Services Law makes an inquiry to the SCR regarding the subject individual, the subject of the inquiry is notified and given ninety days to challenge her indicated report. Section 424-a of the New York Social Services Law guides this appeal.”); N.Y. SOC. SERV. LAW § 424-a (McKinney 2019).

appeal from time of notice, or within 30 calendar days “of becoming aware” of their registry listing if notice is not received.¹⁷²

Beyond administrative appeals, there are other potential routes to removal. One is in limiting the length of time individuals are listed on the registry. In 18 states, time listed on the registry varies by such factors as time passed since the incident, age of the child victim, and substantiated offense type, with more serious offenses listed for longer time periods.¹⁷³ However, in 25 states, substantiated allegations can lead to a permanent, lifetime listing.¹⁷⁴

Another avenue for removal is through a request for expungement, which is distinct from an appeal and is not limited by the latter’s statutory time limit.¹⁷⁵ In some states, expungement is automatic after a set period.¹⁷⁶ For example, in New York, registry listings associated with parents substantiated for child abuse and neglect are expunged ten years after the 18th birthday of the youngest child named in a substantiated report.¹⁷⁷ In other states, expungement can be requested if a change of circumstances can be demonstrated or if a family court overturns the substantiated finding.¹⁷⁸ As one example, in Kansas, an individual can request expungement after three years on the registry if there has been a change in circumstances or new information is identified and 12 months have passed since the last request for expungement.¹⁷⁹

In other states, a request for review and expungement can be made after a set period based on predetermined risk level. For example, in Vermont, where registry listing is for life unless expungement is requested,¹⁸⁰ parents substantiated for abuse or neglect can request a review between one to fifteen years after substantiation depending on their designated

¹⁷² CAL. DEP’T OF SOC. SERVS., SOC 833, GRIEVANCE PROCEDURES FOR CHALLENGING REFERENCE TO THE CHILD ABUSE CENTRAL INDEX § 2(b)-(d) (2012), <https://perma.cc/78YG-HWXE>.

¹⁷³ See *supra* Table 1.

¹⁷⁴ *Id.*

¹⁷⁵ See REVIEW AND EXPUNCTION, *supra* note 15.

¹⁷⁶ *Id.* at 6, 9.

¹⁷⁷ N.Y. SOC. SERV. LAW § 422(6) (McKinney 2019). In 2020, New York State enacted legislation to amend section 422(6). The legislation shortens the length of time parents who have been unsubstantiated for neglect are listed on the registry and will go into effect in January 2022. Gottlieb, *supra* note 44.

¹⁷⁸ REVIEW AND EXPUNCTION, *supra* note 15, at 12, 40.

¹⁷⁹ KAN. DEP’T FOR CHILDREN & FAMILIES, PPS POLICY AND PROCEDURE MANUAL (2020), <https://perma.cc/89UA-5M3H>; KAN. ADMIN. REGS. § 30-46-17(2020) (noting that the expungement review panel should consider whether the circumstances that contributed to the finding of abuse or neglect still exist and whether the parent has taken actions to prevent the reoccurrence of abuse or neglect).

¹⁸⁰ REVIEW AND EXPUNCTION, *supra* note 15, at 40.

“child protection level.”¹⁸¹ The level designation is based on: the nature of the maltreatment and the extent of injury to the child, if any; prior history of child maltreatment as a victim or a perpetrator; response to investigation and willingness to engage in recommended services; and age or developmental maturity.¹⁸² Like Michigan, Delaware uses a risk assessment system to designate perpetrator risk levels; parents with lower risk level designations may request early expungement.¹⁸³ In making an expunction determination, the court considers all relevant factors including the circumstances and nature of the substantiated incident, criminal history, evidence of rehabilitation, and adverse impact of registration on employment opportunities.¹⁸⁴

In some states, however, the listing is permanent or permanent for some types of maltreatment, and there is no additional review process for expungement. For example, in California, which utilizes a preponderance of evidence threshold and includes only persons substantiated for abuse and severe neglect on their registry, substantiated persons are essentially listed for life.¹⁸⁵ In Georgia, which also uses the preponderance of evidence standard but lists all types of substantiated maltreatment on their registry,¹⁸⁶ there is no clear avenue for substantiated persons to be removed except through appeal and a reversed decision by the Georgia Office of State Administrative Hearings, the Superior Court, the Court of Appeals, or the Supreme Court of Georgia.¹⁸⁷

In sum, while almost all states have some form of notice and appeals process in place for listings on the registry, oftentimes these processes are constrained by strict time limits and burdensome legal procedures, which low-income populations find difficult to navigate without legal representation. Nor do many states maintain adequate internal procedures for purging registries of errors or providing for automatic expungement. Consequently, individuals can remain on registries for years, or indefinitely, with no relief from the potential employment consequences.

¹⁸¹ VT. DEP’T FOR CHILDREN & FAMILIES, REQUESTING A REVIEW FROM VERMONT’S CHILD PROTECTION REGISTRY (2019), <https://perma.cc/JFD7-4TW5>.

¹⁸² VT. STAT. ANN. tit. 33, § 4916 (2020).

¹⁸³ DEL. CODE ANN. tit. 16, §§ 923(b)(1)-(4), 929(a)-(b) (2020).

¹⁸⁴ *Id.* § 929(b)(1)-(8).

¹⁸⁵ *See supra* Table 1; CAL. PENAL CODE § 11169(f) (West 2020) (requiring substantiated persons to be listed on the Child Abuse Central Index (CACI) and only removed at age 100).

¹⁸⁶ *See supra* Table 1.

