

CASE STUDY

TAXING VULNERABLE CHILDREN AND FAMILIES THROUGH STATEGRAFT: IT IS TIME TO END RACIALIZED WEALTH EXTRACTION IN FOSTER CARE

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As unjust and counterproductive public policies go, taxing vulnerable children and families is among the worst. For years, experts have been sounding the alarm that foster care “child support”—making parents pay the state when it takes away their children—is bad family policy and fiscal policy.¹ Importantly, critics have also pointed to the myriad ways the practice is unlawful.² New guidance from the federal government to the states provides a generational opportunity to dismantle this form of stategraft in the foster care system.³ In this Case Study we highlight promising legislative and administrative responses to the recent federal guidance.

State laws authorize, and sometimes require, judges to remove children from their homes for alleged parental abuse or neglect and place them in foster care.⁴ The federal government subsidizes state foster care

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1. See, e.g., Jill Duerr Berrick, *Imagining a New Future: Elimination of Child Support Obligations for Child Welfare-Involved Families*, 16 J. PUB. CHILD WELFARE 295 (2021); Maria Cancian, Steven T. Cook, Mai Seki & Lynn Wimer, *Making Parents Pay: The Unintended Consequences of Charging Parents for Foster Care*, 72 CHILD. & YOUTH SERVS. REV. 100 (2017).

2. See Daniel L. Hatcher, *Collateral Children: Consequence and Illegality at the Intersection of Foster Care and Child Support*, 74 BROOKLYN L. REV. 1333, 1356–77 (2009).

3. Dear Colleague Letter from U.S. Health & Human Services and Administration of Children & Families (July 29, 2022), https://www.acf.hhs.gov/sites/default/files/documents/cb/letter_regarding_assignment_rights_child_support_for_children_foster_care.pdf [<https://perma.cc/HHG9-HJK8>]; see Bernadette Atuahene, *A Theory of Stategraft*, 98 N.Y.U. L. REV. 1, 3 (2023).

4. See, e.g., CAL. WELF. & INST. CODE § 300 (2023); WA. REV. CODE § 13.34.130 (2023). 569,879 children were in the foster care system nationally in FY 2022, the last year for which there are complete data. U.S. DEP’T HEALTH & HUM. SERVS., THE AFCARS REPORT (2023), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-30.pdf>

for low-income families, and since 1984, it has required states to seek child support from parents “where appropriate” as a form of cost recovery.⁵ Although the money collected does not actually support their children in foster care, states have treated the federal law as an inflexible mandate, rarely considering whether charging parents is appropriate.⁶

Imposing child support in foster care cases disproportionately affects very poor families of color, especially Black and Indigenous families who are overrepresented in a racially discriminatory system.⁷ In addition to the immediate and long-term financial and emotional hardship to families, charging child support hinders family reunification by extending children’s time in foster care.⁸ Delayed reunification can result

[<https://perma.cc/BN77-D6HJ>]. The debate about the foster care system is beyond the scope of this piece, but critics say it “is predicated on the subjugation, surveillance, control, and punishment of mostly poor Black and Native communities experiencing significant poverty. We more accurately refer to this as the family policing system.” Alan Dettlaff, Kirsten Weber, Maya Pendleton, Bill Bettencourt & Leonard Burton, *How We endUP: A Future Without Family Policing*, UPEND MOVEMENT 3 (2021). For general critiques of the child welfare system and calls for its abolition, see DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022); ALAN DETTLAFF, *CONFRONTING THE RACIST LEGACY OF THE AMERICAN CHILD WELFARE SYSTEM: THE CASE FOR ABOLITION* (2023).

5. Social Security Act, Title IV-E, 42 U.S.C. § 671. While they are not required to do so by federal law, states often also charge child support to parents of children in foster care who are not subsidized under the Title IV-E program. See Diana Azevedo-McCaffrey, *States Should Use New Guidance to Stop Charging Parents for Foster Care, Prioritize Family Reunification*, CTR. ON BUDGET & POL’Y PRIORITIES (Oct. 13, 2022), <https://www.cbpp.org/research/income-security/states-should-use-new-guidance-to-stop-charging-parents-for-foster-care> [<https://perma.cc/7DXA-UV9K>].

6. See, e.g., WY. STAT. ANN. § 14-3-429 (2023) (“The court shall order the parents ... to pay a reasonable sum for the support and treatment of the child ... or shall state on the record the reasons why an order for support was not entered.”).

7. See ANNIE E. CASEY FOUND., KIDS COUNT DATA CENTER, CHILDREN IN FOSTER CARE BY RACE AND HISPANIC ORIGIN (2021), <https://datacenter.aecf.org/data/tables/6246-children-in-foster-care-by-race-and-hispanic-origin#ranking/1/any/true/2048/2638/12993> [<https://perma.cc/6GMH-DTLN>]; see also Jude Mary Cénat, Sara-Emilie McIntee, Joana N. Mukunzi & Pari-Gole Noorishad, *Overrepresentation of Black Children in the Child Welfare System: A Systematic Review to Understand and Better Act*, 120 CHILD. & YOUTH SERVS. REV., 2021, at 1, 14 (finding racial disproportionality in international child welfare systems); Jessica N. Fish, Laura Baams, Armeda Stevenson Wojciak & Stephen T. Russell, *Are Sexual Minority Youth Overrepresented in Foster Care, Child Welfare, and Out-Of-Home Placement? Findings from Nationally Representative Data*, 89 CHILD ABUSE & NEGLECT 203, 208–09 (2019) (finding LGBTQ+ youth are overrepresented in US foster care system).

