

**JUVENILE COURT INTERAGENCY  
AGREEMENTS: SUBVERTING  
IMPARTIAL JUSTICE TO  
MAXIMIZE REVENUE  
FROM CHILDREN**

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**INTRODUCTION**

Fair and equal justice requires an independent and impartial judiciary, free from the influence or control of the other branches

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of government and other external pressures. Judicial independence is necessary for all courts, including our nation's highest Court, federal appellate courts, and the thousands of state and local courts across the country. Perhaps most strikingly, judicial independence and impartiality is crucial in juvenile and family courts in order to protect the best interests of our nation's vulnerable children.

However, America's juvenile court systems<sup>1</sup> are contracting away their independence and impartiality, using interagency contractual arrangements to maximize revenue from children. Faced with historically insufficient state and county funding,<sup>2</sup> juvenile court systems have increasingly sought out other funds and have begun entering revenue generating contractual relationships that allow the courts and agency litigants to profit from the very children they exist to protect. Many juvenile court systems are even issuing annual financial reports similar to corporations, which include details of profiteering from child litigants.

Juvenile courts, state and county prosecutors' offices, and attorneys' general offices have become active participants in a growing poverty industry,<sup>3</sup> siphoning federal funding streams that are intended to help impoverished children. These revenue efforts create financial and structural conflicts that prioritize the fiscal self-interests of juvenile court systems over their missions of serving justice and the best interests of children. The resulting conflicts undermine the independence of judicial decisions and prosecutorial discretion, violating ethical obligations and constitutionally required due process and separation of powers.

For example, Title IV-E federal foster care funds are intended to help state child welfare agencies provide foster care services to vulnerable children.<sup>4</sup> But some state juvenile courts are pursuing a contractual mechanism which allows them to claim the federal foster care funds for themselves. These mechanisms function as follows: a juvenile court signs a contract with the state executive branch agency that normally administers the state child welfare programs. Through that contract, the juvenile court becomes a subgrantee of the executive branch agency, which allows it to be

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1. This article uses the phrase "juvenile courts" in a broad sense, meaning courts that serve children and families in child support and other family law matters, and in proceedings regarding child welfare and juvenile delinquency.

2. See Michael L. Buenger, *The Challenge of Funding State Courts in Tough Fiscal Times*, 41-2 CT. REV. 14 (2004).

3. See generally DANIEL L. HATCHER, *THE POVERTY INDUSTRY: THE EXPLOITATION OF AMERICA'S MOST VULNERABLE CITIZENS* (2016).

4. 42 U.S.C. §§ 671-679b.

considered a Title IV-E foster care placing agency and makes the court itself responsible for the care and placement of children.<sup>5</sup> Then, if the court—through its judicial role—rules that a child is delinquent and should be removed from her home, the court—through its role as a child-placing agency—can claim IV-E revenue regarding services and administrative costs tied to that child. Further, the court can claim additional IV-E revenue by labeling some children “candidates” for foster care and keeping them in the system. The court literally reviews itself through these dual roles. When the court reviews its own actions as a child-placing agency favorably, it receives more federal funds. After entering these interagency contracts with executive branch agencies in order to claim IV-E revenue from children, some courts further contract with a private revenue maximization consultant who promises to help maximize the revenue from children for a contingency fee.<sup>6</sup>

Further, juvenile courts, state prosecutors’ offices, and attorneys’ general offices also use contractual arrangements to generate revenue from child support. Similar to IV-E foster care funds, the Title IV-D child support program is intended to provide funds to help state executive branch child support agencies carry out their enforcement efforts. However, many juvenile courts are now claiming these funds as revenue for themselves by contracting with the state agencies.<sup>7</sup> Through these contracts, juvenile courts hold a financial stake in the issuance and enforcement of child support obligations, and could be incentivized to act against the best interests of children in a variety of situations, including pursuing bonus incentive payments based on their performance percentages.

Such conflict resulting from the courts’ financial incentives is present in all child support cases, but poses a particular concern in those cases where support payments are owed to the government rather than to the children. When impoverished parents receive cash assistance, or when children are removed from their homes due to allegations of abuse and neglect or juvenile delinquency, state child support agencies seek orders against the parents to pay child support to reimburse the government costs.<sup>8</sup> Although still called child support, the money is owed to the state rather than to

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5. See *infra* notes 56–72 and accompanying text.

6. See *infra* notes 73–75 and accompanying text.

7. See *infra* notes 91–119 and accompanying text.

8. See generally Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029 (2007); Daniel L. Hatcher, *Collateral Children: Consequence and Illegality at the Intersection of Foster Care and Child Support*, 74 BROOKLYN L. REV. 1333 (2009).

the children. When juvenile courts have established the aforementioned interagency contracts, they receive these payments, and the more they initiate and enforce such support obligations, the more money they can make for themselves.

Several state prosecutors' and attorneys' general offices are also joining the courts' revenue strategies, entering interagency agreements in order to maximize both IV-E foster care and IV-D child support revenue from children.<sup>9</sup> Just as pursuit of funding can have an inappropriate influence on judicial decisions, pursuit of funding can conflict with prosecutorial discretion. For example, prosecutorial decisions about whether to initiate and enforce child support obligations and how to enforce the obligations, are supposed to be guided only by considerations of justice and the best interests of children. However, these contracts financially incentivize prosecutors to initiate and maximize child support orders and enforcement mechanisms against impoverished parents. These financial incentives are doubled in cases of state-owed support.<sup>10</sup> The revenue maximization strategy harms the efforts of low-income parents to obtain economic stability in order to better care for their children, and undermines the efforts of parents to reunite with their children who have been temporarily removed into foster care. Foster children are used as collateral in a vicious cycle. The more support obligations prosecuted and enforced, the more IV-D revenue generated for the prosecutors' and attorney's general offices, and parents may never get their children back unless they pay off the state-owed child support.

This article will expose and analyze the above funding strategies and their resulting harm. Part I describes the foundational role of state court systems in America, especially juvenile courts. Parts II and III explain how state juvenile courts and prosecutors' and attorneys' general offices are increasingly using interagency contracts to maximize federal foster care and child support funds. Finally, Part IV provides an analysis of how contractual revenue maximizing strategies are subverting the mission and independence of the juvenile court systems to the point of unconstitutional and unethical conduct—thereby causing harm to children, to parents, and to us all.

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9. See *infra* notes 120-136 and accompanying text.

10. See 42 U.S.C. §658a(b)(5)(C).

I.  
STATE JUVENILE COURTS: FROM FOUNDATIONAL  
JUSTICE TO EFFICIENCY-SEEKING  
FACTORIES

The strength of any structure lies in its foundation, and America's judicial system is no exception. But in our courts, attention is typically aimed toward the top. Federal courts are generally viewed as more prestigious than state courts, with federal appellate courts ranking highest. Most judges and law clerks alike aspire for the federal judiciary and seek to move from federal district court appointments to the courts of appeal, and then few up to the U.S. Supreme Court. Within state court systems, the state appellate courts are again viewed as more prestigious than trial courts.

This ranking of prestige is inverted from reality. Over ninety-five percent of all U.S. cases are in state courts, not federal.<sup>11</sup> Of those state court cases, over ninety-nine percent are in the state trial courts—the courts of first resort.<sup>12</sup> However, these courts that are charged with handling the vast majority of cases are overwhelmed as they struggle with insufficient state and county funding, crowded dockets, frustrated or jaded judges, and inadequate legal representation. Unfortunately, this problem is at its worst in the courts serving most of America's children and impoverished adults.

A. *The Neglected Importance of State Juvenile Courts*

Attorneys often consider juvenile court as a stepping stone: “In most jurisdictions, the prosecuting attorneys and public defenders assigned to the juvenile court are some of the least experienced in their offices; these assignments are used as a training ground for new lawyers to learn state laws, rules of procedure, and trial techniques.”<sup>13</sup> Similarly, this “phenomenon is also generally true in judicial assignments to the juvenile court,” as the “[j]udges are rotated

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11. R. LaFountain et al., *Examining the Work of State Courts: An Analysis of 2009 State Court Caseloads*, NAT'L CENT. FOR STATE COURTS (2011), <http://www.courtstatistics.org/FlashMicrosites/CSP/images/CSP2009.pdf> [<https://perma.cc/WT2A-G839>] (showing that 95 percent of U.S. cases are filed in state courts).

12. Court Statistics Project, *State Court Caseloads Digest: 2017 Data*, NAT'L CENT. FOR STATE COURTS 2, 16 (2019), <http://www.courtstatistics.org/~media/Microsites/Files/CSP/Overview/CSP%202017%20Data%20-%20Spreads%20for%20viewing.ashx> [<https://perma.cc/WAK4-2AXS>] (showing that of state court filings in 2017, 83 million were in state trial courts, compared to 241 thousand in state appellate courts).

13. JOSH WEBBER ET AL., *TRANSFORMING JUVENILE JUSTICE SYSTEMS TO IMPROVE PUBLIC SAFETY AND YOUTH OUTCOMES* 8 (2018).

to give them experience on the bench as they prepare for assignment into divisions that are deemed more prestigious and of greater importance than juvenile court, such as criminal and civil courts.”<sup>14</sup> This ladder of prestige is also present in journalism: “Just as the juvenile court is considered the least prestigious assignment among judges and attorneys, the juvenile beat often doesn’t hold a lot of prestige within the newsroom.”<sup>15</sup>

This perception has an impact. The “lower” level state trial courts—including juvenile courts—have long struggled with insufficient state and county funding despite handling the largest caseloads. A 1966 law review article describes the New York Family Court:

“It is a poor man’s court.” . . . Each morning a hundred stories of poverty are suggested by the faces and the personal effects of those who wait to appear before the judges. The cold atmosphere of the room only intensifies the feelings of helplessness, fear, and frustration which accompany poverty. “[C]ourtooms are bare, toilet walls are defaced. The court’s waiting rooms resemble those at hospital clinics.”<sup>16</sup>

Over fifty years later, not much has changed. Many judges and masters have tried their best to carry out justice in such circumstances but are overwhelmed by the numbers. The fear, helplessness, and frustration—the cold atmosphere of poverty—continues. Therefore, facing decades of insufficient funding, juvenile courts have simultaneously evolved through Darwin-like self-preservation, finding ways to maximize revenue from the poverty.

### B. *Juvenile Courts as Efficiency-Seeking Factories*

Juvenile court systems are inserted into local government budget structures where they must struggle for their own funding while simultaneously contributing to broader revenue strategies for their parent states and counties.<sup>17</sup> For example, a news report from Victoria, Texas explains how the county juvenile detention center is

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14. *Id.*

15. Jill Wolfson & John Hubner, *Inside the Juvenile Justice System*, NIEMAN REP. (Dec. 15, 1998), <https://niemanreports.org/articles/inside-the-juvenile-justice-system/> [https://perma.cc/4T93-G6BB].

16. Monrad G. Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CAL. L. REV. 694 (1966).

17. See generally James W. Douglas & Roger E. Hartley, *The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process?*, 63 PUB. ADMIN. REV. 441 (2003); Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217 (1993).

used to maximize county revenue by housing children sentenced by juvenile court judges from multiple jurisdictions:

Victoria County is projected to almost double the revenue it brings in by housing youths from outside the county in its juvenile detention center, showing a shift in the economics behind the facility.

The proposed 2019 budget for Victoria County projects that contracts at the juvenile center will bring in almost \$2.3 million for the county in the next budget year. In 2015, the county brought in about \$1.2 million from contracts with other counties. The county has contracts with about 50 other counties, most of which don't have secure facilities to hold kids and teenagers who courts determine require supervision.

*County Judge Ben Zeller credited the juvenile detention center as a growing source of revenue for the county that helped to offset a decline in property values.* "We have a lot of improvements out at the juvenile detention center," Zeller said at the Aug. 6 budget workshop. "Due to our work out there in improving trends, increasing populations, better payment rates, we were able to budget upward \$450,000 in revenue at juvenile detention."<sup>18</sup>

While participating in revenue strategies for their county and state governments, juvenile courts face historically inadequate funding for their own operations.<sup>19</sup> Adapting to their constant need for funds, the courts started searching for ways to reduce costs and increase revenue, sometimes running more like efficiency-seeking factories than justice-seeking courts. Many of the courts now publish annual reports, similar to those published by companies for their shareholders, which focus on their financials. Unfortunately, many courts have become just as profit-focused as those public companies. The juvenile court in Cuyahoga County, Ohio, one of the courts using interagency contracts to profit from children, also explains its evolution to seek efficiency and revenue in the face of ongoing budget concerns:

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18. Ciara McCarthy, *Revenue From Juvenile Detention Center Shows Growing Trend for Victoria County*, VICTORIA ADVOCATE (Sept. 8, 2018) (emphasis added), [https://www.victoriaadvocate.com/news/government/revenue-from-juvenile-detention-center-shows-growing-trend-for-victoria/article\\_434d6a6e-b218-11e8-849d-1f19478df37d.html](https://www.victoriaadvocate.com/news/government/revenue-from-juvenile-detention-center-shows-growing-trend-for-victoria/article_434d6a6e-b218-11e8-849d-1f19478df37d.html) [<https://perma.cc/TB3C-P4A9>].

