

Holes in the Safety Net

Federalism and Poverty



Edited by Ezra Rosser

CAMBRIDGE

HOLES IN THE SAFETY NET

While the United States continues to recover from the 2008 Great Recession, the country still faces unprecedented inequality as increasing numbers of poor families struggle to get by with little assistance from the government. *Holes in the Safety Net: Federalism and Poverty* offers a grounded look at how states and the federal government provide assistance to poor people. With chapters covering everything from welfare reform to recent efforts by states to impose work requirements on Medicaid recipients, the book avoids unnecessary jargon and instead focuses on how programs operate in practice. This timely work should be read by anyone who cares about poverty, rising inequality, and the relationship between state, local, and federal levels of government.

Ezra Rosser is a law professor at American University Washington College of Law, where he teaches poverty law, property law, and federal Indian law. He is a co-author of the leading poverty law textbook and is the editor of the Poverty Law Blog.

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FEDERALISM AND POVERTY

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States Diverting Funds from the Poor

Daniel Hatcher

Purpose matters. Government exists to protect and maximize the welfare of its citizens, including the vulnerable. When that purpose is undermined, harm results.

Unfortunately, states are doing just that – prioritizing their short-term financial interests over the public good, and hiring private contractors to help. Partnerships between state agencies and private revenue maximization consultants are using schemes to divert billions in federal aid and other funds from children and the poor to government coffers and private profit.¹

The practices undermine the purpose of government, destroy the intended benefits of fiscal federalism, and harm the most vulnerable among us. Consider the following examples from Ohio, New Jersey, and Iowa.

Ohio’s juvenile courts developed a strategy to maximize revenue by ordering poor children to be removed from their homes. The courts signed “subgrantee” contracts indicating that the state will reroute federal foster care funds it receives to the juvenile courts. Under the agreements, courts can only get paid when ruling that poor children are “unruly” or delinquent and that the children must be removed from their homes. The more child removals ordered by the courts, the more revenue the courts receive. To help maximize the funds, some of the juvenile courts hired a private revenue contractor called Justice Benefits, Inc. (JBI). “JBI works on a contingency basis and assists the Court in identifying, documenting costs and preparing claims – JBI is paid 22% on monies recovered through claims submitted by the Court.”²

New Jersey forces school districts to work with a private revenue contractor called the Public Consulting Group (PCG) to maximize claims for school-based Medicaid

¹ See generally, DANIEL L. HATCHER, *THE POVERTY INDUSTRY: THE EXPLOITATION OF AMERICA’S MOST VULNERABLE CITIZENS* (2016) (hereinafter *POVERTY INDUSTRY*) (detailing practices discussed in this chapter).

² Miami County, Ohio, Commissioners Meeting Minutes Summary, Dec. 30, 2014, www.co.miami.oh.us/Archive/ViewFile/Item/379.

funds, and punishes the schools with a loss of state funding if they fail to meet quotas. Then, although intended to help schools serve the needs of low-income children with disabilities, the state diverts the majority of the federal aid to its general coffers and PCG receives a cut as its contingency fee.³ To bolster the claims, PCG advised New Jersey to include \$435 million owed to the school employees' pension fund as state expenditures – but a 2017 federal audit determined the state had not made scheduled payments to the fund in nearly 20 years.⁴

The Iowa state foster care agency hired a private revenue contractor called MAXIMUS, Inc. to help increase the number of foster children who are determined to be disabled – not to provide more help in serving the children's disabling conditions, but so the state can take their disability benefits. The company has helped apply for Social Security disability benefits on the children's behalf, and helped the state take control of the children's funds as representative payee. Then, rather than using the funds to help the children, Iowa diverts the children's money to general revenue.⁵ MAXIMUS's cost proposal to the Iowa Department of Human Resources considers children as "units" – applying "anticipated units" and "unit costs" to describe costs for services in helping Iowa obtain the children's funds.⁶

These are not isolated practices. As detailed in my book, *The Poverty Industry: The Exploitation of America's Most Vulnerable Citizens*, states and their human service agencies team up with private companies in multiple ways to maximize revenue from the vulnerable: taking Social Security survivor and disability benefits from foster children, using illusory budget shell games to siphon away billions in Medicaid funds intended for children and low-income adults, diverting child support payments for foster children and families on public assistance into government revenue, and using nursing homes to take the facilities' federal aid while the elderly receive poor care.⁷ Some states take even more, including confiscating Veteran's Assistance benefits from foster children whose parents died in the military. Nebraska will even take a foster child's burial plot away if she has one.⁸

These examples just scratch the surface of what is taking place across the country, where state and county governments are partnering with private companies to develop countless ways to use the vulnerable as a source of revenue and profit. In seeking to expose the practices, it is difficult to find stopping points – because each revenue scheme will intersect with another, which will intersect with another, and

³ US Dept. of Health and Human Services, Office of Inspector General, *New Jersey Claimed Hundreds of Millions in Unallowable or Unsupported Medicaid School Based Reimbursement*, A-02-15-01010 (Nov. 2017) at 2.

⁴ *Id.* at 8–9.

⁵ See POVERTY INDUSTRY, *supra* note 1, at 80–90.

⁶ MAXIMUS, Inc., Bid Proposal for Iowa Department of Human Services SSI Advocacy Project, § K Cost Proposal, Feb. 12, 2009, 3 (on file with author).

⁷ POVERTY INDUSTRY, *supra* note 1.

⁸ See *generally*, POVERTY INDUSTRY, *supra* note 1 (detailing practices discussed in this chapter).

so on. Thus, to illustrate the interconnections of just a sampling of the practices, Anna is introduced, a hypothetical foster child who encounters and is impacted by the revenue strategies in different states. Although hypothetical, the vulnerable children Anna represents are very real.

Why is this happening? Both “red” and “blue” states have faced poor economic conditions and a political climate opposed to raising sufficient revenue through general taxation. So states are looking for money elsewhere, including schemes that are largely unknown to the public to divert federal aid and other funds from children and the poor. In doing so, states have lost sight of their purpose – focusing on their own fiscal interests rather than the best interests of their citizens.

The resulting harm to vulnerable populations is intense, lasting, and the reverberations affect us all. When a state foster care agency hires a contractor to help the state take resources away from abused and neglected children, the public’s belief in government’s commitment to the common good is harmed by such an egregious breach of trust and moral integrity. And the public is also harmed financially. When agencies take resources from foster children, they are less likely to become self-sufficient after leaving care, more likely to need public assistance, more likely to be unemployed, and more likely to become incarcerated – and we all pay the price. When a foster child in Cleveland, Camden, or Des Moines is harmed, we are all harmed.

A fundamental realignment is required so that states are true to their purpose, to exist not for themselves but for the good of the people. To be clear, the diversionary tactics described in this chapter do not result in valid arguments to cut government aid programs. The levels of public assistance are significantly insufficient to meet current needs. If states are misusing federal aid that is intended solely for the vulnerable, then the appropriate response is not to cut the funding but to stop the misuse.