¹⁸⁷ GA. DIV. OF FAMILY & CHILDREN SERVS., POLICY NO. 20.1, CHILD WELFARE POLICY MANUAL, CHILD ABUSE REGISTRY INCLUSION AND NOTIFICATION TO ALLEGED CHILD ABUSER (2016), <https://perma.cc/A9VU-PRC6>.

IV. A NEED FOR STATUTORY REFORM

Review of statutory schemes and due process protections across the states reveals significant variance. In some states, inclusion criteria for registry listing are relatively narrow—evidence thresholds are high and only select types of maltreatment, or maltreatment associated with specific risk levels, are included. In other states, inclusion criteria are limited, but avenues for removal are restricted: Appeal timeframes are short, and substantiation results in registry listing for decades, if not life. Too often, state statutory schemes and inadequate due process protections result in registries that are easy to get on to but difficult to get off. In such states, evidence thresholds are low, inclusion criteria are wide, and due process protections are limited or unclear.

While lawmakers must guard against Type II errors by not making registries underinclusive, they must also guard against Type I errors by not making registries overinclusive. There is little to no evidence to suggest that substantiation itself is an indication of unfitness for employment, but there is ample evidence to suggest that lack of economic opportunity increases risk of child maltreatment.¹⁸⁸ While more research is needed to understand the full impact of registries on child safety and parental employment,¹⁸⁹ overlapping demographic and occupational trends make it clear that existing statutory schemes and due process protections disproportionately and adversely affect the employment opportunities of low-income women, especially poor Black women.

In recent years, child welfare-affected parents, family defense attorneys, legal scholars, and child welfare organizations have called upon lawmakers to address the penalizing effects of registries through statutory and policy reforms.¹⁹⁰ In addition, over the last two decades, federal and state agencies have raised concerns about conflicting evidentiary standards and due process violations created by the interstate sharing of registry data and the costs and benefits of registry inclusion.¹⁹¹ New recognition of how existing statutory schemes work to penalize substantiated parents and undercut the welfare of children coupled with new understandings of how the welfare state works to systematically marginalize poor women, especially poor Black women,¹⁹² creates a window for policy reform.

¹⁸⁸ Maguire-Jack et al., *supra* note 56, at 2.

¹⁸⁹ Henry et al., *supra* note 7, at 2.

¹⁹⁰ See Gottlieb, *supra* note 44; Greer, *supra* note 15; Sen et al., *supra* note 15.

¹⁹¹ ASSESSING THE FEASIBILITY, *supra* note 4; CARRIÓN, *supra* note 87.

¹⁹² WACQUANT, *supra* note 27.

The need for reform has taken on even more urgency because the COVID-19 pandemic has resulted in historically high rates of unemployment, with women and Black women especially vulnerable.¹⁹³ Recent calls for systemic change in the criminal justice system and a reckoning with the country's racist past and present has also put policy reforms more in reach as people and policymakers revisit the harms that many of our institutions have wrought on people of color.

While reform should not occur piecemeal, the following statutory and policy changes are recommended to reduce erroneous deprivation of liberty interests while also safeguarding the welfare of children. These include: raising the evidentiary standard for substantiation to a preponderance of evidence to guard against Type I errors; adopting a nuanced, evidence-based approach to maltreatment listing, including the use of risk assessment tools to determine which substantiated acts and omissions pose an ongoing threat to children; providing timely written notice in clear and accessible language and including a description of findings, justification, consequences, employment implications, and appeals processes; providing a proactive and long window for appeal—parents should be given the opportunity to appeal findings *before* registry listing, and any time after listing, to address initial findings or relevancy to employment; and automatic expungement from the registry after a designated period of time or unfounded adjudication in the family court. Finally, few states provide poor parents with counsel to appeal their registry listing.¹⁹⁴ Instead, of the parents who do appeal, most represent themselves *pro se*.¹⁹⁵ Given the liberty interests at risk, notice to parents should include the right to representation and referrals to free legal service providers.

CONCLUSION

In sum, registries have strayed far from their original purpose as an investigative tool for child maltreatment, with their current use as employment registries undermining families, rather than protecting them, by

¹⁹³ Samantha Schmidt, *Women Have Been Hit Hardest by Job Losses in the Pandemic. And It May Only Get Worse.*, WASH. POST (May 9, 2020, 7:00 AM), <https://perma.cc/Y4EJ-7D7Q>; NAT'L WOMEN'S LAW CTR., EMPLOYERS COMMITTED TO GENDER AND RACIAL EQUITY MUST PUT WORKERS FIRST IN COVID-19 RESPONSE 1 (2020), <https://perma.cc/4TFP-UVPK> (“Women and communities of color have been disproportionately harmed by COVID-19.”); NAT'L WOMEN'S LAW CTR., DESPITE SLIGHT GAINS IN MAY, WOMEN HAVE STILL BEEN HIT HARDEST BY PANDEMIC-RELATED JOB LOSSES 2, 3 (2020), <https://perma.cc/8FNL-ANQW> (noting that 16.5%, or one in six, of Black women were unemployed in May 2020, whereas May's unemployment rate for white men was 10.7%).

¹⁹⁴ See, e.g., N.J. Dep't of Children & Families v. L.O., 213 A.3d 187 (N.J. Super. Ct. App. Div. 2019).

¹⁹⁵ Sen et al., *supra* note 15, at 908.

threatening their economic security. While child safety protection is a laudable and essential goal, such registries cast too wide a net, catching poor women, many of whom are Black, who are trying to preserve and provide for their families while presenting no harm to other children. In this time of reckoning, where the insidious nature of racism is being uncovered in a myriad of state institutions and practices, the time for reform has come.