19. See, e.g., Paulsen, *supra* note <CITE \_Ref37756408>; Alison Kitchens & Andrew Damstedt, *Day in Juvenile Court Reveals Challenges for All Parties*, CAP. NEWS SERV. (May 6, 2011), <https://cnsmaryland.org/2011/05/26/day-in-juvenile-court-reveals-challenges-for-all-parties/> [<https://perma.cc/H6C9-PZ4A>].

The juvenile court identified significant savings and revenue enhancements that may equal \$5 million. . . . The 2016 budget for the juvenile court was cut by nearly 4%. In 2017, the budget was cut again about 6%. And for the 2018, the budget was cut by over 6%. . . . The Court is working hard to make numerous cuts and to increase revenues for the 2018-2019 biennium . . . .<sup>20</sup>

As one of their cost reduction strategies, many high volume court proceedings impacting vulnerable populations are not held before actual judges but rather before other judicial officials such as magistrates, masters, officers, or referees—who in some states are not even required to be attorneys. Juvenile court “referees” in New Jersey are not required to be lawyers and only need a four-year college degree.<sup>21</sup> North Carolina magistrates who decide civil and criminal cases do not need a college degree,<sup>22</sup> and North Carolina also allows non-attorney juvenile court counselors to issue custody orders.<sup>23</sup> And in Alaska, magistrates who can hear all sorts of criminal, civil, and juvenile matters do not even need a high school degree—but simply to be 21 and a citizen of the state.<sup>24</sup> However, the situation is not always much better in states with seemingly stricter requirements. For example, Pennsylvania does require that its juvenile court hearing officers be licensed attorneys, but only requires the attorneys to receive 6 hours of specific juvenile law instruction before they start deciding the fate of children.<sup>25</sup> As a comparison, Pennsylvania requires 600 hours of training before someone can be a licensed massage therapist.<sup>26</sup>

Further, to increase efficiencies and possible revenue streams, the courts have brought multiple non-judicial services in house, with the juvenile court judges running their courts more like large

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20. CUYAHOGA CNTY. COURT OF COMMON PLEAS-JUV. DIV., 2017 ANNUAL REPORT 6 (2017), [http://juvenile.cuyahogacounty.us/pdf\\_juvenile/en-US/AnnualReports/2017AnnualReport.pdf](http://juvenile.cuyahogacounty.us/pdf_juvenile/en-US/AnnualReports/2017AnnualReport.pdf) [<https://perma.cc/2HTJ-9TAN>].

21. SUP. CT. OF N.J., JUVENILE REFEREE PROGRAM STANDARDS (2000), <https://www.njcourts.gov/notices/n001207a.pdf> [<https://perma.cc/XJ9Z-GXLF>].

22. *The Important Role of the North Carolina Magistrate*, JUDICIAL BRANCH OF N.C. (2018), [https://www.nccourts.gov/assets/documents/publications/Magistrates\\_FactSheet\\_2018\\_0.pdf](https://www.nccourts.gov/assets/documents/publications/Magistrates_FactSheet_2018_0.pdf) [<https://perma.cc/Z5UH-SNP2>] (“The candidate also must have a four-year college degree or eight years of work experience as a clerk of superior court; or a two-year associate degree and four years of work experience in a job related to the court system.”).

23. N.C. GEN. STAT. § 7B-1902 (1979).

24. Job Posting for Magistrate Judge II, WORKPLACE ALASKA (2013), <https://agency.governmentjobs.com/alaska/default.cfm?action=jobbulletin&JobID=692861> [<https://perma.cc/M4CK-QSDD>].

25. 237 PA. CODE § 1182.

26. 49 PA. CODE § 20.11.

revenue-generating factories while simultaneously doling out decisions in the children's cases. Two county juvenile courts provide examples.

1. Juvenile Division, Common Pleas Court of Montgomery County, Ohio

In Montgomery County, Ohio, an annual report explains that the county's juvenile court, which has only two actual judges and about ten magistrates (who often cannot issue orders but only recommendations that must be adopted by the judges), handled over 21,000 new cases in 2017.<sup>27</sup> Although the court only has two judges, a large organization of 400 employees has grown beneath the judges, combining what are typically intended to be many independently run departments under one roof.<sup>28</sup> The court runs the programs, with the head Administrative Judge in charge.

The court runs its own detention center for children it decides to detain, which holds children as young as 8 years old.<sup>29</sup> The entire juvenile probation department also falls under the control of the court, although it is intended to independently carry out multiple types of investigations, supervisions, and related services and to provide recommendations to the judge.<sup>30</sup> The court started its own in-house psychological services department, which is supposed to conduct independent evaluations that are then used by the judge.<sup>31</sup> The Court Appointed Special Advocate Program supervises the guardians ad litem who are supposed to independently advocate for children's interests, but the program is overseen by the court.<sup>32</sup> Similarly, the Citizen's Review Panel is supposed to provide an independent review of the juvenile court and agency process for in-

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27. COMMON PLEAS CT. OF MONTGOMERY CNTY., 2017 REPORT TO THE CITIZENS OF MONTGOMERY COUNTY 31–42 (2017), [https://www.mcoho.org/2017\\_Report\\_to\\_the\\_Citizens\\_of\\_MC\\_04\\_05\\_18.pdf](https://www.mcoho.org/2017_Report_to_the_Citizens_of_MC_04_05_18.pdf) [<https://perma.cc/FD4J-RF5P>]; see also Ohio R. Civ. P. 53.

28. See COMMON PLEAS CT. OF MONTGOMERY CNTY., 2018 REPORT TO THE CITIZENS OF MONTGOMERY COUNTY 23–35 (2018), <http://www.mcjcoho.org/Files/Annual.Report/2018-Common-Pleas-Court-Annual-Report.pdf> [<https://perma.cc/47TG>].

29. Jimmie L. Carter, *Detention*, MONTGOMERY CNTY JUV. CT., <http://www.mcjcoho.org/Department/Detention/default.asp> [<https://perma.cc/A9X8-9HFN>] (last visited Apr. 7, 2020).

30. COMMON PLEAS CT. OF MONTGOMERY CNTY.-JUV. DIV., 2018 ANNUAL REPORT 43, <http://www.mcjcoho.org/Files/Annual.Report/2018-JC-Annual-Report.pdf> [<https://perma.cc/4ZGV-LKNZ>].

31. *Id.* at 46.

32. *Id.* at 43.

volved children, but it is run by the court.<sup>33</sup> Further, the court operates its own residential treatment centers that house children removed from their homes and allow the court to maximize revenue from the children through the interagency contracts analyzed in Part II.<sup>34</sup> The court even maintains its own school.<sup>35</sup> All of the employees, including the teachers, serve “at the pleasure of the Administrative Judge,” putting them directly under the control of the court.<sup>36</sup>

The Administrative Judge indicated that he may only have six to ten minutes for each child’s case in the juvenile treatment court docket.<sup>37</sup> Rather than hiring more judges to handle the large caseloads, the juvenile court sought to increase efficiency by becoming an IBM Watson design partner in order to use artificial intelligence in the court room. The judge describes the use of IBM Watson to provide decisions in children’s cases: “Watson accumulates information, and the more information it gets, the more it learns . . . . [T]he concept is that as we feed into Watson more scenarios, it will be able to give back to me in a year or 18 months suggested solutions to a problem.”<sup>38</sup> The juvenile court judge was elected President of the National Council of Juvenile and Family Court Judges in 2017,<sup>39</sup> and IBM Watson became the lead sponsor of the organization’s national conference the following year.<sup>40</sup>

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33. *Id.*

34. *Id.* at 9.

35. Carter, *supra* note 29.

36. Job Posting for Science Teacher, COMMON PLEAS COURT OF MONTGOMERY COUNTY-JUVENILE DIVISION (2019), <http://www.mcjcoho.org/Files/HRJobPostings/SCIENCE%20TEACHER%20-%207-2-2019-Until%20Filled.pdf> [<https://perma.cc/TZ74-TRMH>].

37. *Montgomery County Juvenile Court*, IBM, <https://www.ibm.com/case-studies/montgomery-county-juvenile-court> [<https://perma.cc/6R3M-3SLZ>] (last visited Apr. 7, 2020).

38. Chris Stewart, *County First to Use IBM Watson’s Supercomputer on Juvenile Cases*, DAYTON DAILY NEWS, (Aug. 3, 2017), <https://www.daytondailynews.com/news/local/hey-watson-local-judge-first-use-ibm-artificial-intelligence-juvenile-cases/InVqz6eeNxxFsMVAe5zrbL/> [<http://perma.cc/ZB5L-FPJJD>].

39. Marisol Zarate, *Ohio Judge Elected President of National Council of Juvenile and Family Court Judges*, CHRON. SOC. CHANGE (Aug. 8, 2017), <https://chronicleof-socialchange.org/news-2/ohio-judge-elected-president-national-council-juvenile-family-court-judges/27751> [<https://perma.cc/LE7Z-NG6L>].

40. NAT’L COUNCIL OF JUV. AND FAM. CT. JUDGES, 2018 NATIONAL CONFERENCE ON JUVENILE JUSTICE (2018), <https://ncjfcj-old.ncjfcj.org/2018-national-conference-juvenile-justice>. [<https://perma.cc/GJR4-R9EX>].

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## 2. Juvenile Court of Memphis and Shelby County, Tennessee

In Shelby County, Tennessee, the juvenile court heard over 45,000 cases in 2017, with only one actual judge and about ten magistrates who serve at “the pleasure of the judge.”<sup>41</sup> The court’s annual report describes a focus on revenue and efficiency: “The goal of the Clerk’s Office in 2017 was to continue to function efficiently and effectively, to respond to the needs of the families of our community, and to generate revenue through collection of court ordered fines and fees, grant contracts and state reimbursement to offset the cost of court operation.”<sup>42</sup>

The court charges children \$150 a day when it orders the children to be held in its detention center.<sup>43</sup> Much like the court in the previous section, this court runs its own corrective and protective services departments, probation services, psychological services, a school, and multiple other programs intended to be independent but that report to the judge.<sup>44</sup> The guardian ad litem program, which provides the legal representation for both children and parents, has also been operated by the court.<sup>45</sup> Further, as described in Part III, the court is one of several state juvenile courts that have entered interagency contracts to maximize revenue from federal IV-D child support funds when the court issues and enforces orders against impoverished parents.<sup>46</sup>

While the court has tried to run like an efficiency-seeking factory, it has failed at administering equal justice. The court’s 2008 annual report asserts that “[m]any juvenile justice initiatives undertaken at this Court have been adopted as models for other programs in Tennessee and across the nation.”<sup>47</sup> However, the U.S. Department of Justice’s Civil Rights Division began an investigation into the court the following year in 2009, resulting in its 2012 report finding that the juvenile court “fails to provide constitutionally

41. JUV. CT. OF MEMPHIS AND SHELBY CNTY., ANNUAL REPORT (2017), <https://www.shelbycountyttn.gov/DocumentCenter/View/32885/Annual-Report-2017> [<https://perma.cc/W8Q4-32V3>]; See TENN. CODE ANN. § 37-1-107 (2020).

42. JUV. CT. OF MEMPHIS AND SHELBY CNTY., ANNUAL REPORT, *supra* note 41, at 7. R

43. *About the Detention Centers*, SHELBY CNTY, TENN., <https://www.shelbycountyttn.gov/378/About-the-Detention-Centers> [<https://perma.cc/9PFQ-8RWG>] (last visited Apr. 4, 2020).

44. JUV. CT. OF MEMPHIS AND SHELBY CNTY., ANNUAL REPORT, *supra* note 41. R

45. *Id.* at 9.