The remainder of this chapter summarizes how state practices diverting aid from the poor are undermining the purpose of government and the intended benefits of fiscal federalism, through the lens of the hypothetical Anna encountering numerous revenue strategies. Although the examples provided here are not exhaustive, they are representative of the expanding strategies using the vulnerable as revenue, now permeating into virtually every type of poverty program and service.

EXAMPLES OF STATE REVENUE SCHEMES

It could be the same foster care child, Anna, 13 years old, from an impoverished neighborhood, mentally disabled, targeted for multiple sources of revenue. She is solitary in her need for care and assistance – but multiple in her role as a source of funds for the state and its revenue contractors.

Anna faces similar experiences as other vulnerable children who end up in foster care. Although still a child, she already suffers from post-traumatic stress disorder

(PTSD), which foster children experience at twice the level of US war veterans. She was taken into foster care from an impoverished home due to allegations of neglect, a home weakened by struggles to overcome poverty and bouts with homelessness. Rather than helping the family stay intact, the state's removal of Anna from her home increased her trauma. Because she is older and disabled, and sometimes responds angrily to the trauma she feels inside, adoption is unlikely. Anna hopes to reunify with her biological parents, but few resources are provided to help their struggle and the state moves forward to terminate their parental rights despite the lack of an adoptive resource. Growing up in foster care, the statistics are lined up against Anna – facing likely future homelessness, struggles to find work, a high probability of making less than \$10,000 annually, likely needing to apply for food stamps, lacking health insurance, increased chances of never finishing high school, only a 2 percent chance of getting a college degree, and likely involvement in the criminal justice system.⁹

Anna needs help that is solely focused on her best interests, but she encounters a system that considers her as a source of funds. Once in foster care, she is processed through the agency's revenue maximization unit. Anna has a small trust fund with \$1,900 inherited from her deceased uncle. If she lives in Iowa, the state child welfare manual directs the foster care agency (DHS) to first try to take those minimal funds from Anna:

[A]pproach the trustee, seeking to have DHS made payee for the income of the trust. If sufficient funds are not available from the trust to meet the total cost of care, request the trustee to petition the district court to release funds to cover the cost of foster care maintenance (or as much of the cost of maintenance as possible).¹⁰

If Anna lives in Nebraska, the state would scour her for even more possible resources. In addition to Social Security and Veterans Administration (VA) benefits, a state regulation encourages the agency to consider taking the following assets from foster children – even burial spaces:

1. Cash on hand;
2. Cash in savings or checking accounts;
3. Stocks;
4. Bonds;
5. Certificates of deposit;
6. Investments;
7. Collectable unpaid notes or loans;
8. Promissory notes;
9. Mortgages;
10. Land contracts;
11. Land leases;
12. Revocable burial funds;
13. Trust or guardianship funds;
14. Cash value of insurance policies;
15. Real estate;
16. Trailer houses;
17. Burial spaces;
18. Life estates;
19. Farm and business equipment;
20. Livestock;
21. Poultry and crops;
22. Household goods and other personal effects; and
23. Federal and state tax refunds.¹¹

⁹ *Id.* at 15.

¹⁰ Iowa Dept. of Human Services, Out-of-Home Placement Policy and Procedures, Employees' Manual, Title 17, Chapter E at 160–61, <http://dhs.iowa.gov/sites/default/files/17-E.pdf>.

¹¹ 479 NAC 2–001.08.

After identifying other possible assets to take from Anna, the state refers her for further processing by its revenue contractor, using her to apply for and take her Social Security disability benefits, a process detailed in the following text.

States Taking Foster Children's Benefits

The state's revenue contractor is given access to sift through Anna's medical records. During this process, the state refers Anna to physicians where she is prescribed multiple psychotropic medications. Then, the revenue contractor begins the process of applying for federal aid on her behalf, determining that she may be eligible for disability benefits, called Supplemental Security Income (SSI), if the Social Security Administration determines she came from a poor family and is disabled enough. The contractor also seeks out other children in the state foster care system who have dead parents, to apply for Old-Age, Survivors, and Disability Insurance benefits (OASDI, or "survivor benefits"). Survivor benefits are similar to life insurance, property rights belonging to children after a parent worked and paid payroll tax contributions. The state plugs Anna into a strategy where it seeks to maximize these benefits and then routes the funds to state coffers under the rationale of repaying itself for foster care costs.¹²

Across the country, private contractors often help with the process, identifying children who may be eligible for the benefits, and seeking to have the children determined disabled or locating those who have dead or disabled parents.¹³ Contract documents describe procedures where the children are viewed almost like resources to be mined on a conveyor belt – using data analytics, dissection, and algorithms – and ranking the children in terms of how much revenue they can potentially produce and how quickly, rather than prioritizing the children's needs.¹⁴ In Maryland, the state contracted with MAXIMUS, whose assessment report described foster children as a "revenue generating mechanism."¹⁵ MAXIMUS's cost proposal to the Iowa Department of Human Resources described children as "units."¹⁶ If Anna is in Florida, PCG provided an assessment for how the state can obtain more children's Social Security benefits, describing "[p]redictive analytics" and "data mining techniques" to "score" and "triage" the foster children to maximize the revenue.¹⁷

To carry out the process, a contractor applies for the SSI disability benefits on Anna's behalf, helps with the appeals process when there are questions of whether

¹² POVERTY INDUSTRY, *supra* note 1, at 80–90.

¹³ *Id.*

¹⁴ *Id.* at 82–90.

¹⁵ Maryland Department of Human Resources, *MAXIMUS Benefits & Eligibility Advocacy Services*, SSI/SSDI Assessment Report, Feb. 2013 (on file with author).

¹⁶ MAXIMUS, Inc., Bid Proposal for Iowa Department of Human Services SSI Advocacy Project, § K Cost Proposal, Feb. 12, 2009, at 3 (on file with author).

¹⁷ Public Consulting Group, Social Security Advocacy Assessment, State of Florida, Department of Children and Families, Sep. 14, 2012, at 6, 28, 29.

she is disabled enough, and then helps the state apply to become representative payee to gain control over Anna's resulting funds. Although a representative payee is a fiduciary, obligated to only use the beneficiary's funds for her best interests, the state instead diverts Anna's money to state revenue. PCG's assessment report for Florida describes increasing the "penetration rate" of disabled children to convert their benefits into \$21 million annual government revenue: "PCG has estimated that increasing the SSI penetration rate to meet the national best practice of 20% would produce approximately 2,538 children newly eligible for SSI benefits," which the report explains would result in \$21 million annually in new government revenue.¹⁸ Usually, the state does not even tell children or their advocates that it is applying for the funds or applying to gain access to the money as representative payee.