8. Cancian, Cook, Seki & Wimer, *supra* note 1, at 108 (“[O]rdering mothers to pay support to offset the costs of foster care delays reunification. ... [A] \$100 increase in the monthly child support order amount is predicted to increase the months to reunification by 6.6 months.”).

in the permanent termination of parental rights.⁹ In fact, failure to pay child support alone can be a basis under state law to terminate parental rights.¹⁰

Further, research in multiple states has found that child support in foster care cases is uniquely difficult to collect. According to a 2020 study conducted by the Department of Child Support Services in Orange County, California, the program spent \$2.44 to collect every \$1.00 in foster care cases.¹¹ By contrast, in typical child support cases, where the noncustodial parent pays the custodial parent, the program spent less than 40 cents for every dollar it collected. In the name of cost recovery, collection of foster care child support is a net financial loss for government.¹²

In addition to being bad family and fiscal policy, critics have argued that pursuing foster care child support violates statutory and constitutional law.¹³ Because of the documented negative impacts on reunification, imposing child support on low-income parents conflicts directly with federal statutory mandates to return children to the home. To pursue parents in child support arrears, foster care rules allow counties to garnish wages and benefits, levy bank accounts, impose property liens, intercept tax refunds, suspend or revoke driver's licenses,

9. In fact, federal law *requires* states to file a TPR petition for a child who has been in foster care for fifteen of the last twenty-two months. 42 U.S.C. § 671(a), 675(1)(E).

10. *See, e.g., In the Matter of J.C.J. and J.R.J.*, 381 N.C. 783, 791, 799 (2022) (upholding lower court decision to terminate parental rights solely because parents had not paid sufficient support to the state for their children's foster care and recognizing that courts are not required to notify parents of their duty to pay child support to the state).

11. ORANGE CNTY. DEP'T CHILD SUPPORT SERVS., CHILD SUPPORT AND FOSTER CARE SPECIAL STUDY 9 (2d ed. 2020), <https://www.css.ocgov.com/sites/css/files/import/data/files/116568.pdf> [<https://perma.cc/RVB7-MHJA>]. Compared with non-foster care child support cases, the study found that households owing child support in foster care cases were much more likely to be living in poverty (77% had annual incomes under \$20,000), behind in their payments (60% were in arrears), and involved single mothers (40%, or more than 4 times the rate in other child support cases). *See id.* at 5–6.

12. Researchers have found similar results in other states, including Washington and Minnesota. *See* WASH. STATE DEP'T SOC. & HEALTH SERVS., ECON. SERVS. ADMIN., DIV. CHILD SUPPORT, WASHINGTON'S COST EFFECTIVENESS FOR FOSTER CARE CHILD SUPPORT CASES 1 (2019), <https://www.dshs.wa.gov/sites/default/files/ESA/dcs/documents/Cost%20Effectiveness%20FC%20collections%20FINAL.pdf> [<https://perma.cc/26TC-WXGG>] (finding that Washington collected \$4.21 for each dollar spent on all child support in FY 2018, but collected only \$0.39 for each dollar spent to collect child support in foster care cases); Trish Skophammer, *Child Support Collections to Offset Out of Home Placement Costs: A Study of Cost Effectiveness* (2017) (D.P.A. dissertation, Hamline University), https://digitalcommons.hamline.edu/hsb_all/16 [<https://perma.cc/HL4W-PM5P>] (finding that the Minnesota "child support program is likely spending more than it collects" and recommending against charging child support in foster care cases).

13. *See* Hatcher, *supra* note 2, at 1356–77.

and report delinquencies to credit bureaus, all of which undermine a parent's ability to meet reunification requirements, such as securing employment and housing.¹⁴ Undermining these goals increases the likelihood of termination of parental rights, which may also run afoul of the U.S. Constitution by violating the substantive due process rights of parents and children.¹⁵

In response to the mounting legal and policy critiques of foster care child support, the federal government issued new guidance in July 2022 instructing states to narrowly interpret the term “where appropriate” so that child welfare agencies seek child support from the parents of low-income children “only in very rare circumstances.”¹⁶ Some states responded quickly to the new guidance. For example, on September 1, 2022, the Washington State Department of Children, Youth, and Families announced that it was immediately ending “the outdated and harmful practice of referring parents to child support collection after a child is placed into foster care.”¹⁷ Several other state legislatures and agencies across the country and political spectrum have reduced or stopped child support referrals and collections or are in the process of doing so.¹⁸

California has taken the most comprehensive approach to eliminating the current and lingering harm of foster care child support. Through a series of legislative and regulatory steps, the state ended future child support referrals in foster care cases and is discharging almost half

14. See Social Security Act, Title IV-E, 42 U.S.C. § 666.

15. See Hatcher, *supra* note 2, at 1364–70. Furthermore, in proceedings to terminate parental rights (TPR), a parent's access to the judicial system cannot “turn on [one's] ability to pay.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 (1996). Because TPR “works a unique kind of deprivation,” the court “place[d] decrees forever terminating parental rights in the category of cases in which the State may not ‘bolt the door to equal justice.’” *Id.* at 118, 124.