46. See *infra* notes 911-119 and accompanying text. R

47. JUV. CT. OF MEMPHIS AND SHELBY CNTY., ANNUAL REPORT 2 (2008), <https://www.shelbycountyttn.gov/DocumentCenter/View/11677/2008-Annual-Report?bidId=> [<https://perma.cc/26TY-M9YB>].

required due process to children of all races,” the court’s “administration of justice discriminates against Black children,” and the court “violates the substantive due process rights of detained youth by not providing them with reasonably safe conditions of confinement.”<sup>48</sup> As a result, the court entered a memorandum of agreement to implement numerous improvements recommended by the Department of Justice, with ongoing monitoring. However, when the Trump Administration took control, the Department of Justice ended the agreement and oversight after a request to do so from the Shelby County Juvenile Court judge, mayor, and sheriff.<sup>49</sup>

Despite the decision by the DOJ to end the monitoring, the due process monitor—who had been monitoring the agreement since 2012—entered a final report on December 10, 2018. The report concluded that “the structure of the Juvenile Court of Memphis and Shelby County remains deeply flawed enabling a culture of intimidation that undermines due process,” and that “[t]he abrupt termination of oversight by the United States Department of Justice, Civil Rights Division (DOJ) on October 19, 2018 failed to recognize that Juvenile Court has actively resisted compliance with the word and the spirit of the Agreement and is likely to result in the Court reverting to prior practices.”<sup>50</sup> As an example, the report describes how the juvenile court continued a structure where the judge exerted control and intimidation over children’s attorneys.<sup>51</sup> The University of Memphis School of Law created a Children’s Defense Clinic in 2016 to help provide independent legal representation, but after “the airing of a podcast where the Clinic Director expressed concerns about the conditions of confinement in the juvenile detention center, the juvenile court judge responded by instructing the Panel Coordinator to stop assigning cases to the clinic.”<sup>52</sup> According to the report, the judge emailed the Dean of the Law School and the President of the University to complain and stated “that since the Court had ‘no input’ into who was hired for the clinical position and because the law school failed to ‘discipline

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48. U.S. DEP’T. OF JUST., INVESTIGATION OF THE SHELBY COUNTY JUVENILE COURT 1 (2012).

49. Wendi C. Thomas, *Juvy Court’s Discrimination Goes On, But Mayor Wants Federal Oversight to End*, MLK50 (June 18, 2017), <https://mlk50.com/juvy-courts-discrimination-goes-on-but-mayor-wants-federal-oversight-to-end-cc8e6af6f4a3> [<https://perma.cc/P5CR-DRRU>].

50. SANDRA SIMKINS, U.S. DEP’T OF JUST., FINAL REPORT ON SHELBY COUNTY JUVENILE COURT 1 (2008).

51. *Id.* at 3.

52. *Id.*

its staff’ the Court’s decision to stop assigning cases was final.”<sup>53</sup> The Monitor’s report provided copies of emails from the juvenile court’s chief legal officer and the Juvenile Defender Panel’s coordinator that used derogatory and offensive language against the clinic director.<sup>54</sup> The law school ultimately discontinued the Children’s Defense Clinic. The juvenile court’s judge was elected treasurer of the National Council of Juvenile and Family Court Judges in 2018, with the organization’s press release calling him a trailblazer in his home state, and he was subsequently elected president of the organization in 2020.<sup>55</sup>

## II. JUVENILE COURTS MAXIMIZING REVENUE FROM IV-E FOSTER CARE FUNDS

Expanding their efforts to run like revenue seeking businesses, juvenile courts are entering contracts with the executive branch of state governments and using children as the commodity. For example, the federal government provides Title IV-E foster care funds to help state child welfare agencies provide foster care services to children. However, some state juvenile courts are entering contracts which allow them to take over the foster care agency executive branch function and claim the funds for themselves.

Before turning to the details, it is important to consider the children and families who are used in this revenue strategy. Children involved in the foster care and juvenile justice systems usually do not come from wealthy, or even middle-class, families. Rather, the parents have often faced years of poverty, incidences of homelessness, lack of education, domestic violence, struggles with addiction, mental illness, and lack of healthcare. When the children are

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53. *Id.* at 34–37.

54. *Id.* (including emails from the court’s Chief Legal Officer saying, in reference to the clinic director, “Did she spend her Christmas break with the Stepford Wives? I may barf!” to which the court’s Juvenile Defender Panel Coordinator indicated, “I was thinking more Mommy Dearest,” and the Chief Legal Officer later replied, “She really is trailer park trash.”).

55. *Judge Dan H. Michael Elected as Treasurer to NCJFCJ Board of Directors*, NAT’L COUNCIL OF JUV. AND FAM. CT. JUDGES (Sept. 1, 2018), <https://www.ncjfcj.org/news/judge-dan-h-michael-elected-as-treasurer-to-the-ncjfcj-board-of-directors-2/#:~:text=%d2%80%93%20The%20National%20Council%20of%20Juvenile,%2C%E2%80%9D%20said%20Judge%20John%20J> [https://perma.cc/DBK5-R3LZ]; *Judge Dan H. Michael Elected as 76th President of the NCJFCJ*, NAT’L COUNCIL OF JUV. AND FAM. CT. JUDGES (July 22, 2020), <https://www.ncjfcj.org/news/judge-dan-h-michael-elected-as-76th-president-of-the-ncjfcj/> [https://perma.cc/N53L-7W9Z].

removed from their homes rather than providing needed services to families, they often face further difficulties in the “system”—overcrowded juvenile courts, over-worked social workers, poorly monitored foster placements, and unsafe group homes. Children who have struggled with the trauma of poverty can face even greater trauma after entering the foster care system, and the statistics are daunting as they leave foster care. Studies have indicated foster children suffer from post-traumatic stress disorder at almost twice the level of war veterans, many experience homelessness, more than half experience unemployment, twenty-five percent do not graduate from high school, and only two percent obtain a bachelor’s degree. Further, a past study found that almost eighty-two percent of former foster males had been arrested by age twenty-six. These are the children and families subjected to the revenue strategies, as described in more detail below.

The analysis begins in Ohio, where at least thirty of the county juvenile court systems are pursuing IV-E funds to maximize court revenue when they order children removed from their homes and when they label children as “foster care candidates.”<sup>56</sup> The courts signed interagency contracts (“subgrant agreements”) with the Ohio Department of Job and Family Services, the state agency that includes the child welfare agency.<sup>57</sup> Normally, state child welfare agencies, which are part of the executive branch, are responsible for operating state foster care services—including the receipt of IV-E federal foster care funding to help run the agency services. However, through these subgrant agreements, the Ohio juvenile courts have contracted to take over the executive branch functions while simultaneously carrying out their judicial branch functions. Through the agreements, the juvenile courts contract to act as Title IV-E placing agencies, so when juvenile court judges rule that children are “unruly” or delinquent and should be removed from their family homes, the courts are literally removing the children to themselves so they can receive the IV-E funds.<sup>58</sup> The financial pay-off to the courts for entering these contracts is significant. In Summit County, Ohio, just one of the thirty-two participating county

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56. OHIO DEP’T OF JOBS & FAM. SERVS., TITLE IV-E JUVENILE COURT CONTACT LIST (Mar. 2020), <http://jfs.ohio.gov/ocf/JuvenileCourtContactList.sum> [<https://perma.cc/CDU8-74UF>].

57. *See, e.g.*, OHIO DEP’T OF JOB AND FAM. SERVS., LUCAS CNTY. JUV. CT. SUBGRANT AGREEMENT, G-1819-06-0131 (2017); OHIO DEP’T OF JOB AND FAM. SERVS., SUMMIT CNTY. JUV. CT. SUBGRANT AGREEMENT, G-1213-06-0242 (2009).

58. *See* SUMMIT CNTY. JUV. CT. SUBGRANT AGREEMENT, *supra* note 57, at 1.

court systems, the juvenile court received over \$1.1 million in IV-E revenue annually through this strategy as of 2015.<sup>59</sup>

For the Ohio courts to generate revenue after ordering child removals, the children and the placements must be IV-E eligible.<sup>60</sup> The courts can choose between several eligible options, including “non-secure settings such as foster care, group homes, treatment foster care, residential treatment facilities and other child care institutions.”<sup>61</sup> Although the IV-E requirements limit the size of public facilities to no more than twenty-five beds, there is no restriction on the size of private facilities, and “both in-state and out-of-state residential programs qualify, as do non-profit and for-profit organizations.”<sup>62</sup> The state agency provides a list of hundreds of organizations for the courts to choose from, listing their costs in a manner which amounts to a bidding process for the children.<sup>63</sup> Additionally, some of the juvenile courts, like the court in Montgomery County, even run their own IV-E qualifying residential treatment centers.<sup>64</sup>

Only impoverished children are eligible to be used in this IV-E funding strategy. Unless a child’s family is poor enough for welfare cash assistance, the juvenile court cannot receive IV-E funds after removing the child from her home.<sup>65</sup> In light of this, the Ohio child welfare agency’s Bureau of Fiscal Operations provided a training for juvenile courts about how to maximize IV-E funds, including the importance of the “penetration rate” (also termed the “eligibility ratio or “discount rate”)—a measure which involves the percentage of children removed from their homes who are IV-E eligible (and thus from poor families). As described in the training, the penetration rate is determined by “[t]he number of placement days experienced by Title IV-E program eligible children housed in al-

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59. SUMMIT CNTY. CT. OF COMMON PLEAS JUV. DIV., 2015 ANNUAL REPORT (2015), <https://juvenilecourt.summitoh.net/index.php/information/publications/reports/finish/17-annual-reports/1254-annual-report-2015> [https://perma.cc/38FH-HREE].

60. See LUCAS CNTY. JUV. CT. SUBGRANT AGREEMENT, *supra* note 57.

61. *Using Federal Title IV-E Money to Expand Sanctions and Services for Juvenile Offenders*, 2 TRAINING & TECHNICAL ASSISTANCE PROGRAM BULL. 1, 4 (2004).

62. *Id.*

63. STATE OF OHIO, TITLE IV-E REIMBURSEMENT CEILINGS FOR APRIL 1, 2019 THROUGH MARCH 21, 2020 (2020), <https://jfs.ohio.gov/ocf/IVECeilings1920.stm> [https://perma.cc/KBB9-A6U8].

64. COMMON PLEAS CT. OF MONTGOMERY CNTY.-JUV. DIV., *supra* note 34 and accompanying text.

65. Shardé Armstrong, *The Foster Care System Looking Forward: The Growing Fiscal and Policy Rationale for the Elimination of the “AFDC Look-Back,”* 17 N.Y.U. J. LEGIS. & PUB. POL’Y 193, 209–12 (2014).

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lowable settings DIVIDED BY the total number of placement days experienced for all children in custody/care placements for the reporting period.”<sup>66</sup> The resulting ratio can be multiplied by several administrative costs to determine how much IV-E funding the courts can claim. Thus, the greater the percentage of poor children removed by the courts into foster care, and the longer those poor children are held in foster care as compared to non-poor children, the more money the juvenile courts can obtain. Considering the incentives, a demographic comparison is striking: the percentage of Ohio foster children from poor families reached seventy-seven percent by 2014, although Ohio’s statewide poverty rate was 14.6%.<sup>67</sup>

Often, the greatest amount of the IV-E revenue generation for juvenile courts involves administrative costs. Once the court removes a IV-E child from the home, the court can begin using the child almost like a commodity to fund a long list of court operational costs, such as:

- Payroll and fringe benefit costs of court staff,
- equipment and supply costs,
- postage and telephone costs,
- the cost of liability insurance,
- travel and per diem costs,
- costs of rent, leases and utilities,
- a listing of over a dozen categories of training costs,
- costs of contracted services,
- and other “shared administrative costs” which can include the costs of court staff such as administrative assistants and receptionists, and utilities and supplies.<sup>68</sup>

The courts can even use IV-E children to seek funding for depreciation of their court buildings.<sup>69</sup> Then, the courts will engage in a pyramid-like strategy: after using the children to pursue all the potential IV-E revenue for administrative costs, the courts will circle

66. OHIO DEP’T OF JOB AND FAM. SERVS., HOW TO ALLOCATE COSTS (DEVELOP THE ALLOWABLE COST POOL) AND COMPLETE THE QUARTERLY BILLING FORM (JFS 01797) FOR TITLE IV-E 5, 56, [http://jfs.ohio.gov/ocf/JVCIV\\_ECostAllocation\\_QBillTrain020613Final1.stm](http://jfs.ohio.gov/ocf/JVCIV_ECostAllocation_QBillTrain020613Final1.stm) [<https://perma.cc/2QTZ-654P>] (last visited Mar. 30, 2020).

67. *Child Welfare Financing SFY 2014, Ohio*, ANNIE E. CASEY FOUND. (2014), [https://www.childtrends.org/wp-content/uploads/2016/10/Child-Welfare-Financing-SFY2014\\_Ohio.pdf](https://www.childtrends.org/wp-content/uploads/2016/10/Child-Welfare-Financing-SFY2014_Ohio.pdf) [<https://perma.cc/QRQ4-LBXC>].

68. See HOW TO ALLOCATE COSTS, *supra* note 66; LUCAS CNTY. JUV. CT. SUBGRANT AGREEMENT, *supra* note 57, at Attachment B.