The state uses Anna through what is essentially a loophole. Instead of adhering to its fiduciary obligation to only serve Anna's best interests, the state relies on another federal regulation that explains it can use a child's funds to pay for unmet current maintenance needs. Thus, the state asserts that it should be able to take Anna's benefits to repay the state cost of her care under the theory that the current maintenance clause allows such self-reimbursement. However, the rationale ignores what should be an absolute legal and moral barrier to the revenue strategy – that the state, not Anna, has the obligation to pay for the foster care costs. In fact, the Supreme Court has recognized that foster children have no legal debt obligation for their own care.¹⁹ As a representative payee, the state is supposed to exercise individualized fiduciary discretion to decide how use Anna's benefits only for her unmet needs or conserving funds in a way that is best for her. The state's revenue strategy of instead taking Anna's funds for itself directly breaches that fiduciary requirement.²⁰

If the state used Anna's funds to help her as intended, the money could provide her with extra needed tutoring, possibly a computer, and many other services and items that are not already paid for by the government. For example, Anna loved a presentation she saw about computer-generated artwork, and she wants to learn, but she has never had the chance. She could use her own funds to purchase necessary equipment and classes to learn the skill that could lead to a future career. Also, Anna could save her benefits for the difficult transition to independence as she ages out of care. In fact, the 2014 Achieving a Better Life Experience Act (or Able Act) established 529A savings accounts specifically for children's Social Security disability benefits. The law allows disabled children to conserve their benefits in a way that is exempt from the otherwise existing \$2,000 asset limit. A child like Anna can then

¹⁸ *Id.* at 5.

¹⁹ *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 382 (2003) (holding that the state was not a creditor and therefore did not violate the Social Security Act's anti-attachment provision, but the court recognized it was not deciding several other possible legal challenges to the practice).

²⁰ POVERTY INDUSTRY, *supra* note 1, at 80–82.

use the conserved funds for education costs, or for many other needs including assistive technology, housing, transportation, and employment training.

In 2018, after several years of policy advocacy, litigation, and legislative effort,²¹ the Maryland General Assembly passed legislation, which would help Anna if she lived there, that begins to protect foster children's Social Security and Veteran's Assistance benefits. But no other state has done so. Titled "Protecting the Resources of Children in State Custody," the legislation requires that when the state foster care agency acts as representative payee for a child receiving disability or survivor benefits, the state must conserve at least 40 percent of the funds for the child starting at age 14, at least 80 percent of the funds starting at age 16, and 100 percent of the funds starting at age 18.²² The legislation includes the 529A (ABLE) accounts as an option for the savings, and also requires the state to provide foster children with financial literacy training, which can help inspire the children to become involved in planning for their future. Hopefully, more states will enact similar legislation and make further improvements to protect all foster children's resources.

If Anna doesn't live in Maryland, the state will take her Social Security disability benefits until she ages out of care, and she will be left with nothing. Further, while in foster care, she is also plugged into another revenue strategy, this time one that uses her poverty and her disabilities to take her school-based Medicaid resources.

States Diverting Medicaid Resources from the Vulnerable

The state revenue practices of taking Social Security benefits from foster children are stark and widespread, but are a fraction of the scope of state Medicaid maximization strategies. Each year, states are diverting millions in disability and survivor benefits from foster children – whereas with Medicaid resources taken from vulnerable populations, the amount is in the billions.²³

²¹ See, e.g., Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 *CARDOZO L. REV.* 1797 (2006); AP, *States' Use of Foster Kids' Benefits Assailed*, Mar. 16, 2011, <http://baltimore.cbslocal.com/2011/03/16/states-use-of-foster-kids-benefits-is-assailed/>; Daniel L. Hatcher, *How Maryland Robs Its Most Vulnerable Children*, *BALTIMORE SUN*, Oct. 14, 2013; Daniel L. Hatcher, *Legislation Needed to Protect Foster Kids' Assets*, *BALTIMORE SUN*, Mar. 3, 2015; WAMU (NPR in Washington, DC), *The Kojo Nnamdi Show, How Local Foster Care Plays a Role in "The Poverty Industry"*, June 28, 2016; Daniel L. Hatcher, *Maryland Needs to Stop Forcing Foster Children to Pay for Their Own Care*, *BALTIMORE SUN*, Apr. 2, 2018.

²² Maryland General Assembly, 2018 Regular Session, House Bill 524 (also indicates that when the department acts as payee for any child it must "use or conserve the benefits in the child's best interest, including using the benefits for services or special needs not otherwise provided by the Department or conserving the benefits for the child's reasonably foreseeable future needs"), <http://mgaleg.maryland.gov/2018RS/bills/hb/hb0524E.pdf>.

²³ POVERTY INDUSTRY, *supra* note 1, at 114–35.

States again often hire private revenue contractors to help, finding ways to leverage the Medicaid funding structure toward financial self-interest. Resulting strategies are numerous and complex, including terminology such as “bed taxes,” “intergovernmental transfers” (IGT), “upper payment limits” (UPL), “random moment time studies” (RMTS), and “school-based Medicaid claiming.”²⁴

Medicaid is a shared program between the federal government and states, structured around matching grants. For a state to receive a federal Medicaid matching grants, it must first use state funds on eligible health care services for vulnerable children and adults. For example, Maryland has a 50 percent match percentage, so if Maryland spends \$50 on eligible services it can claim an additional \$50 match from the federal government – for a total of \$100 available for the needed services. Some other states benefit from a higher federal match, like in Mississippi, where the federal government pays almost 75 percent.

But states often subvert the intended shared financing through schemes to maximize claims for federal matching funds with no additional state spending. The state part of the match is often illusory. Worse still, once the additional federal Medicaid funding is claimed, many states divert the aid from vulnerable populations to general state use. Rather than raising sufficient state revenue through equitable and general taxation, states are taking aid from the poor to fund themselves.²⁵ Again, the practices are bipartisan. In Texas, over a five-year period, former Governor Rick Perry “used such illusory schemes to divert more than \$1.7 billion in federal Medicaid matching funds to his general coffers.”²⁶ In California, Governor Jerry Brown signed a 2013 bill to use a bed tax revenue strategy that was estimated would result in \$3 billion in Medicaid routed to the state general fund over a three-year period.²⁷

Which brings us back to Anna, as the state uses her in such a strategy to take Medicaid resources from her and her school.

While taking Anna’s Social Security disability benefits, the state may also be diverting her school-based Medicaid resources. When children are poor and disabled, states can claim federal Medicaid matching funds on their behalf for much-needed school-based health services and related administrative costs – including special education, rehabilitative services, physical and speech therapy, and services under Medicaid’s Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) program.²⁸ According to the most recent Government Accountability Office (GAO) investigation into school-based Medicaid claiming, at least 18 states were diverting a portion of Medicaid funding from children into state revenue, with

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 118.

²⁷ *Id.* at 142.

²⁸ *Id.* at 126.

10 of those states diverting between 40 and 85 percent of the federal aid.²⁹ Again, revenue maximization consultants are helping.