16. Dear Colleague Letter, *supra* note 3, at 1.

17. News Release, Wash. State Dep't Child., Youth, & Fams., DCYF Ends Child Support Collection Referrals on Parents Involved in Child Welfare (Sept. 1, 2022), <https://content.govdelivery.com/accounts/WADEL/bulletins/32abf56> [<https://perma.cc/TUX6-J8Z6>] (“We know that most parents are already facing financial hardships when they come into contact with the child welfare system,” said DCYF Secretary Ross Hunter. “This old and misguided policy only deepened that hardship and made it harder for parents to get their kids home.”). The announcement also referenced the state ending juvenile incarceration fees, the result of a national campaign to end fees and fines in juvenile court. *Id.*; see also Selbin & Patel-Tupper, *Using the U.S. Department of Justice to Help End Juvenile Statecraft*, 64 WIS. L. REV. FORWARD, 2024, at 67–68.

18. See, e.g., H.B. 227, 68th Leg., Reg. Sess. (Mont. 2023) (amending Mont. Code. Ann. § 41-3-446); S.B. 4248, 220th Leg., 2022–23 Sess. (N.J. 2023); A.B. 4027, 2023–24 Leg., Reg. Sess. (N.Y. 2023); H.B. 129, 2024 Leg., Gen. Sess. (Utah 2024); S.B. 24-202, 74th Leg., Reg. Sess. (Colo. 2024).

a billion dollars in outstanding foster care debt imposed on families. The details are noteworthy for other states considering reform:

- In September 2022, California Governor Gavin Newsom signed Assembly Bill 1686 (A.B. 1686) requiring county welfare agencies “to presume that the payment of support by the parent is likely to pose a barrier to the proposed reunification.”¹⁹
- In March 2023, to comply with the federal guidance and recently enacted A.B. 1686, the California Department of Social Services ordered counties to end prospective referrals to child support in foster care cases on January 1, 2023, except in extremely rare circumstances and to halt all collection and enforcement activity on open cases.²⁰
- On October 23, 2023, after a bill stalled in the legislature to provide retrospective relief by forgiving foster care child support arrears,²¹ the California Department of Child Support Services issued two policies to discharge outstanding debt as uncollectible, except under the same very rare circumstances set out in the March 2023 Department of Social Services guidance.²²

Statecraft in the foster care system has harmed children, parents, and communities for 40 years, directly undermining the stated goal of reunifying families.²³ New federal guidance and early state responses have brought relief to hundreds of thousands of vulnerable families.

19. A.B. 1686, 2021–22 Leg., Reg. Sess. (Cal. 2022).

20. All County Letter from Cal. Health & Hum. Servs. Agency, Dep’t Soc. Servs., New Statewide Policy on Referring Families with a Child in Foster Care to Child Support Agencies (Mar. 20, 2023), <https://www.cdss.ca.gov/Portals/9/Additional-Resources/Letters-and-Notices/ACLs/2023/23-29.pdf?ver=2023-03-28-110444-200> [https://perma.cc/2V39-KWJV]. “The only exception to this new policy is if at the time of assessment, a parent’s annual income is greater than \$100,000 annually or 400 percent of the federal poverty level, whichever is greater, and a referral to the child support agency will not pose a barrier to reunification.” *Id.* at 4.

21. A.B. 1324, 2023–24 Leg., Reg. Sess. (Cal. 2023).

22. See Yana Singhal, *California’s Plan to End Collection of ‘Uncollectible’ Child Support Debt for Low Income Parents Praised*, DAVIS VANGUARD (Dec. 11, 2023), <https://www.davisvanguard.org/2023/12/californias-plan-to-end-collection-of-uncollectible-child-support-debt-for-low-income-parents-praised/> [https://perma.cc/4LJG-RGFH]; CSSP Letter from Cal. Dep’t Child Support Servs., Foster Care Arrears, (Oct. 23, 2023), https://dcss.ca.gov/wp-content/uploads/sites/345/2023/11/CSSP_Letter_23-02_FosterCareArrears_10232023.pdf [https://perma.cc/8C2U-YYVV].

23. See, e.g., Fred Wulczyn, *Family Reunification*, 14 CHILD., FAMS., & FOSTER CARE 95, 95 (2004).

These developments give us hope that through concerted action we can successfully contest, shrink, and abolish these and other oppressive youth and family policies, “creating a world where the dignity and integrity of all families is valued and supported.”²⁴

24. MOVEMENT FOR FAMILY POWER, <https://www.movementforfamilypower.org> (last visited Feb. 15, 2024) [<https://perma.cc/K5GU-9GNK>].