69. See HOW TO ALLOCATE COSTS, *supra* note 66; LUCAS CNTY. JUV. CT. SUBGRANT AGREEMENT, *supra* note 57, at Attachment B.

back to seek additional IV-E revenue for the costs of pursuing revenue for the administrative costs.<sup>70</sup>

Training materials advise the juvenile courts on how they can increase their IV-E revenue from children by claiming more administrative costs than actually occur, through what is essentially an accounting gimmick. The training provides an example that although the “actual costs” of supplies for the juvenile court IV-E staff may be \$2,000, the court can instead use a “Percentage of Full Time Equivalent (FTE) Method” in order to charge \$2,500, or twenty-five percent more than the actual costs.<sup>71</sup> Using such a method for administrative costs, the courts would be knowingly submitting IV-E claims that are not accurate.

As an example of the pay-off from administrative cost claiming, when the Lucas County Juvenile court used IV-E children in 2016 to generate \$123,124.12 in revenue for foster care placement reimbursement, the court also parlayed those children into \$457,381.01 in IV-E funding for administrative costs—almost four times the amount of direct services.<sup>72</sup>

Realizing the potential revenue, Lucas County and many other of the Ohio juvenile courts hired a private revenue contractor, Justice Benefits, Inc. (JBI), to help maximize the IV-E funds from children. The company explains that it engages in “federal revenue maximization for state and local political entities,” that “[w]e specialize in Enhanced IV-E Administrative Claiming,” that “JBI has been working with Ohio Juvenile Courts since 2003,” and that “[c]urrently, JBI works with over 20 Ohio Juvenile Courts to successfully file IV-E quarterly claims.”<sup>73</sup> A Miami County Commissioner’s Meeting explains that a contingency-fee contract with JBI helps the juvenile court to 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.”<sup>74</sup> Thus, each time the Ohio

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70. HOW TO ALLOCATE COSTS, *supra* note 66.

71. *Id.*

72. LUCAS CNTY. JUV. CT., 2016 ANNUAL REPORT 35 (2016), <http://www.co.lucas.oh.us/DocumentCenter/View/70170/2016-Annual-Report-LCJC> [<https://perma.cc/2V9E-K75X>].

73. *Web Bases System for the Ohio Juvenile Courts*, JUSTICE BENEFITS, INC., <http://jfs.ohio.gov/ocf/WebBasedRMSinformation.pdf> [<https://perma.cc/6SDG-M8BP>]; *see also* MIAMI CNTY., OHIO, COMMISSIONERS MEETING MINUTES SUMMARY (July 19, 2018), [http://jfs.ohio.gov/ocf/JVCIV\\_ECostAllocation\\_QBillTrain020613Final1.stm](http://jfs.ohio.gov/ocf/JVCIV_ECostAllocation_QBillTrain020613Final1.stm) [<https://perma.cc/2QITZ-654P>].

74. MIAMI CNTY., OHIO, COMMISSIONERS MEETING MINUTES SUMMARY (Dec. 30, 2014), <https://www.co.miami.oh.us/ArchiveCenter/ViewFile/Item/379> [<https://perma.cc/PB9H-RDLZ>].

juvenile court rules that IV-E children are delinquent or unruly, JBI can help the court obtain more IV-E funds. The courts' decision to engage a contingency-fee based revenue contractor even further incentivizes the courts in their revenue strategy. Moreover, while seeking funds from child removals, the courts also developed a strategy to obtain more revenue by treating other children as "foster care candidates." If the courts issue rulings that children are delinquent or unruly and order them into court supervision through probation, the courts can hold the threat of removal over the families and use the children to claim IV-E funds for court administrative costs. The courts similarly contract with Justice Benefits, Inc. for assistance, including trainings for how children can be treated as "foster care candidates" to claim the IV-E revenue.<sup>75</sup>

Similar to Ohio, other state juvenile courts also use similar interagency contracts to claim IV-E funds from children. In Louisiana, financial statements of the Jefferson Parish Juvenile Court from 2005 indicate how "the Judicial Expense Fund budget was favorably impacted by the accrual of \$326,286.45 in Title IV-E money."<sup>76</sup> The reports further explain:

As indicated by the financial statements and mentioned previously, the Court has identified Title IV-E funding as a significant new revenue source. Essentially this money represents Federal reimbursement, passed through the Louisiana Department of Social Services, of various indirect, administrative, and direct expenditures associated with the provision of services to children in the foster care system.

The Court currently has a contract with the Department of Social Services that provides for the drawdown of \$750,000.00 of Title IV-E money, and is likely to be amended, as initial revenue estimates were conservative. This contract expires on June 30, 2006 and Management is reasonably confident that the agreement will be renewed for at least one year.<sup>77</sup>

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75. *Candidacy for Foster Care Webinars*, OHIO DEP'T OF JOB AND FAM. SERVS. (2018), <https://jfskb.com/sacwis/index.php/ofc-policy/862-candidacy-for-foster-care-webinar-qa> [<https://perma.cc/RV3M-BESJ>] ("The webinar titled 'Foster Care Candidacy and RMS Overview Webinar for Title IV-E Courts and DYS' was held June 20, 2018. The webinar discussed how Foster Care Candidacy and RMS apply to Title IV-E Courts and DYS staff. This webinar was presented by ODJFS and JBI (Justice Benefits, Inc.)").

76. JUV. CT. OF THE PARISH OF JEFFERSON, STATE OF LOUISIANA, FINANCIAL STATEMENTS 7 (2005), [https://app.la.state.la.us/PublicReports.nsf/AC395D55385EFD5D862571CB00533F01/\\$FILE/00000544.pdf](https://app.la.state.la.us/PublicReports.nsf/AC395D55385EFD5D862571CB00533F01/$FILE/00000544.pdf) [<https://perma.cc/TM4X-P5VG>].

77. *Id.*

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A 2017 financial statement explains how the Jefferson Parish Juvenile Court continued the agreement to obtain the IV-E funds, and how the amount “has steadily increased over the last [three] quarters of 2017 due to additional training and better documentation in determining eligibility status,” and that “Title IV-E revenue is expected to continue on this pattern throughout 2018.”<sup>78</sup>

In Arizona, the Administrative Office of the Courts similarly manages interagency agreements to obtain IV-E funds for juveniles in out-of-home placements in delinquency cases.<sup>79</sup> Again, the resulting revenue is significant. The Pima County Juvenile Court reports \$170,000 in Title IV-E revenue “derived via cost reimbursement from the federal government through the Administrative Office of the Courts.”<sup>80</sup> In Muskegon County, Michigan, the Circuit Court-Family Division similarly entered a contract with Justice Benefits, Inc. to “capture new Title IV-E federal reimbursement dollars.”<sup>81</sup> Additionally, the Iowa Department of Human Services Employee’s Manual explains that responsibility for administering IV-E programs “extends to Juvenile Court Services through an interagency agreement that authorizes Juvenile Court Services to provide child welfare services.”<sup>82</sup>

Further, some states are maximizing IV-E funds through their juvenile probation departments—which are in turn connected to

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78. JUV. CT. OF THE PARISH OF JEFFERSON, STATE OF LOUISIANA, FINANCIAL STATEMENTS 8 (2017), [https://app.lla.state.la.us/PublicReports.nsf/06DBEDF6B7F7A7F8862582D500627D06/\\$FILE/0001A193.pdf](https://app.lla.state.la.us/PublicReports.nsf/06DBEDF6B7F7A7F8862582D500627D06/$FILE/0001A193.pdf) [<https://perma.cc/4R7Y-LCQM>]; see also ORLEANS PARISH JUV. CT., 2018 PROPOSED ANNUAL BUDGET 8 (2018), [http://cityofno.granicus.com/MetaViewer.php?view\\_id=3&clip\\_id=2782&meta\\_id=387149](http://cityofno.granicus.com/MetaViewer.php?view_id=3&clip_id=2782&meta_id=387149) [<https://perma.cc/H7KE-S67X>] (noting \$250,000 in IV-E revenue in 2018).

79. See Title IV-E Program, ARIZ. JUD. BRANCH (2020), <https://www.azcourts.gov/jjsd/Budgeting-and-Program-Development/Title-IV-E-Program> [<https://perma.cc/F4P6-VWTW>] (“The AOC [Administrative Office of the Courts] manages the Title IV-E program through Service Agreements”); ARIZ. ST. JUV. CT. R. 19.1 (“Notwithstanding the foregoing, the following procedures shall be employed where the Juvenile Court has entered into signed agreements to obtain reimbursement under Title IV-E of the Social Security Act.”).

80. PIMA CNTY. ADM’R, FISCAL YEAR 2019/2020 COUNTY ADMINISTRATOR’S RECOMMENDED BUDGET 5–161 (2019), [https://webcms.pima.gov/UserFiles/Servers/Server\\_6/File/Government/Finance%20and%20Risk%20Management/Reports/budget%20reports/2019-2020/2019-2020%20Recommended%20Budget%20Book.pdf](https://webcms.pima.gov/UserFiles/Servers/Server_6/File/Government/Finance%20and%20Risk%20Management/Reports/budget%20reports/2019-2020/2019-2020%20Recommended%20Budget%20Book.pdf) [<https://perma.cc/S4P3-LBLN>].

81. MUSKEGON CNTY. BD. OF COMM’RS, MINUTES 202 (Oct. 9, 2001), <https://www.co.muskegon.mi.us/DocumentCenter/View/5514/2001-Board-Minutes-PDF> [<https://perma.cc/N9V3-AL9Q>].

82. IOWA DEP’T OF HUM. SERVS., EMPLOYEE’S MANUAL 6 (2012), <https://dhs.iowa.gov/sites/default/files/13-B.pdf> [<https://perma.cc/M3EP-SF59>].

the courts. In Illinois, the Juvenile Probation and Court Services Departments report directly to chief judges of each county.<sup>83</sup> In 2014, Justice Benefits, Inc. entered a contract with the Cook County Office of the Chief Judge Juvenile Probation and Court Services to maximize IV-E funds for a contingency fee through which the company would get ten percent of the first fifteen million dollars in IV-E funds and fifteen percent of all claims over fifteen million dollars.<sup>84</sup>

In Texas, the state Juvenile Justice Department entered an interagency cooperation contract, valued up to \$10,500,000, in order for the agency's juvenile probation departments to maximize IV-E revenue.<sup>85</sup> Although the juvenile probation departments are considered part of the state Juvenile Justice Department, each of the county probation departments is run by a juvenile board which is comprised of judges. For example, the Bexar County Juvenile Probation Department claimed \$650,000 from IV-E children in 2017, and the head of the juvenile probation department is the Juvenile Board Chair, who is a Juvenile District Court Judge.<sup>86</sup>

Again, in some of these Texas counties, Justice Benefits, Inc. entered contracts directly with the Juvenile Boards—run by the judges—to help maximize IV-E funds when the judges order children removed from their homes.<sup>87</sup> The judges of the Nueces County Juvenile Board (the Board) entered such a contract with Justice Benefits, Inc. in 2014: “The intent of this agreement is to

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83. 705 ILL. COMP. STAT. 405/Art. VI (1987).

84. COOK CNTY. GOV'T, CONTRACT BETWEEN COOK COUNTY GOVERNMENT AND JUSTICE BENEFIT, INC. 2 (Feb. 19, 2014), <http://opendocs.cookcountyil.gov/procurement/contracts/1490-13306.pdf> [<https://perma.cc/FQ74-9BWE>]; *see also* MCLEAN CNTY, IL, MINUTES OF THE JUSTICE COMMITTEE 4 (Apr. 1, 2008), <https://www.mcleancountyil.gov/Archive/ViewFile/Item/1861> [<https://perma.cc/Y3YA-9EHU>] (“Motion by Nuckolls/Harding to Recommend Approval of an Addendum to the Justice Benefits Contract to seek Title IV-E Administrative Claims Funds for McLean County Court Services, Juvenile Division.”).

85. TEX. DEP'T OF FAM. AND PROTECTIVE SERVS., CONTRACT BETWEEN TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES AND TEXAS JUVENILE JUSTICE DEPARTMENT. (Dec. 1, 2011), [https://www2.tjjd.texas.gov/procurementfiles/Interagency/DFPS%20-%20Title%20IV-E/CON0000206-Amend\\_3-Executed.PDF](https://www2.tjjd.texas.gov/procurementfiles/Interagency/DFPS%20-%20Title%20IV-E/CON0000206-Amend_3-Executed.PDF) [<https://perma.cc/WD8D-MYM4>].

86. BEXAR CNTY. JUV. PROBATION DEP'T, 2017 ANNUAL REPORT 29 (2017), [http://home.bexar.org/JPDAnnualReport/2017/BCJPD\\_annualreport\\_2017\\_web.pdf](http://home.bexar.org/JPDAnnualReport/2017/BCJPD_annualreport_2017_web.pdf) [<https://perma.cc/D7BP-T4KN>]; *see also* TEX. HUM. RES. CODE ANN. § 152.0032 (West 2007).