If Anna lives in New Jersey, the GAO explains that the state's schools have received a small fraction of the Medicaid funds intended for poor schoolchildren, the remainder going to the state and its contractor.³⁰ Similar to how PCG is helping several states obtain more foster children's Social Security benefits, the company contracts with New Jersey and several other states to help maximize school-based Medicaid. PCG helps New Jersey run the Special Education Medicaid Initiative (SEMI). Tellingly, New Jersey decided to administer the program out of its Department of Treasury. The state program requires school districts to collaborate with the contractor, plugging impoverished disabled schoolchildren like Anna into projections and equations to target increased federal Medicaid funds. All the aid is supposed to help the schools directly serve the children. However, New Jersey takes most of the federal aid, PCG receives a contingency fee, and only a fraction goes to the schools. In a 2017 audit, the US Department of Health and Human Services, Office of Inspector General explains that New Jersey gives only 35 percent of the Medicaid funds to the schools. New Jersey budget documents indicate the fraction provided to schools is even smaller, only 17.5 percent:

Notwithstanding the provisions of any law or regulation to the contrary, each local school district that participates in the Special Education Medicaid Initiative (SEMI) shall receive a percentage of the federal revenue realized for current year claims. The percentage share shall be 17.5% of claims approved by the State by June 30.³¹

The discrepancy is due to the state's manipulation of the Medicaid match structure. New Jersey has a 50 percent federal Medicaid match rate. So for \$100 in claimed Medicaid payments for Anna, \$50 is supposed to be paid by the state and \$50 by the federal government. New Jersey only gives 35 percent of the federal portion of the match to Anna's school to help her (or \$17.5, 35 percent of \$50). But here is what makes the percentage even lower: New Jersey requires schools to absorb the costs of the state share rather than the state making those payments as intended.³² So the schools get 0 percent of the state's \$50 share. Thus, out of the total \$100 that is supposed to go to Anna's school to help her, the school only receives 17.5 percent (\$17.5 out of the \$100 the school is supposed to receive).

²⁹ US General Accounting Office, *Medicaid in Schools: Poor Oversight and Improper Payments Compromise Potential Benefit*, GAO/T- HEHS/OSI-00-87 (2000), www.gao.gov/assets/110/108362.pdf.

³⁰ *Id.*

³¹ The State of New Jersey, 2019 Detailed Budget at F-7, www.nj.gov/treasury/omb/publications/19budget/pdf/FY19BudgetBook.pdf.

³² *Medicaid in Schools*, *supra* note 29, at 16.

It gets worse. The 2017 federal audit concluded that more than \$300 million of the school-based Medicaid funds New Jersey claimed while working with PCG were unallowable and therefore that the state should refund that full amount, and that an additional \$306.2 million in claims were unsupported. As part of its findings, the Inspector General determined that New Jersey “improperly incorporated into its payment rates more than \$400 million owed to the school employees’ pension fund despite not having made scheduled payments to the fund in nearly 20 years,” and that “PCG improperly altered school employees’ responses to timestudies to indicate that their activities were directly related to providing Medicaid services when the responses indicated the activities were unrelated.”³³

It gets even worse. New Jersey only forces schools in impoverished areas to participate in this revenue strategy. Schools with richer children can ask to opt out of the program, whereas schools with more poor children cannot.³⁴ The lower-income schools are required to work with PCG and develop target revenue goals. If Anna’s school fails to meet its revenue quota of using poor children to claim Medicaid funds, New Jersey punishes the school with a reduction in state education funds. As the federal audit explains, “[E]ach school must reach 90 percent of the SEMI revenue budgeted by PCG each year or the school may lose State education aid.”³⁵

If Anna instead lives in Delaware, the 2000 GAO audit found that the state was taking 70 percent of the school-based Medicaid, New York and Pennsylvania were taking 50 percent, and Wisconsin and Michigan were taking 40 percent.³⁶ All those states have had statewide school-based Medicaid contracts with PCG.³⁷ In a sample contract proposal submitted to Nebraska in 2017, PCG states that it is “the nation’s leading firm for assisting states administer and enhance school based Medicaid programs, while strictly adhering to state and federal compliance requirements,” and that “[w]e have assisted over 15 statewide programs and 2500 districts level programs over the last 30 years in generating \$5.2 [billion] in federal Medicaid reimbursement for our clients.”³⁸

³³ *New Jersey Claimed Hundreds of Millions in Unallowable or Unsupported Medicaid School Based Reimbursement*, *supra* note 3, at Results in Brief.

³⁴ Kimberley Harrington, Acting Commissioner, New Jersey Department of Education, Memorandum, Special Education Medicaid Initiative Fiscal Year 2018 Revenue Projections, www.nj.gov/education/specialed/memos/011717Meidicaid.pdf (explaining how only schools with fewer than 40 Medicaid eligible children can ask for a waiver from the program).

³⁵ *New Jersey Claimed Hundreds of Millions in Unallowable or Unsupported Medicaid School Based Reimbursement*, *supra* note 3, at 3. See also N.J.A.C. 6A:2A-5.3.

³⁶ *Medicaid in Schools*, *supra* note 29, at 16.

³⁷ Public Consulting Group, Technical Proposal in Response to State of Nebraska Request for Proposal for Contractual Services, RFP# 5331Z1, Transmittal Letter, Mar. 16, 2017, <http://das.nebraska.gov/materiel/purchasing/5531/Public%20Consulting%20Group%20-%20Tech.pdf> (“We currently administer statewide school-based Medicaid initiatives in thirteen states, including Arizona, Colorado, Delaware, Georgia, Indiana, Kansas, Michigan, New Jersey, New York, Pennsylvania, South Dakota, Wisconsin and West Virginia.”).

³⁸ *Id.* at 2.

*State Juvenile Courts Claiming Revenue by Removing
Poor Children from Their Homes*

Anna could have also ended up in a foster care placement due to juvenile delinquency allegations – and still be used as a source of revenue. If she lives in Ohio, the juvenile court receives payments if the judge determines Anna should be removed from her home, a revenue practice akin to the “kids for cash” scandal in Pennsylvania, where two juvenile court judges received payments in return for sentencing children to juvenile justice detention facilities.³⁹

Title IV-E federal foster care funds are intended to help state child welfare agencies provide foster care services to abused and neglected children. But in Ohio, juvenile courts found a way to claim the federal foster care funds for themselves. To access the money, a juvenile court first signs a contract with the Ohio Department of Job and Family Services, the statewide agency that normally administers the state child welfare programs and the receipt of federal Title IV-E funds. Through the contract, the juvenile court becomes a subgrantee to be considered a Title IV-E placing agency. Then, if the court rules that a child is “unruly” or delinquent and orders the child removed from her home and put in eligible out-of-home placement, the court gets paid.⁴⁰ The more children the court removes from their homes, the more Title IV-E funds the court can receive. In Summit County – not the largest county in Ohio – the juvenile court was making more than \$1.1 million in Title IV-E revenue annually through this strategy.⁴¹ At least 34 county juvenile court systems in Ohio are now engaged in this revenue practice.⁴²

To receive the money, Ohio juvenile courts have many placement options after ordering a child removal, including with for-profit companies and even out-of-state centers:

Reimbursement may be claimed for youth placed in non-secure settings such as foster care, group homes, treatment foster care, residential treatment facilities and other child care institutions. There are restrictions on the size of eligible public facilities: they may not have more than 25 beds. But there is no restriction on the

³⁹ John Schuppe, *Pennsylvania Seeks to Close Books on “Kids for Cash” Scandal*, NBC NEWS, Aug. 12, 2017, www.nbcnews.com/news/us-news/pennsylvania-seeks-close-books-kids-cash-scandal-n408666.