87. NUECES COUNTY, CONTRACT BETWEEN JUSTICE BENEFIT, INC. AND NUECES COUNTY JUVENILE BOARD (Nov. 20, 2014), [http://ncagenda.co.nueces.tx.us/docs/2014/CC-REG/20141203\\_271/5835\\_JBI%20Agreement%20executed%2011-20-14.pdf](http://ncagenda.co.nueces.tx.us/docs/2014/CC-REG/20141203_271/5835_JBI%20Agreement%20executed%2011-20-14.pdf) [<https://perma.cc/Q5LW-L8GG>].

compensate JBI only for new [IV-E] revenues received by the Board . . . “ and a contingency fee arrangement of “fifteen percent (15%) of all [IV-E] revenue paid to the Board . . . .”<sup>88</sup> The judges of the Juvenile Board in Alice, Texas similarly approved an agreement with Justice Benefits, Inc. to claim the IV-E funds, and the Board approved using the resulting IV-E funds for merit payments to department staff and costs for remodeling a building “paid for through Title IV-E federal funds and not local county funds . . . .”<sup>89</sup> In Harris County, Texas, the judges of the Juvenile Board approved a contract with Justice Benefits, Inc. to claim IV-E funds, outside of the normal competitive bid process.<sup>90</sup>

Thus, as illustrated by the prior examples, the juvenile court systems’ practice of entering contractual deals to maximize revenue from children is spreading. The strategies divert the courts’ focus from serving the interests of vulnerable children to using the children to fund the courts. The diversion undermines judicial independence and the core purpose of the courts, and risks harm to the children and families the courts exist to protect. Further, as the next section explains, the juvenile court systems have sought further interagency contracts to profit from children—by targeting child support.

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88. *Id.*

89. Mauricio Julian Cuellar, *Juvenile Board Members Review Next Year’s Probation Dept. Budget*, ALICE ECHO-NEWS JOURNAL (Dec 19, 2008), <https://www.alicetx.com/article/20081219/News/312199996> [<https://perma.cc/6DBQ-JW8S>].

90. HARRIS CNTY. JUV. BD., MEETING AGENDA (Feb. 24, 2010), <https://hcjpd.harriscountytexas.gov/Board%20Agendas/Board%20Agenda%20-%20February%2024,%202010.pdf> [<https://perma.cc/C59Y-CBRD>] (Approval of exemption from competitive bid process and renewal of contract with Justice Benefits, Inc.). As further insight into the business-like operations of the court, a news investigation in 2018 explained how three Republican juvenile court judges in Harris County were “assigning an extraordinary number of cases to a handful of private lawyers” who were making campaign contributions to the judges, rather than assigning the cases to the public defender’s office. Neena Satija, *Harris County Juvenile Judges and Private Attorneys Accused of Cronyism*, TEX. TRIB. (Nov. 1, 2018), <https://www.texastribune.org/2018/11/01/harris-county-texas-juvenile-judges-private-attorneys/> [<https://perma.cc/9FWX-YXEP>]. (“Those courts are also appointing the same lawyers to dozens of family court cases, where the same judges preside over child custody disputes, protective orders and decisions for kids in foster care.”) For example, one lawyer “took on 377 juvenile cases . . . along with 126 family court cases and some probate cases,” which “brought his total haul in taxpayer money for the year to about \$520,000, data from the county auditor’s office shows.” *Id.*

### III. COURT REVENUE FROM CHILD SUPPORT

While expanding their contractual efforts seeking foster care funds, juvenile courts are also using children and impoverished parents to pursue another federal funding stream—through the Title IV-D child support program. This section provides a brief summary of the IV-D child support program, including the cost recovery focus, and explains how juvenile courts are targeting the federal funding stream.

#### A. *Title IV-D Child Support Program*

The Title IV-D child support program is intended to provide federal funds to help state executive branch child support agencies carry out their services.<sup>91</sup> For children in single-parent households, child support can be a crucial benefit when the payments are properly established and directed to the benefit of the children. Courts are supposed to carefully and impartially consider the circumstances of the parents and children to establish child support orders that obligors have the ability to pay, and only order the use of enforcement mechanisms when in the best interests of the children. If courts are financially incentivized to increase collections and use enforcement tools regardless of the children's interests, harm can result—to the parents, children, and to society.<sup>92</sup> Further, over \$24 billion in child support debt across the country is owed to the government rather than to children,<sup>93</sup> and courts receive even greater financial incentives to order and enforce such state-owed support obligations.

Child support is converted to a state-owed obligation in multiple ways. First, when struggling custodial parents seek welfare assistance, states force the parents to assign their child support rights to the government to pay back the costs of the assistance. Also, states will simultaneously pursue “medical support” payments as part of the support obligation to offset the cost of Medicaid.<sup>94</sup> States re-

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91. For a history of the program, see Hatcher, *Child Support Harming Children*, *supra* note 8, at 1034–44.

92. *Id.*; see also, VICKI TURETSKY, REFORMING CHILD SUPPORT TO IMPROVE OUTCOMES FOR CHILDREN AND FAMILIES 3 (5th ed. 2019).

93. OFF. OF CHILD SUPPORT ENF'T, PRELIMINARY REPORT 95 (2018), [https://www.acf.hhs.gov/sites/default/files/programs/css/fy\\_2018\\_preliminary\\_data\\_report.pdf](https://www.acf.hhs.gov/sites/default/files/programs/css/fy_2018_preliminary_data_report.pdf) [<https://perma.cc/BCQ7-SFZJ>] (\$24 billion in government-owed arrearages is over 21 percent of the total national child support debt of \$114 billion).

94. *Id.* at 115.

quire poor mothers to cooperate in identifying absent fathers and then to sue them repeatedly for child support that is assigned to the state. When mothers are poor, the fathers are also usually poor, so the ability to pay back the cost of welfare is unrealistic. Studies have indicated that over seventy percent of the national child support debt is owed by parents with incomes of only \$10,000 or less.<sup>95</sup> The resulting collection efforts of state-owed child support pits impoverished parents against each other, harming fragile families and children.

Poor fathers who try to catch up almost always fail, as the poverty industry lines up against them and the relentless enforcement mechanisms never slow: a poor father finally obtains a new job but then is fired after he is jailed for unpaid child support; a truck driver trying to catch up on child support arrearages has his license suspended due to the back payments of child support, so he can't work; a construction worker has 65 percent of his wages garnished for child support and as a result he can't afford his rent or insurance on his old work truck.

As a result of the forced welfare cost recovery mechanisms, the poverty industry is further harming the already fragile relationships between poor mothers and fathers, and poor children often lose contact with their fathers as the insurmountable child support mechanisms drive the fathers away. Moreover, society is also harmed by the welfare cost recovery focus. Poor fathers who are unable to pay child support retreat from their families and are driven into the underground economy, reducing legitimate work and resulting tax payments—and increasing crime.<sup>96</sup>

Moreover, the administrative costs of enforcing the state-owed child support against impoverished families are likely greater than the resulting payments.<sup>97</sup> And even when the support payments are collected, the result is payments taken from the low-income families that increases their economic turmoil and their likelihood of needing future public assistance—thus further increasing state costs.<sup>98</sup>

Further, states will pursue government-owed support when children are removed into foster care from impoverished families. Again, the costs likely outweigh collections, and only harm results:

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95. See TURETSKY, *supra* note 92.

96. HATCHER, *supra* note 3, at 144.

97. *Id.*

98. *Id.*

When children enter foster care, the parents struggle to overcome poverty and other barriers with the hope of reuniting with their children. However, the additional debt obligation from government-owed child support can often derail the parents' struggle for economic stability and family reunification. Many states include the child support payments as a requirement in plans before reunification can be considered. States convert foster children into collateral, with the parents only able to seek reunification if they can pay off the government debt first.<sup>99</sup>

Despite the harm, juvenile courts are entering interagency IV-D contracts—described below—that create financial incentives for the courts to issue such support orders against impoverished parents.

### B. Juvenile Court IV-D Contracts

Similar to the IV-E interagency contracts, juvenile courts are now claiming federal IV-D child support funds as revenue for themselves by entering interagency contracts so that the courts seek the federal funds when ordering and enforcing child support obligations. Ohio again provides an example. The Ohio county child support agencies and juvenile courts use similar contract forms for these interagency agreements “to purchase services for the effective administration of the support enforcement program.”<sup>100</sup> Through the agreements, the child support agencies are purchasing the time of the juvenile court magistrates as units of service to “[c]onduct hearings; to prepare and review Magistrate reports; [and] to conduct status review for all eligible IV-D cases; including but not limited to establishment of paternity; establishment of support, enforcement of support and related orders.”<sup>101</sup> Both the child support agencies and juvenile court certify in the contracts “that all units of service are eligible for federal financial participation (FFP) reimbursement,” meaning eligible for the IV-D federal funds.<sup>102</sup>

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99. *Id.*

100. OHIO DEP'T OF JOB AND FAM. SERVS., IV-D CONTRACT, WARREN COUNTY CHILD SUPPORT ENFORCEMENT ADMINISTRATION AND WARREN COUNTY JUVENILE COURT, <https://www.co.warren.oh.us/Commissioners/Resolutions/2019/031919.pdf> [<https://perma.cc/3U3L-B3DU>]; see also FRANKLIN CNTY. BD. OF COMM'RS, RES. NO. 0134-19 (Feb. 26, 2019), <https://crms.franklincountyohio.gov/RMSWeb/pdfs/58027.Court%20of%20Common%20Pleas%20Resolution%202019.pdf> [<https://perma.cc/9TQY-8NHF>].

101. OHIO DEP'T OF JOB AND FAM. SERVS., *supra* note 100.

102. *Id.*

The Lorain County juvenile court describes how its “IV-D Domestic Support Unit provides judicial services to the Child Support Enforcement Agency (CSEA),” and that the interagency “contract provides funding for the operation of the Domestic Support Unit and includes full and partial reimbursement of salary and benefits for 16 court employees, including two magistrates.”<sup>103</sup>

The interagency contracts are lucrative for the Ohio juvenile courts: in Franklin County, the child support agency renewed a one-year contract with the county juvenile court in 2019 for child support services worth over \$1.2 million to the juvenile court;<sup>104</sup> in Lucas County, the juvenile court received an additional three-quarters of a million in revenue in 2013 through the IV-D child support funds;<sup>105</sup> and in Cuyahoga County, the juvenile court received over \$2.2 million in IV-D revenue in 2011.<sup>106</sup> As a result of their interagency contracts with both the state foster care and child support agencies, the Ohio juvenile courts can order children removed from their home and claim IV-E foster care revenue—which simultaneously triggers the ability of the courts to receive IV-D revenue by issuing and enforcing child support orders against the children’s impoverished parents.

Similarly, the California child support agency contracts with the Judicial Council of California (JCC), which oversees all the state courts, for Title IV-D child support services.<sup>107</sup> The Judicial Council then arranges for its individual county courts to do the contractual work for the child support agency. As a result of the contracts, the courts turned their attention to the money. As an example, an audit found that the Alameda County Superior Court went so far as to report inaccurate information in an attempt to claim more child support funds.<sup>108</sup> Rather than submitting actual hours worked, the court used a method that maximized funds by inaccurately report-

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103. *Department of Fiscal Management, LORAIN CNTY. DOMESTIC RELATIONS CT.*, <https://www.loraincounty.com/domesticrelations/departments/departments-fiscal-management.shtml> [<https://perma.cc/3JHX-N7HZ>].

104. FRANKLIN CNTY. BD. OF COMM’RS, *supra* note 100.

105. LUCAS CNTY. JUV. CT., 2013 ANNUAL REPORT 25 (2013), <https://www.co.lucas.oh.us/DocumentCenter/View/70173/2013-Annual-Report-LCJC> [<https://perma.cc/S9KB-WLQX>].

106. CUYAHOGA CNTY. COUNCIL, RES. NO. R2011-0104 (Mar. 22, 2011), [http://council.cuyahogacounty.us/pdf\\_council/en-US/Legislation/Resolutions/2011/R2011-0104s.pdf](http://council.cuyahogacounty.us/pdf_council/en-US/Legislation/Resolutions/2011/R2011-0104s.pdf) [<https://perma.cc/ZY42-QQX7>].

107. *See CAL. DEP’T OF CHILD SUPPORT SERVS., JUDICIAL COUNCIL OF CALIFORNIA CONTRACT REVIEW AUDIT REPORT 3* (2017), <https://www.courts.ca.gov/documents/Audit-Report-dcss-Alameda-20170901.pdf> [<https://perma.cc/5YXN-K6ME>].