⁴⁰ Ohio Dept. of Job and Family Services Subgrant Agreement, G-1415-06-XXXX, <http://jfs.ohio.gov/ocf/2014-2015-Final-Juvenile-Court-Subgrant-Agreement.stm>.

⁴¹ Summit County Court of Common Pleas Juvenile Division, 2015 Annual Report, <https://juvenilecourt.summitoh.net/index.php/information/publications/reports/finish/17-annual-reports/1254-annual-report-2015>.

⁴² State of Ohio Title IV-E Juvenile Court Contact List, <http://jfs.ohio.gov/ocf/JuvenileCourtContactList.stm>.

size of private facilities. Moreover, both in-state and out-of-state residential programs qualify, as do non-profit and for-profit organizations.⁴³

One of the for-profit companies is what a news investigation describes as “a giant corporation called National Mentor Holdings, which, over the last three decades, has turned the field of foster care into a cash cow.”⁴⁴ The investigative stories described National Mentor as “a \$1.2 billion company with a history of trouble at its homes for at-risk children.”⁴⁵

There is a catch. Under Title IV-E, the juvenile courts only receive the revenue if they order the removal of children from poor families, not from well-off families. So the focus is on percentages: the higher the state “penetration rate” – the percentage of children removed from their homes who are poor and thus Title IV-E eligible – the more federal funds can be claimed. The state foster care agency’s Bureau of Fiscal Operations has provided a slide show training for how the juvenile courts can maximize the funds, renaming the penetration rate the “Eligibility Ratio (ER) aka the participation, penetration or discount rate,” and providing the equation used to maximize the funds:

The Eligibility Ratio (ER) is computed by taking:

The number of placement days experienced by Title IV-E program eligible children housed in allowable settings

DIVIDED BY

The total number of placement days experienced for all children in custody/care placements for the reporting period.⁴⁶

The resulting ratio is used to claim the Title IV-E funds. So the greater the percentage of poor children compared to nonpoor children removed into foster care, the more revenue the juvenile courts can claim. The results are apparent in the numbers. Although Ohio’s statewide poverty rate is 14.6 percent, the percentage of children removed into foster care who are poor reached 77 percent by 2014.⁴⁷

⁴³ National Council of Juvenile and Family Court Judges, Juvenile Sanctions Center, Training and Technical Assistance Program Bulletin, *Using Federal Title IV-E Money to Expand Sanctions and Services for Juvenile Offenders*, Vol. 2 No. 2, 2004 at 4, <http://docplayer.net/18586465-Using-federal-title-iv-e-money-to-expand-sanctions-and-services-for-juvenile-offenders.html>.

⁴⁴ Aram Roston, *Foster Profits*, BUZZFEED, Feb. 20, 2015, www.buzzfeed.com/aramroston/fostering-profits?utm_term=.ywWtAvyrY#.iqbK9abKM.

⁴⁵ Aram Roston, “*Culture of Incompetence*”: *For-Profit Foster-Care Giant Is Leaving Illinois*, BUZZFEED, Apr. 17, 2015, www.buzzfeed.com/aramroston/mentorleavesillinois?utm_term=.kojzELqzv#.yxY4n1e4M.

⁴⁶ Ohio Dept. of Job and Family Services, Bureau of Fiscal Accountability, *How to Develop the Allowable Cost Pool and Complete the Quarterly Billing Form (JFS 01797) for Title IV-E*, http://jfs.ohio.gov/ocf/HowtoAllocateCosts022014_FinPart3.stm at 5, 56.

⁴⁷ Child Trends, *Child Welfare Financing SFY 2014*, Ohio, www.childtrends.org/wp-content/uploads/2016/10/Child-Welfare-Financing-SFY2014_Ohio.pdf.

The Ohio juvenile courts sought help in maximizing revenue from children, through contacts with Justice Benefits, Inc.:

Justice Benefits, Inc. (“JBI”) specializes in federal revenue maximization for state and local political entities. JBI was incorporated in 1997 with the objective of helping state and local political entities access new federal funding opportunities. We specialize in Enhanced IV-E Administrative Claiming. JBI has been working with Ohio Juvenile Courts since 2003. . . .

JBI’s IV-E training staff consists of former probation officers. Having this background allows the JBI staff to better relate to the Ohio Juvenile Court staff. JBI IV-E training staff have faced and solved the same day to day problems that Ohio County staff encounters on a daily basis.⁴⁸

For example, Miami County, Ohio signed a contingency-fee contract where JBI helps the juvenile court maximize funds: “JBI is paid 22% on monies recovered through claims submitted by the Court, and will be paid from the Juvenile Court Title IV-E Fund.”⁴⁹

The more poor children the Ohio juvenile court orders removed, the more Title IV-E funds the court can claim, and the more money JBI can make through its contingency fee.

Because of the juvenile courts’ potential conflict, the Supreme Court of Ohio’s Board of Commissioners on Grievances and Discipline (Board) was asked in 2006 to address the legality of the revenue practice. But the Board punted the question to the Ohio Judicial Conference, who in turn asked its Juvenile Law and Procedure Committee to decide. So the question of whether it is legally permissible for juvenile courts to receive payments in return for ordering child removals was decided by a committee of juvenile court judges, who issued a legal argument that no conflict of interest or other legal concern was present.⁵⁰

However, the contract document for the court subgrant agreements reveals that both the state and the juvenile courts realized the conflict exists. In the first section of the 24-page contract, the Ohio Department of Job and Family Services felt it necessary to admonish a juvenile court that it must agree “that it will not deliberately adjudicate a child unruly or delinquent for the sole purpose of receiving Federal Financial Participation (FFP) [federal Title IV-E funds].”⁵¹ Further, a slide

⁴⁸ Web-Based System for the Ohio Juvenile Courts, Justice Benefits, Inc., <http://jfs.ohio.gov/ocf/WebBasedRMSinformation.pdf>.

⁴⁹ Miami County, Ohio, Commissioners Meeting Minutes Summary, Dec. 30, 2014, www.co.miami.oh.us/Archive/ViewFile/Item/379.

⁵⁰ Ohio Judicial Conference, Resolution to Support Optional Juvenile Court Participation as a Title IV-E Placing Agency, Prepared by the Juvenile Law and Procedure Committee, Nov. 17, 2006, www.ohiojudges.org/Document.aspx?DocGuid=400faab0-352d-474a-bcb9-d85a82f81bd7.