108. *Id.* at 5.

ing more hours than the court staff actually worked for the child support agency—adding up to an amount of over \$440,000 inappropriately claimed by the court:

As a result, overall grant hours were recorded based on a methodology that maximizes grant funding, not in accordance with the JCC policy and procedures or federal regulations that require salary to be allocated based in the actual direct labor hours worked in the program. In addition, the FLF staff and FLF supervisors “certify under penalty of perjury that this time sheet accurately represents actual time worked. . .” on the JC-4 timesheet. As a result, we deemed the time reporting documentation unreliable and unsupported as there is no support, in terms of direct labor hours, to allocate salary, benefit or indirect costs to the AB 1058 grant program.<sup>109</sup>

Other state juvenile court systems also carry out these revenue practices. The juvenile court in Shelby County, Tennessee, which was described above, explains how “[t]he Court maintained two special grant agreements with the Tennessee Department of Human Services that provide funding for four child support magistrates, six principal court clerks and two management/supervisory personnel.”<sup>110</sup> In Maryland, “[e]ach year the Maryland Judiciary enters into a “Cooperative Reimbursement Agreement” (CRA) with the Maryland Child Support Enforcement Administration (CSEA)” and as a result, “[t]he Judiciary receives several million dollars each year under the CRA.”<sup>111</sup> Similarly, in New Jersey, the statewide executive branch child support agency “has a cooperative agreement with the Administrative Office of the Courts (AOC) for assistance in the establishment and enforcement of child support orders, central registry and reconciliation of accounts related to support payments.”<sup>112</sup>

In Michigan, the courts actually established their own child support enforcement department—called the “Friend of the Court

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109. *Id.* at 6.

110. JUV. CT. OF MEMPHIS AND SHELBY CNTY., ANNUAL REPORT 3 (2016), <https://dashboard.shelbycountyttn.gov/sites/default/files/file/pdfs/Annual%20Report%202016%20v3%2010-11-17%20.pdf> [<https://perma.cc/DXT9-CFMC>].

111. MD. JUDICIARY, MANAGING THE JUDICIARY’S COOPERATIVE REIMBURSEMENT AGREEMENT 3 (Oct. 2015), <https://www.mdcourts.gov/sites/default/files/import/family/grants/cra/managingjudiciaryscramanualforadminjudgesmagistratesctadministrators.pdf> [<https://perma.cc/R6HU-RU63>].

112. N.J. DEP’T OF TREASURY, PROJECT MANAGEMENT STRUCTURE APPENDIX E, <https://www.state.nj.us/treasury/purchase/bid/attachments/37829-e.pdf> [<https://perma.cc/UA38-EKJT>] (last visited Apr. 3, 2020).

Bureau” (FOC).<sup>113</sup> The FOC has offices in each county court and carries out essentially all the child support functions that would typically be undertaken independently by both the court (order establishment) and the executive branch agency (enforcement).<sup>114</sup> The duties of the Friend of the Court Bureau are “performed under the direction and supervision of the chief judge” and the chief judge also appoints “referees” to hold hearings for the Friend of the Court Bureau in establishing and enforcing recommended child support orders.<sup>115</sup> This court agency then contracts with the statewide child support agency in the executive branch, in order for courts to obtain federal Title IV-D revenue, including federal incentive funds.<sup>116</sup>

The courts in Pennsylvania have taken the interagency agreements even further, not just contracting with the state child support agencies, but actually becoming the county IV-D child support agencies.<sup>117</sup> Pennsylvania’s statewide child support agency explains how it completely contracted out its executive branch functions to the judiciary:

The Department of Human Services, Bureau of Child Support Enforcement (BCSE), administers Pennsylvania’s Child Support Enforcement Program through Cooperative Agreements with the 67 counties and county Courts of Common Pleas. The Domestic Relations Sections (DRSs) of the Courts of Common Pleas provide child support services in the counties. The DRSs

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113. *See, e.g.*, MICH. SUP. CT., FRIEND OF THE COURT HANDBOOK (2018), [https://courts.michigan.gov/Administration/SCAO/Resources/Documents/Publications/Manuals/focb\\_hbk.pdf](https://courts.michigan.gov/Administration/SCAO/Resources/Documents/Publications/Manuals/focb_hbk.pdf) [<https://perma.cc/JFP2-SUHU>]; THIRD JUD. CIR. CT. OF MICH., 2017 ANNUAL REPORT 29-30 (2017), <https://www.3rdcc.org/Documents/Administration/General/AnnualReports/2017%5EAnnual%20Report%20for%202017%5E%5E.pdf> [<https://perma.cc/82UU-6V4Q>] (“The FOC is an administrative arm of the Court . . .”).

114. Friend of the Court Act 294, MICH. COMP. L. §§ 552.501-552.535 (1982).

115. *Id.*

116. *See* BD. OF COMM’RS OF THE CNTY. OF ALLEGAN, FRIEND OF THE COURT TITLE IV-D COOPERATIVE REIMBURSEMENT AGREEMENT 2017/2021, STATE OF MICHIGAN (Sept. 8, 2016), [http://cms.allegancounty.org/sites/pages/Calendar/Lists/Board%20of%20Commissioners/Attachments/737/D1\\_147-607\\_FOC\\_approve5YRCRPAgreement.pdf](http://cms.allegancounty.org/sites/pages/Calendar/Lists/Board%20of%20Commissioners/Attachments/737/D1_147-607_FOC_approve5YRCRPAgreement.pdf) [<https://perma.cc/B966-WGC5>].

117. PHILA. FAM. CT., 2012: YEAR IN REVIEW 49 (2012), <https://courts.phila.gov/pdf/report/2012/FC-2012-Annual-Report.pdf> [<https://perma.cc/L358-AS9M>] (“Philadelphia Domestic Relations serves as the county Title IV-D child support agency.”).

establish paternity and child support orders, and enforce support obligations for Pennsylvania families.<sup>118</sup>

A sample “intergovernmental cooperative agreement” between the Pennsylvania statewide child support agency and the Domestic Relations Section of the Court of Common Pleas of Somerset County explains that through the agreement “the Domestic Relations Section (DRS) or equivalent child support division of a family court will function as the local Title IV-D agency in its county.”<sup>119</sup>

#### IV. STATE PROSECUTORS AND ATTORNEY GENERAL’S OFFICES INTERAGENCY CONTRACTS

In addition to courts, state prosecutors and attorneys general are also contracting to maximize revenue from children. First, regarding federal foster care revenue, Michigan county prosecutors’ offices enter contracts with the state Department of Human Services (which runs the foster care agency) to represent the state agency where children may be removed from their homes due to state petitions of abuse and neglect. These contracts enable the prosecutors’ offices to claim federal foster care IV-E revenue.<sup>120</sup> For example, the Genesee County Board of Commissioners approved the request “to allow the Prosecutor’s Office to apply for Title IV-E funds through the renewal of a contract with the Michigan Department of Human Services to provide legal services to DHS in Family Court on child abuse and neglect cases . . . .”<sup>121</sup> Similar to the prac-

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118. *Bureau of Child Enforcement*, PA DEP’T OF HUM. SERVS. (2016), [https://www.humanservices.state.pa.us/CSWS/csws\\_controller.aspx?PageId=CSWS%2Fbcse\\_about.ascx&Preference=Desktop&Owner=Client](https://www.humanservices.state.pa.us/CSWS/csws_controller.aspx?PageId=CSWS%2Fbcse_about.ascx&Preference=Desktop&Owner=Client) [<https://perma.cc/WES5-JMA8>].

119. PA DEP’T OF HUM. SERVS., 2015-2020 IV-D COOPERATIVE AGREEMENT WITH DOMESTIC RELATIONS SECTION OF THE COURT OF COMMON PLEAS, SUMMERSET COUNTY. (2015), [https://contracts.patreasury.gov/Admin/Upload/331135\\_4100070496\\_201510201057.pdf](https://contracts.patreasury.gov/Admin/Upload/331135_4100070496_201510201057.pdf) [<https://perma.cc/8JZR-F3MT>].

120. *See, e.g.*, MICH. DEP’T HUM. SERVS., CONTRACT BETWEEN MICH. DEPARTMENT OF HUMAN SERVS. AND COUNTY OF MUSKEGON COUNTY TREASURER (Dec. 22, 2014), <https://www.co.muskegon.mi.us/DocumentCenter/View/221/DHS-Contract-PDF> [<https://perma.cc/26KK-74V4>] (agreement with County of Muskegon Prosecuting Attorney); BAY CTY. BD. OF COMM’RS, RES. 2011-71 (Apr. 19, 2011), <https://www.baycounty-mi.gov/Docs/BoardComm/2011/05-03-11-Results.pdf> [<https://perma.cc/2945-PJTP>] (“This Agreement funds a portion of the Assistant Prosecutor’s Wages directly related to the IV-E Agreement . . . .”).

121. Memorandum from Governmental Operations Comm. to Genesee Cnty. Bd. of Comm’rs (Sept. 18, 2013), [https://www.gc4me.com/departments/board\\_of\\_commissioners\\_1/docs/GOC\\_091813.pdf](https://www.gc4me.com/departments/board_of_commissioners_1/docs/GOC_091813.pdf) [<https://perma.cc/F7E7-PW67>].

tices of juvenile courts and probations offices, the prosecutors can use the children to maximize IV-E administrative cost revenue.<sup>122</sup> Also, the county prosecutors sometimes seek further private contractor expertise in maximizing the revenue. The Ingham County prosecutor's office enters contracts with the state agency in order to obtain both foster care IV-E funds and child support IV-D funds, and the office sought help from a revenue maximization consultant, Maximus, Inc.: "Ingham County Prosecuting Attorney's Office wished to engage their consultant Maximus, Inc. in the preparation and billing for the Title IV-D and Title IV-E in order to maximize the eligible reimbursement to the Prosecutor's Office . . . ."<sup>123</sup> Other states have similar interagency agreements between prosecutors' offices and the state foster care agency, triggering the claiming of IV-E funding. The commissioners in Green County, Ohio, approved "the IV-E contract between Job & Family Services and the Prosecuting Attorney for the prosecutor's activities which contribute to the administration of the IV-E program for Children Services."<sup>124</sup>

State attorneys general and prosecutors also pursue child support IV-D revenue through interagency agreements. In Lucas County, Ohio, the prosecutor's office contract payments are contingent upon receipt of the federal IV-D funds (FFP).<sup>125</sup> Similarly, the

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122. *Id.* at 15. ("Title IV-E funds are earned on a reimbursement basis; there are no prepayments for services. The amount of reimbursement is based on a formula that takes into account the amount of legal services and their associated costs provided by the Prosecutor's Office to DHS.")

123. INGHAM CNTY. BD. OF COMM'RS, RESOLUTION AUTHORIZING CONTRACT WITH MAXIMUS, INC., FOR THE PREPARATION AND BILLING FOR TITLE IV-D AND IV-E GRANTS, RESOLUTION #09-212 (June 23, 2009).

124. BD. OF COMM'RS OF GREEN CNTY., OHIO, MINUTES 12 (Jan. 18, 2018), [https://www.co.greene.oh.us/AgendaCenter/ViewFile/Minutes/\\_01182018-582](https://www.co.greene.oh.us/AgendaCenter/ViewFile/Minutes/_01182018-582) [<https://perma.cc/K6WU-FSQB>]; *see also* ATHENS CNTY. CHILDREN'S SERVS. BD., AGREEMENT WITH ATHENS COUNTY PROSECUTING ATTORNEY (Jan. 29, 2019), [http://www.co.athensoh.org/document\\_center/Commissioners%20Office/2019%20Commissioners/Jan.29.19.M.signed.pdf](http://www.co.athensoh.org/document_center/Commissioners%20Office/2019%20Commissioners/Jan.29.19.M.signed.pdf) [<https://perma.cc/N3QK-XUZP>]; TEX. DEP'T OF FAM. AND PROTECTIVE SERVS., CONTRACT FOR TITLE IV-E COUNTY LEGAL SERVICES (Aug. 29, 2018), [https://co.jefferson.tx.us/agenda/agendas\\_pl/20180910\\_471/Attachments/cc091018%20-TITLE%20IV-E%20LEGALSERV.CONTRACT.pdf](https://co.jefferson.tx.us/agenda/agendas_pl/20180910_471/Attachments/cc091018%20-TITLE%20IV-E%20LEGALSERV.CONTRACT.pdf) [<https://perma.cc/9RBS-RZDL>].

125. LUCAS CNTY. CHILD SUPPORT ENF'T AGENCY, IV-D CONTRACT WITH LUCAS COUNTY PROSECUTOR'S OFFICE RESOLUTION NO. 19-16 (Jan. 8, 2019), <https://lcapps.co.lucas.oh.us/carts/resos/22144.pdf> [<https://perma.cc/HW42-DDG9>]; *see also* OHIO ADMIN. CODE 5101:12-1-80 (2020); LAKE CNTY. CHILD SUPPORT ENF'T AGENCY, IV-D CONTRACT WITH LAKE COUNTY PROSECUTOR'S OFFICE (2013), <https://myneighborsandme.files.wordpress.com/2019/03/prosecutor-iv-d-contract.pdf> [<https://perma.cc/H4C5-ZLRB>]; BELMONT CNTY. CHILD SUPPORT ENF'T AGENCY,

Wadena County Attorney's office in Minnesota entered a "cooperative agreement" with the county child support agency.<sup>126</sup> In Muskegon County, Michigan, the court entered such an interagency agreement,<sup>127</sup> and then the court went further—essentially joining with the prosecutor's office: "In 2012, Muskegon's prosecuting attorney and chief judge determined that the public in Muskegon County would be better served by having their offices combine resources to provide in one location the services that were formerly provided separately."<sup>128</sup> Although intended to be two separate branches of government, "the Muskegon County Prosecutor's Office Child Support Division was moved into the Family Court and became the Muskegon County Family Court Establishment Division."<sup>129</sup> The county hopes that combining the courts and prosecutor's offices as one agency/office will become the national model.<sup>130</sup>

The Texas Attorney General's office uses an even broader approach, taking control of both the child support agency functions and the courts in the effort to maximize child support revenue. A state statute designates the Texas Attorney General's office as the statewide IV-D agency, allowing the office to reap millions in federal IV-D revenue each year.<sup>131</sup> The attorney general's office then

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IV-D CONTRACT WITH BELMONT COUNTY PROSECUTOR'S OFFICE (Feb. 15, 2017), <http://belmontcountyccommissioners.com/wp-content/uploads/bsk-pdf-manager/2017/02/February-15-2017.pdf> [<https://perma.cc/V5XA-DZ9S>].

126. WADENA CNTY. OFF. HUM. SERVS., IV-D CHILD SUPPORT COOPERATIVE AGREEMENT BETWEEN WADENA COUNTY OFFICE OF HUMAN SERVICES, COUNTY SHERIFF AND COUNTY ATTORNEY (2018), <http://www.co.wadena.mn.us/AgendaCenter/ViewFile/Item/979?fileID=1784> [<https://perma.cc/74WD-LB9E>].

127. CNTY. OF MUSKEGON, TITLE IV-D COOPERATIVE REIMBURSEMENT I (2013), <https://www.co.muskegon.mi.us/DocumentCenter/View/160/Cooperative-Reimbursement-PDF> [<https://perma.cc/5HYA-E8UE>].

128. Jane Hess, *Muskegon County's Holistic Approach to Child Support is Becoming a National Model*, 31 THE PUNDIT 1 (2017).

129. *Child Support Division*, MUSKEGON CNTY. PROSECUTORS, <https://www.co.muskegon.mi.us/581/Child-Support-Division> [<https://perma.cc/876C-GPN7>] (last visited Apr. 7, 2020).

130. See Hess, *supra* note 128.

131. See TEX. FAM. CODE ANN. § 231.001 (West 1995). Similarly, the Washington, D.C. child support courts work "collaboratively" with the Attorney General's office, who is the D.C. child support agency. *Parentage and Child Support Branch*, D.C. CTS., <https://www.dccourts.gov/superior-court/family-court-operations/parentage-and-child-support-branch> [<https://perma.cc/X77C-VUR6>] (last visited Apr. 7, 2020). In its role as the IV-D agency, the DC Attorney General's office receives federal child support incentive payments, so the agency is financially incentivized in how it prosecutes and enforces cases. D.C. CODE ANN. § 46-226.01 (West 2001).

enters cooperative agreements with the county domestic relations courts. Through these interagency contracts, the attorney general's office funds the "child support courts" as part of an "integrated child support system."<sup>132</sup> As the Midland County courts explain:

The child support courts program is funded with federal and state funds. The Office of Court Administration receives the funds through a cooperative agreement with the Child Support Division of the Office of the Attorney General. The existing agreement authorizes the Office of Court Administration to expend approximately \$5 million annually to operate the program. Of that amount, approximately 66% comes from federal funds and the remainder comes from general revenue appropriated to the Office of the Attorney General.<sup>133</sup>

Through the agreement, the courts receive IV-D child support funding, including "incentive funding" if the courts meet performance standards, and the courts agree to be monitored and reviewed by the attorney general's office.<sup>134</sup> Thus, the attorney general's office, acting as the state child support agency, funds the very courts that the agency appears before—and requires that the judicial branch be monitored and reviewed by the executive branch. Further, the Texas legislature, the third branch of state government, enacted legislation requiring that the courts and the attorney general's office focus their efforts on maximizing federal child support revenue. The statute explains how the "presiding judges of the administrative judicial regions, state agencies, and counties may contract with the Title IV-D agency for available federal funds under Title IV-D to reimburse costs and salaries associated with associate judges, court monitors, and personnel appointed under this subchapter."<sup>135</sup> Then, the statute explicitly requires that "[t]he presiding judges and the Title IV-D agency shall act and are authorized to take any

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132. *E.g.*, TRAVIS CNTY. INTEGRATED CHILD SUPPORT SYSTEM, COOPERATIVE AGREEMENT 17-C0090 (Feb. 10, 2017), <http://traviscountytx.iqm2.com/Citizens/FileOpen.aspx?Type=4&ID=34126&MeetingID=1696> [https://perma.cc/5J4D-ST9W].

133. *Title IV-D Child Support Court*, MIDLAND CNTY. TEX., <https://www.co.midland.tx.us/315/Title-IV-D-Child-Support-Court> [https://perma.cc/H8RE-997H].

134. TRAVIS CNTY. INTEGRATED CHILD SUPPORT SYSTEM, *supra* note 131, at § 5.2 (2017); EL PASO CNTY. INTEGRATED CHILD SUPPORT SYSTEM, COOPERATIVE AGREEMENT, NO. 13-C0116 (2012), <http://www.epcounty.com/meetings/commcourt/2012-10-29/13.pdf> [https://perma.cc/3C84-4PVF].

135. TEX. FAM. CODE ANN. § 201.107 (West 2020)

*action necessary to maximize the amount of federal funds available under the Title IV-D program.*"<sup>136</sup>

## V.

### UNCONSTITUTIONAL AND UNETHICAL JUVENILE COURT SYSTEMS

These contractual agreements and structures that link the courts, state human service agencies, and prosecutors and attorneys general create significant legal concern. This section of the article summarizes how the structural linkages and financial incentives are likely unconstitutional, including separation of powers and due process violations, and can cause violations of attorney and judicial ethics.

#### A. *Separation of Powers*

To prevent tyranny and better protect the ideals of justice and individual liberties, constitutional democracies are founded upon the core principles of separate and independent government functions combined with checks and balances. The U.S. Congressional Research Service describes the historical intent of separation of powers as drafted into the U.S. Constitution:

The framers viewed human nature as inherently bad, and suspected that the natural inclination of men is to abuse power. Tyranny, to them, was "the accumulation of all powers, legislative, executive, and judiciary, in the same hands." To separate the functions of government into independent branches was necessary but not sufficient. Each branch would also need the ability to stand as a check against the others. No branch, however, would possess an overruling influence over the others, and each would be provided with the necessary means to resist encroachment from the others.<sup>137</sup>

In the 47th paper of *The Federalist*, James Madison explained, "The accumulation of all powers, legislative, executive and judiciary, in the hands of one, a few, or many, and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny."<sup>138</sup> Alexander Hamilton also strongly supported the separation of powers between the three branches, and expressed most concern regarding independence of the judiciary:

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136. *Id.* (emphasis added).

137. MATTHEW E. GLASSMAN, CONG. RSCH. SERV., R44334, SEPARATION OF POWERS: AN OVERVIEW (2016).

138. THE FEDERALIST NO. 47 (James Madison).

“The complete independence of the courts of justice is peculiarly essential in a limited Constitution.”<sup>139</sup> Similarly, U.S. Senator Sam J. Ervin, Jr., who was chairman of the Senate select committee that investigated the Watergate scandal, wrote:

[J]udicial independence is the strongest safeguard against the exercise of tyrannical power by men who want to live above the law, rather than under it. The separation of powers concept as understood by the founding fathers assumed the existence of a judicial system free from outside influence of whatever kind and from whatever source, and further assumed that each individual judge would be free from coercion even from his own brethren.<sup>140</sup>

In the instances when branch functions are shared the original intent at the country’s founding was that such overlap exists for the purpose of checks and balances:

Madison recognized that the doctrine of separation of powers did not stand alone in the constitutional document, but was inextricably bound to the concept of checks and balances. The constitutionally required sharing and participation in the exercise of some of the power and authority of the other branches, this interdependence through carefully created checks and balances, was deliberately designed, as Madison noted in Federalist 51, so that “ambition could be made to counteract ambition.”<sup>141</sup>

Moving forward in time, some shared functions have additionally become recognized as necessary for purposes of efficiencies and the practical operations of modern government. Although overly simplified, scholarship has described two lines of reasoning in applying the separation of powers doctrine: formalism, requiring strict adherence to separation of powers, and functionalism, embracing flexibility to allow some overlap. The functionalist approach recognizes that “[a] model of strict separation may have been possible two hundred years ago when the national government had relatively few employees and little regulatory responsibility, but not at a time when the government needs vast bureaucracies to oversee far reaching and complicated legislation.”<sup>142</sup> However, even under the functionalist analysis, the purposes and limitations

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139. THE FEDERALIST NO. 78 (Alexander Hamilton).

140. Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 L. & CONTEMP. PROB. 108, 121 (1970).

141. 38 Mass. Prac., Admin. Law & Prac. § 2:1.

142. David Orentlicher, *Conflicts of Interest and the Constitution*, 59 WASH. & LEE L. REV. 713 (2002).

of the separation of powers doctrine remain under what is essentially a two-step analysis: (1) whether the overlap of branch functions is necessary for a genuine governmental need, and (2) whether “a proposed reallocation can go too far in its innovation and disrupt the Constitution’s careful balance of power.”<sup>143</sup> For example, “[a]ccording to one characterization of functionalist analysis, the issue addressed is whether a ‘contested action usurps a function constitutionally reserved to [an]other branch or whether it threatens to interfere substantially with operations of the other branch of government.’”<sup>144</sup> Further, inherent in separation of powers analysis is that shared functions between the branches must be limited when conflicts of interest are present.<sup>145</sup> Conflicts of interest concerns are significant for each of our branches, and perhaps most paramount for our courts:

[T]he notion that no man can be a judge in his own cause was among the earliest expressions of the rule of law in Anglo American jurisprudence. . . . Conflicts of interest destroy the independence that is the hallmark of the judiciary, and by extension of all public officers. Yet the judiciary must internalize that principle because judges are the arbiters of justice; if they fail, civil society in Locke’s sense fails, and we revert to a state of nature.<sup>146</sup>

The separation of powers doctrine is also explicitly present in most state constitutions, with potentially even more strict separation application.<sup>147</sup> Courts have struggled with application of the separation of powers doctrine over the years, and scholars have attempted to label and categorize the court decisions into lines of reasoning such as “formalism” and “functionalism.”<sup>148</sup> However, there are

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143. *Id.*

144. *Id.* at 730 (quoting Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1283 (1988)).

145. *Id.* at 736 (“As the subsequent subparts indicate, one can generally understand the Court’s separation of powers decisions in terms of a functionalist approach limited by conflicts of interest concerns.”).

146. Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 306 (1989).

147. G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 337 (2003). Further, states still recognize the separation of powers doctrine when not explicitly stated in their state constitution. See Curtis Rodebush, *Separation of Powers in Ohio: A Critical Analysis*, 51 CLEV. ST. L. REV. 505 (2004).

148. Orentlicher, *supra* note 142. For a general discussion of the importance of separation of powers for state courts, see Hon. Ellan A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543 (1997).

some circumstances—such as the sampling described in this article—that are an affront to the separation of powers doctrine regardless of what line of reasoning is applied.<sup>149</sup>

In state after state, examples of separation of powers violations result from the linkages of courts and the executive branch functions in the IV-D and IV-E interagency contracts described in this article.<sup>150</sup> The Ohio juvenile court IV-E contracts provide a good starting point for the constitutional analysis, where at least thirty of the county juvenile court systems entered interagency contracts with the state child welfare agency so that the courts obtain federal IV-E foster care funds.<sup>151</sup> Although executive branch child welfare agencies normally operate state foster care services, including the receipt of IV-E funds, the Ohio juvenile courts contracted to take over the executive branch functions by becoming the Title IV-E placing agencies.<sup>152</sup> As a result, when the Ohio courts use their judicial branch function to rule that IV-E eligible children are unruly or delinquent and should be removed from their homes, the rulings allow the courts to exercise their contractual executive branch placement agency functions—enabling the courts to claim and maximize federal IV-E foster care revenue. The contractually combined judicial and executive branch functions result in a separation of powers violation, as discussed below.