⁵¹ Ohio Dept. of Job and Family Services Subgrant Agreement, <https://council.summitoh.net/index.php/legislative-information/legislation/2011/finish/24/3429>.

presentation prepared by the statewide agency's Bureau of Fiscal Operations also cautions juvenile courts of this conflict, including a more direct bullet point warning to courts: "No cherry picking" children for removals to receive more funds.⁵² One juvenile court judge in Franklin County even went on record to explain his concern that "the more kids that are placed out of their homes, the more money the court gets, which might lead some people to question the court's motivation: helping the youngsters or getting the money?"⁵³ Further, the subgrant contract also indicates that the county commissioners can take a cut of the revenue that juvenile courts receive after ordering child removals, up to 25 percent.⁵⁴

As more evidence of the conflict, the juvenile court in Cuyahoga County (which includes Cleveland) used the federal Title IV-E funds resulting from court-ordered child removals to give juvenile court system judges and staff more than \$1.8 million in salary increases in 2017. The salary increases are laid out in a county council resolution: "To allow for the salary increases per County Council Resolution R2017-077 and the agreement that Juvenile Court pay for any 2017 salary increases in CY 2017... Appropriations for this increase have been transferred in cash from Title IV-E Maintenance."⁵⁵ The salary increases were to be paid out the county general fund, but the juvenile court simultaneously transferred money from its Title IV-E revenue to pay the full amount back to the county general fund:

Fund Nos./Budget Accounts. . .

A. FROM: 20A635 – title IV-E Juvenile Court JT1717052 JC517318 – Title IV-E Juvenile Court FCM Transfer Out \$ 1,830,389.04

TO: 01A001 – General Fund JC372052 – Juv Ctr – Judges Revenue Transfer \$ 1,830,389.04

A cash transfer is requested to pay for the NCSC Juvenile Court Classification and Compensation Study completed in October 2015. Funding is coming from the Title IV-E Maintenance Fund, which as of June 30, 2017 had a cash balance of \$5.8 million.⁵⁶

As evident from the revenue amounts, there is no shortage of poor children in Cleveland from which the juvenile court can obtain Title IV-E payments in exchange for ordering child removals. As of 2017, the child poverty rate in Cleveland

⁵² Ohio Dept. of Job and Family Services, Bureau of Fiscal Affairs, Overview of the Title IV-E Juvenile Court Program, <http://jfs.ohio.gov/ocf/overviewoftitleive.pdf>.

⁵³ Encarnacion Pyle, *Juvenile Courts' Role Debated*, COLUMBUS DISPATCH, Sep. 11, 2006, www.pressreader.com/usa/the-columbus-dispatch/20060911/28203322676879.

⁵⁴ Ohio Dept. of Job and Family Services Subgrant Agreement, Article III, C.1.

⁵⁵ County Council of Cuyahoga County, Ohio, Resolution No. R2017-0142, http://council.cuyahogacounty.us/pdf_council/en-US/Legislation/Resolutions/2017/R2017-0142C%20OBM%20Fiscal%20Items%20for%208-8-2017%20and%20amending%20R2017-0098.pdf.

⁵⁶ *Ibid.*, 10.

reached 53.5 percent,⁵⁷ and for East Cleveland the child poverty rate reached 63.5 percent.⁵⁸

In addition to failing to adequately address the conflict of interest, the Ohio Judicial Conference Juvenile Law and Procedure Committee also did not address Due Process Clause concerns when judges have an interest in the outcome of judicial hearings. The committee did not consider long-standing US Supreme Court precedent – from a case that started in Ohio during the prohibition era, *Tumey v. Ohio*:

There, the mayor of a village had the authority to sit as a Judge (with no jury) to try those accused of violating a state law prohibiting the possession of alcoholic beverages. Inherent in this structure were two potential conflicts. First, the mayor received a salary supplement for performing judicial duties, and the funds for that compensation derived from the fines assessed in a case. No fines were assessed upon acquittal. The mayor-judge thus received a salary supplement only if he convicted the defendant. . . . Second, sums from the criminal fines were deposited to the village's general treasury fund for village improvements and repairs. . . . The Court held that the Due Process Clause required disqualification "both because of [the mayor-judge's] direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village." . . . It so held despite observing that "[t]here are doubtless mayors who would not allow such a consideration as \$12 costs in each case to affect their judgment in it."⁵⁹

Rather than address such Supreme Court precedent, the Ohio judges relied on their *parens patriae* powers to preemptively argue against potential legal challenges, giving themselves the green light to continue and expand the practice of claiming Title IV-E revenue through child removals.⁶⁰ Of note, Ohio juvenile court judges also submitted a similar argument in 1967 against recognition that children should be afforded constitutional rights, including the right to counsel:

It is the unquestioned right and imperative duty of every enlightened government, in its character of *parens patriae*, to protect and provide for the comfort and well-being of such of its citizens as, by reason of infancy are unable to take care of themselves. The performance of this duty is justly regarded as one of the most important of governmental functions, and all constitutional limitations must be so understood and construed as not to interfere with its proper and legitimate exercise. . . .

⁵⁷ Northeast Ohio Coalition for the Homeless, *Just the Facts: Poverty and Homelessness in Our Community*, www.neoch.org/poverty-stats-2017/.

⁵⁸ Barb Hall, *New Census Data Shows 30 Percent Poverty Rate in 17 Cities in Ohio*, CLEVELAND PATCH, Jan. 12, 2017, <https://patch.com/ohio/cleveland/new-census-data-shows-30-percent-pov-erty-rate-17-cities-ohio>.

⁵⁹ *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 877–878 (2009) (discussing and quoting *Tumey v. Ohio*, 273 U.S. 510, 520–535 (1927)).

⁶⁰ Ohio Judicial Conference Resolution, *supra* note 50.

The present popularity of resorting to the constitutional safeguards of the liberties of the person presents an easy and plausible reason for ignoring the fact that children could not possibly grow to productive and law-abiding adulthood if they were entitled to those liberties which are the perquisites of physical, mental and emotional maturity.⁶¹

Luckily, the US Supreme Court ruled in favor of the children in that case. But courts have not yet considered possible legal challenges to the current revenue practices of the Ohio juvenile courts. Further, the receipt of federal foster care Title IV-E funds after ordering Anna's removal from her home is not the only revenue incentive in the Ohio juvenile courts, as explained in the following text.

After Ordering Child Removals, Juvenile Courts Seek Additional Revenue in Return for Ordering Support Obligations Against Impoverished Parents

After the juvenile court adjudicates Anna unruly or delinquent and orders her to be placed in out-of-home care, which triggers the court's receipt of Title IV-E foster care funds, the court can then order Anna's impoverished parents to pay child support to reimburse the costs of the placement. Although still called child support, the money is not owed to the children but rather to the state. The court is incentivized to issue and enforce such orders against the parents because the orders trigger the ability of the juvenile court to obtain additional revenue.⁶² Such funds are available under a different federal program, the Title IV-D child support program, intended to provide funds to help state child support agencies carry out their enforcement efforts. Courts have again found a way to claim the funds as revenue for themselves: if the juvenile courts sign contracts with the state child support agency, the courts can obtain the IV-D funds when ordering and enforcing child support against the poor parents. As examples, the Lucas County juvenile court received an additional three-quarters of a million in revenue in 2013 through the IV-D child support funds,⁶³ and Cuyahoga County's juvenile courts received more than \$2.2 million in IV-D revenue in 2011.⁶⁴

The juvenile courts' decisions to order child support against parents, and enforcing those orders to repay costs of care, cause yet more harm. The courts' revenue strategy pursues impoverished parents and undermines their struggles to improve their economic circumstances in the hopes of reunifying with their children. Through such practices, courts and state agencies are using foster children as

⁶¹ Brief of the Ohio Association of Juvenile Court Judges as Amicus Curiae at 4, In re Gault 387 U.S. 1 (1967) 1966 WL 100788 at *3.

⁶² Ohio Code 2151.36.

⁶³ Lucas County Juvenile Court, 2013 Annual Report, www.co.lucas.oh.us/Archive/ViewFile/Item/617.

⁶⁴ County Council of Cuyahoga County, Ohio, Resolution No. R2011-0104, [http://council.cuyahogacounty.us/pdf_council/en-US/Legislation/Resolutions/2011/R2011-0104\\$.pdf](http://council.cuyahogacounty.us/pdf_council/en-US/Legislation/Resolutions/2011/R2011-0104$.pdf).

collateral – where parents may not be able to get their children back unless they pay off the government costs ordered after the courts have removed the children. Some states will even permanently terminate parental rights if the parents can't afford the payments.⁶⁵

Then, if one or both of Anna's parents is undocumented, the Ohio Sheriff's offices can receive revenue for incarcerating the parents. So, after the juvenile court orders Anna's removal from her home, and after ordering Anna's parents to pay support, a court could also decide to incarcerate the parents for nonsupport (which can include felony charges).⁶⁶ Then the county sheriff's office could receive revenue by jailing the undocumented parents, and could again contract with JBI to help maximize the funds, such as in Lucas County:

After reviewing the operations, characteristics, policies and procedures used by the County, and particularly the Lucas County Sheriff's Office, Justice Benefits, Inc. (JBI) will identify and optimize all federal reimbursement opportunities that may exist through participation in new programs or expansion of current Federal Financial Participation programs. Of particular interest is the State Criminal Alien Assistance Program, which provides Federal assistance to local facilities incurring costs for incarcerating undocumented criminal foreign-born individuals meeting certain criteria. Upon the County signing an Initiative with JBI for the claiming of said federal funds, JBI will become entitled to twenty-two percent (22%) of all revenue paid to the County as a direct result of JBI's activities.⁶⁷

The search for revenue from Anna is not done yet.

Juvenile Courts and Private Collection Agencies Seek Revenue Directly from Children

The juvenile court can even issue an order that Anna “reimburse any or all of the costs incurred for services or sanctions provided or imposed” (in addition to the other revenue practices in which the state takes her Social Security disability benefits and child support from her parents).⁶⁸ Because children like Anna and their parents are poor, they usually can't afford to pay back the costs in lump sum payments. So the juvenile court is given the authority to collect the resulting debt ordered against Anna, and can use private for-profit collection agencies to do so.⁶⁹ For example, the juvenile court in Columbiana County, Ohio hired Capital Recovery Systems, Inc. – “Home of the No-Cost Court Collections Program ©” – to

⁶⁵ POVERTY INDUSTRY, *supra* note 1, at 164–78.

⁶⁶ Ohio Code 2919.21.

⁶⁷ Lucas County, Ohio, Approval of Renewal Contract with Justice Benefits, Inc. for Federal Financial Participation Funding Opportunity Research for a Period of 1 Year for the Lucas County Sheriff's Office, July 26, 2016, <https://lcapps.co.lucas.oh.us/carts/resos/t8108.pdf>.

⁶⁸ Ohio Code 2152.20

⁶⁹ *Id.*

collect such unpaid court costs and fines.⁷⁰ The juvenile court avoids paying any money to the collection agency by adding the collection fee as yet an additional amount owed by the child:

The amount owed will increase once it has been turned over for debt collection. Capital Recovery Systems, Inc. does charge a fee to the Court of 30 percent of the costs collected. When an account is forwarded for collection, that fee will be added on to the account as additional costs to be collected from the parties so that the Court will not be incurring additional costs through this partnership.⁷¹

The juvenile court can also charge interest and an additional fee if the child struggles to make payments through a payment plan.⁷² Then, if the child is old enough to drive, the juvenile court may take steps to suspend her driver's license due to unpaid court costs.

Youth involved in the foster care and juvenile justice systems already face almost insurmountable barriers, including frequent homelessness after they leave state custody. Pursuing the youth for unaffordable court ordered costs, and taking their driver's license in the process, expedites the snowball effect of harm. As a Butler County, Ohio juvenile court clerk explained to a reporter, courts use license suspensions to go after the children who are "transient" because they don't consistently have a home:

"This tool (suspension) is helpful as many of our population are transient, and you can't find a good address to pursue collections," he said. "These dollars from the inactive ledger continue to be recovered when individuals later pursue driving privileges or interact with the BMV. They then will respond to their suspension and the financial obligation which prompted it."⁷³

Youth caught up in the juvenile system like Anna are supposed to be able to expunge and seal their juvenile records, but the juvenile court in Hamilton County (which includes Cincinnati) threatens juveniles that their court debts don't go away and that the failure to pay those fines and costs will block their ability to expunge their records:

Q. What happens if I don't pay my Court fines and costs?

A. Costs and fines do not go away unless they are paid. Juvenile Court has traditionally been responsive to the need of clients and allowed payment plans over a period of time.

⁷⁰ Capital Recovery Systems, Inc., www.caprecsys.com/.

⁷¹ Morning Journal, *County Juvenile Court Partners with Collection Firm*, Sep. 14, 2014, www.morningjournalnews.com/news/local-news/2014/09/county-juvenile-court-partners-with-collection-firm/.

⁷² Supreme Court of Ohio, Desktop Guide for Juvenile Court Clerks, www.supremecourt.ohio.gov/jcs/cfc/resources/juvcourtclerk.pdf.

⁷³ Denise G. Callahan, *Courts Looking at New Ways to Collect \$18.4 Million in Fines and Costs*, JOURNAL-NEWS, Nov. 29, 2013, www.journal-news.com/news/courts-looking-new-ways-collect-million-fines-and-costs/67QPf4h4Cwp8eLlHxNGyL/.

Costs and fines are debts just like any other financial obligation. Failure to pay fines and costs will prevent records being sealed or expunged.⁷⁴

In several states, children can even be locked up again for not paying back the juvenile court costs and fines, resulting in yet more costs owed and further harm to the children through the impact of incarceration.⁷⁵

Artificial Intelligence in Juvenile Courts

Looking toward the next wave of possible profit and revenue from vulnerable populations, artificial intelligence (AI) has entered the picture. In 2017, the Ohio juvenile courts began exploring a partnership with “IBM Watson” to bring AI into the judges’ courtrooms: “Montgomery County, Ohio was the first to pilot the technology in a U.S. specialty juvenile court.” According to IBM, “We signed [a juvenile court judge] up as a design partner and literally had our development and design team sit through his court.” The judge and his colleagues “helped IBM develop the digital case file by blending the local court’s experience handling tough children’s cases with the capability of Watson’s cognitive technology.”⁷⁶

The juvenile court is apparently aiming to reduce the time judges spend reviewing “so much information from so many different groups: probation officers, behavioral health providers, police departments, educators,” and seeking to rely instead on IBM Watson: “The solution beats sifting through anywhere from 30 to 300 pages of paperwork in the five to seven minutes [the judge] may have for each of 30–35 juveniles seen during a typical treatment court docket.”⁷⁷

IBM Watson is now apparently aiming at juvenile courts across the country, serving as the main “presenting sponsor” in the 2018 National Conference on Juvenile Justice.⁷⁸ IBM is not new to seeking contracts to bring automation into state programs involving vulnerable populations, as explained in a review of Virginia Eubanks book, *Automating Inequality*:

Eubanks opens the book in Indiana in 2007, where the governor signed a contract with IBM to automate the food stamp and Medicaid application process by

⁷⁴ Hamilton County Juvenile Court, Frequently Asked Questions, Juveniles, www.juvenile-court.org/juvenilecourt/FAQs/FAQ_juveniles.asp.

⁷⁵ Jessica Feierman, Juvenile Law Center, *Debtors’ Prison for Kids?*, 2016, <https://debtorsprison.jlc.org/documents/JLC-Debtors-Prison.pdf>.

⁷⁶ Chris Stewart, How to Develop the Allowable Cost Pool and Complete the Quarterly Billing Form (JFS 01797), DAYTON DAILY NEWS, Aug. 3, 2017, www.mydaytondailynews.com/news/local/hey-watson-local-judge-first-use-ibm-artificial-intelligence-juvenile-cases/InVqz6eeNxvFsMVAe5zrBL/.

⁷⁷ *Id.*

⁷⁸ National Conference of Juvenile and Family Court Judges, 2018 National Conference on Juvenile Justice, www.ncjfcj.org/2018-national-conference-juvenile-justice (listing IBM Watson as the Presenting Sponsor).

replacing local caseworkers with online applications, statistical models, and a regional call center.

“What that system did was quite explicitly sever the link between local caseworkers and the district that they served,” she says. “The result of that was *not* people getting off welfare and finding ways to self-sufficiency; the result was [a rise in] denials of benefits for basic human rights like food and medical care, a rise in extreme poverty in Indiana, and even death.”

In 2009, Indiana had pulled out of the IBM contract, alleging improper rejections, missing documents and increased wait time. . . . An appeals court in 2012 found that IBM breached its contract with the state by failing to automate the system. Six years later, IBM is still litigating its battle with Indiana over the failed automation gambit.⁷⁹

The cautionary tale should not be ignored as government programs serving children and the poor consider possible applications of new technologies. We need our states, agencies, and courts to be more human in order to be true in their purpose of serving the public good, not less so.

REALIGNING GOVERNMENT PURPOSE

States have lost their way. The revenue schemes are many, states have taken wrong turns into the intertwined web of money and harm, and private revenue contractors have helped guide them deeper and deeper down the wrong paths.

Even at state agencies and tribunals that exist to protect and serve the most vulnerable among us, the focus of agency leadership is increasingly all about the money rather than solely developing the best ways to serve their beneficiaries. States pursue short-term revenue strategies rather than long-term public good. Human service agencies create revenue maximization units at the center of their operations. Juvenile courts issue annual reports that highlight the amount of revenue they bring in.

This subversion of government purpose is undermining fiscal federalism, the intended partnership between states and the federal government in the funding and operation of America’s largest aid programs. Fiscal federalism pairs the federal government’s financial strength and ability to withstand economic downturns with the long-held view that state and local governments are better able to understand and serve the more localized needs of their vulnerable populations. So the idea is for the federal government to provide most of the funds and state governments to run the programs. However, when states use the vulnerable to maximize revenue rather than serving their best interests, the entire structure of fiscal federalism is broken.

⁷⁹ Sidney Fussell, *How Algorithmic Experiments Harm People in Poverty*, GIZMODO, Jan. 23, 2018, <https://gizmodo.com/how-algorithmic-experiments-harm-people-living-in-pover-182231248>.

During times of economic turmoil when impoverished children and families need the most help, cash-strapped states may be even more likely to use the poor rather than serve them. The only beneficiaries are the contractors that profit from the harm. Poverty industry contractors now permeate every government level that administers programs for the vulnerable.⁸⁰ In terms of the flow of aid funds, contractors profit from helping county agencies and service providers claim funds from the states, from helping states audit and reduce payout of the funds to the service providers, from helping the states claim funds from the federal government, and from helping the federal government audit and reduce payout to the states.⁸¹ Instead of collaborating to serve the public good, each level of government is pit against each other in the revenue quest. And to grease the poverty industry wheels, the contractors often hire staff directly from state and county human service agencies, and vice versa.⁸²

A realignment of state and local government purpose toward maximizing the public welfare is needed, now more than ever. In normal times, federal agencies could be called on to increase oversight over state use of aid funds, and better enforce federal requirements – to help guide states back toward the right path. But these are not normal times. As states have fallen from their purpose, the agencies in the Trump administration have not just fallen but have actively undercut federal protections and imposed more hardships on the vulnerable. With the retirement of Justice Kennedy, the Supreme Court may transform from an already weak check to an enabler of governments' disavowal and dismantling of intended purpose.

Until elections hopefully help to stop our federal government from increasingly losing its way, states are largely on their own in developing their moral compass. Similar to how several cities and at least two states have now declared themselves sanctuaries in an effort to reduce harm to immigrant children and families, we need states and local governments to find in their soul the inherent purpose of serving the vulnerable rather than using them.

We cannot sit passively in our privileged false bubbles of nonexistent protection and wait for states to discover their soul. Disorganized reactionary flailing and yelling at each other on Twitter will not help. But through organized and sustained direct action, we can provide guidance and be catalysts in expediting the right path. Litigation, legislative reform, writing, teaching, speaking out, protesting, voting, running for elected office, helping a person in need, and training others to do the same can all play a role. Again, purpose matters, and we must all regularly self-reflect so that we do not put self-interest over cause. We need the press to expose and inform to serve the greater good, putting aside the self-interested chase for ratings and money. We need advocacy groups to coalesce in the pure pursuit of their

⁸⁰ POVERTY INDUSTRY, *supra* note 1, at 44.

⁸¹ *Id.* at 44, 51–52.

⁸² *Id.* at 40–41.

nonprofit missions rather than clambering to use the hardship of others for self-interested public relations. We need professors, scholars, and researchers to expend their efforts for societal benefit rather than solely on their careers. We need to protest with the aim of achieving necessary change and not simply providing fodder for Facebook.

For if we each are not individually true to our purpose, our collective states cannot be true. We are all vulnerable, and we are all interdependent – with each other and with the government institutions that are intended to help us.

When a foster child in West Baltimore is harmed, we are all harmed. So we need to help that child.