The Ohio juvenile courts began this contractual effort to maximize IV-E revenue in 1996, when four of the county juvenile courts entered the interagency agreements to become IV-E child placing

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149. For an important article describing an unconstitutional juvenile court structure in Missouri, see Josh Gupta-Kagan, *Where the Judiciary Prosecutes in Front of Itself: Missouri's Unconstitutional Juvenile Court Structure*, 78 MO. L. REV. 1245 (2013).

150. See, e.g., CHILD SUPPORT ENFORCEMENT PROGRAM, CONN. DEP'T OF SOC. SERVS., <https://portal.ct.gov/DSS/Child-Support/CCSES-Transition/CCSES-Transition> [<https://perma.cc/9FNJ-MNZE>] (last visited Mar. 30, 2020) (“The Connecticut Child Support Enforcement Program (Title IV-D of the federal Social Security Act or the Child Support/IV-D program) is a cooperative effort between dual agencies: the Office of Child Support Services (OCSS) in the Executive branch and the Support Enforcement Services (SES) in the Judicial branch of Connecticut government to deliver quality child support services with a mission to improve the well-being of children and promote the self-sufficiency of families. The program partners working with OCSS under cooperative agreements are: the Office of the Attorney General, Support Enforcement Services of the Judicial Branch, Family Support Magistrates, and Superior Court Operations.”).

151. See *supra* notes 56-72 and accompanying text.

152. *Id.*

agencies.<sup>153</sup> By 2006, at least twenty-five of the county juvenile courts followed the financial incentives to enter the agreement—with one county court system pausing to ask questions about legality.<sup>154</sup> Butler County officials raised legal concerns regarding conflicting roles of the courts under interagency agreements.

On March 1st, 2006 the Supreme Court Of Ohio's Board of Commissioners on Grievances and Discipline (Board) was asked: '(W)hether or not it is permissible, within the canons, for a juvenile court to act as a child placing agency for the purpose of receiving reimbursement through Title IV-E of the Social Security Act when provisions of that act require the court to make judicial determinations concerning whether or not continued placement in the home is contrary to the welfare of the child, and whether or not the placing agency (in this case the court) has made reasonable efforts to prevent the need for the placement of the child in order to receive such reimbursement.'<sup>155</sup>

The Board declined to offer an opinion, and instead referred the question to the Ohio Judicial Conference Juvenile Law and Procedure Committee, comprised of juvenile court judges.<sup>156</sup> Thus, the question of whether it is legally and ethically permissible for juvenile court judges to enter contracts for their courts to take on executive branch IV-E child placing agency functions was considered by a committee of juvenile court judges.<sup>157</sup> On November 17, 2006, the committee of judges in the Juvenile Law and Procedure Committee issued a "Resolution" in what is essentially a short legal brief supporting their arguments, and concluding, "It is the position of the juvenile judges of Ohio, in light of the preceding arguments that optional juvenile court participation as a Title IV-E placing

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153. Patrick Griffin & Gregory Halemba, *Federal Placement Assistance Federal Placement Assistance Funding for Delinquency Services*, 1 CHILD., FAM. AND THE CTS.: OHIO BULL. 1 (2003).

154. Encarnacion Pyle, *Juvenile Courts' Role Debated*, COLUMBUS DISPATCH (Sep. 11, 2006), <https://www.pressreader.com/usa/the-columbus-dispatch/20060911/282033322676879> [<https://perma.cc/FJJ5-ZA9Y>].

155. *Ohio Updates: Title IV-E Courts Receive Support of Ohio Judicial Conference*, 3 CHILD., FAM. AND THE CTS.: OHIO BULL. 17 (2006).

156. *Id.*

157. OHIO JUD. CONF. JUV. L. AND PROC. COMM., RESOLUTION TO SUPPORT OPTIONAL JUVENILE COURT PARTICIPATION AS A TITLE IV-E PLACING AGENCY (Nov. 17, 2006), <http://www.ohiojudges.org/Document.ashx?DocGuid=400faab0-352d-474a-bcb9-d85a82f81bd7> [<https://perma.cc/2MQ9-7NMT>].

agency is supported by law and consistent with the ethical standards embodied in the Judicial Canons.”<sup>158</sup>

The committee of juvenile court judges addressed “whether this structure violates the separation of powers doctrine inherent in the Ohio Constitution or whether it causes violation of the Ohio Canons of Judicial Conduct . . . .”<sup>159</sup> The analysis is incomplete and incorrect. The Committee’s separation of powers analysis is considered here, and the judicial ethics analysis and concerns with due process (which the judges failed to address) are then considered in the sections that follow.

The judges’ legal brief in support of their resolution only devoted about one page to the separation of powers concerns. Attempting to minimize their new contractual role, the judges actually referred to the executive branch responsibilities in serving as a foster care child placing agency as merely “incidental administrative activities.”<sup>160</sup> Further, seeking to alleviate concerns regarding influence from the executive branch agency resulting from the interagency agreements, the judges asserted that contractual oversight of the agency is only “analogous to an audit.”<sup>161</sup> After briefly referencing case-law regarding separation of powers, the judges’ analysis was the following:

Applying the law to the facts of this case, the constitutional function of courts as adjudicators is not impeded by incidental administrative activities such as providing for the placement of children. Nor is the fact that the court has entered into a contract with an executive agency for reimbursement to be considered an overruling influence. The Department of Job and Family Services handles the administration of reimbursement with federal funds but not the administration of the court. The actions of Job and Family Services are analogous to an audit.<sup>162</sup>

Turning first to the juvenile court judges’ description of the separation of powers doctrine in their argument, their short legal analysis references U.S. and Ohio Supreme Court precedents, essentially indicating that separation of powers between the three branches “were not intended to operate with absolute independence,” but that when there is any shared branch functions one branch still must not exert such influence as to prevent another branch from “accomplishing its constitutionally assigned func-

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158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. OHIO JUD. CONF. JUV. L. AND PROC. COMM., *supra* note 157.

tion”<sup>163</sup>—and that “none [of the branches] ought to possess directly or indirectly an overruling influence over the others.”<sup>164</sup> The analysis accurately cites precedent but is incomplete, as countless court opinions and scholarship has attempted to address the various iterations of how concerns can be present depending on which branches are involved in shared, delegated, or usurped powers, and how they are involved. Application of the separation of powers doctrine has been complex and varied over the years.<sup>165</sup> But, as the following paragraphs make clear, under any analysis or any theory of separation of powers, the practices of the juvenile courts in Ohio under the interagency agreements violate the principles.

The judges’ description of their contractual role as merely an “incidental administrative activit[y]” is concerning and incorrect. Through the interagency agreement, the judges have taken on the crucially important executive branch function of serving as the IV-E foster agency responsible for the placement and care of all children who the judges order removed from their homes.<sup>166</sup> The U.S. Department of Health and Human Services briefly summarizes the importance of this placement and care responsibility under Title IV-E of the Social Security Act, including being “legally accountable for the day-to-day care and protection of the child”:

The title IV-E foster care program requires, as a condition of eligibility, that a child’s placement and care responsibility be vested either with the State agency or another public agency with which the State has a bona fide agreement pursuant to section 472(a)(2)(B)(ii) of the Act. The term placement and care means that the State agency is *legally accountable for the day-to-day care and protection of the child* who has come into foster care through either a court order or a voluntary placement agreement. . . . Placement and care responsibility allows the State agency to make placement decisions about the child, such as where the child is placed and the type of placement most appropriate for the child. It also ensures that the State

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163. *Id.* (citing *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425 (1977)).

164. *Id.* (citing *State ex rel. Bryant v. Akron Metro. Park Dist.*, 166 N.E. 407, 410 (Ohio 1929), as cited in *Bray v. Russell*, 729 N.E.2d 132, 134 (2000)).

165. See *supra* notes 142-150 and accompanying text.

166. OHIO ADMIN. CODE 5101:9-7-08 (2020) (“The county juvenile court and the board of county commissioners may enter into a subgrant agreement with ODJFS to administer Title IV-E of the Social Security Act, which allows the juvenile court to assume full responsibility for the placement and care of adjudicated unruly and delinquent children. The subgrant agreement enables these courts to receive Title IV-E reimbursement for allowable foster care maintenance (FCM), administration, and training costs as outlined in this rule.”).

provides the child with the mandated statutory and regulatory protections, including case plans, administrative reviews, permanency hearings, and updated health and education records.<sup>167</sup>

Because of the importance of the responsibilities for the placement and care of foster children, the agency's role is subject to an extensive body of detailed federal statutes and regulations, with the overarching purpose of ensuring the "safety and well-being of children."<sup>168</sup> In addition to the extensive federal law requirements, Ohio law also explains some of the responsibilities—even insuring the provision of adequate education services:

The Title IV-E agency having responsibility for the placement and care of the child shall:

- (1) Ensure the proper administration of funds, allocated or reimbursed.
- (2) Determine eligibility for FCM program services.
- (3) Maintain a separate FCM case record for each program eligible child in the legal responsibility of the Title IV-E agency.
- (4) Assure that each child who has attained the minimum age for compulsory school attendance receiving FCM reimbursement is a full-time elementary or secondary school student. Full-time elementary or secondary school attendance includes the following:
  - (a) A child is enrolled, or in the process of enrolling in an institution providing elementary or secondary education.
  - (b) A child is instructed in elementary or secondary education at home in accordance with the home school law of the state where the home is located.
  - (c) A child in an independent study elementary or secondary education program in accordance with the law of the state where the program is located, which is administered by the local school or school district.
  - (d) A child is incapable of attending school on a full-time basis due to the medical condition of the child,

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167. ADMIN. FOR CHILDREN AND FAM., CHILD WELFARE MANUAL, 8.3A.12 TITLE IV-E, FOSTER CARE MAINTENANCE PAYMENTS PROGRAM, ELIGIBILITY, RESPONSIBILITY FOR PLACEMENT AND CARE (2020), [https://www.acf.hhs.gov/cwpm/public\\_html/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=31](https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=31) [<https://perma.cc/Z9FV-2JGC>] (emphasis added); *see also* OHIO ADMIN. CODE 5101:2-42-04 (D)(1)-(3).

168. *E.g.*, 42 U.S.C. §670, *et. seq.* (2018); 45 C.F.R. § 1355, *et. seq.* (2020).

and the incapability is supported by regularly updated information in the case plan of the child.

(5) Facilitate service planning and provision of services under the FCM program. Service planning and provision of services shall include but are not limited to:

- (a) Placement prevention efforts.
- (b) Determining the appropriateness of placement.
- (c) Ensuring all procedural safeguards are provided.
- (d) Case management.
- (e) Family reunification efforts.
- (f) Providing support to the child's caregivers.
- (g) Discharge planning.
- (h) Independent living.
- (i) Referral to other programs as required or necessary . . . .<sup>169</sup>

Because of the importance of the role, the executive branch agency functions of placing and caring for children are subject to continuous judicial review, which means the Ohio juvenile court judges are actually reviewing themselves. This conflict is not minor. A publication jointly prepared by the Supreme Court of Ohio, the National Center for Juvenile Justice, and the Ohio Department of Job and Family Services summarizes specific required judicial findings under federal law during three procedural phases of a child's case:

In practice, that calls for participating courts to consider and make detailed, formal and timely findings on three issues in the cases of children who need out-of-home placement:

1. Necessity of removal. First, compliance with IV-E requirements calls for the court authorizing a child's removal from the home to make a fact-based determination that "continuation in the home would be contrary to the welfare" of the child—and to do so in the first order that sanctions the child's removal, even temporarily.
2. Efforts to prevent removal. Within 60 days of the child's removal, the court must find that "reasonable efforts have been made to prevent the child's removal from home"—which may be satisfied by a finding that, under the circumstances, a failure to make advance efforts to prevent removal was "reasonable."
3. Efforts to finalize permanency. Within 12 months of the date that the juvenile enters IVE eligible foster care—generally at a special "permanency hearing" that is required for children

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169. OHIO ADMIN. CODE 5101:2-47.

who have lingered that long in placement—the court must find that “reasonable efforts have been made to finalize a permanent placement for the child.”<sup>170</sup>

In each of these important judicial determinations, the Ohio juvenile court judges—through their judicial branch role—are reviewing themselves in their executive branch role, contradicting one of “the earliest expressions of the rule of law in Anglo American jurisprudence,” that “no man can be a judge in his own cause.”<sup>171</sup> As just one example of this conflict, the Ohio statutes explain how the “Title IV-E agency which has legal responsibility for a child,” which is the juvenile court, “must obtain a judicial determination by a juvenile court of competent jurisdiction signifying that reasonable efforts were made by the Title IV-E agency to finalize the permanency plan for a child placed in substitute care . . . .”<sup>172</sup> Further, the judges are financially incentivized to rule in their own favor, because making such determinations triggers the courts’ ability to claim and maximize IV-E foster care revenue. Also, in addition to the three specifically required judicial determinations outlined above, the juvenile courts must hold review hearings every 6 months, which again includes review of their own actions as the IV-E agency responsible for placement and care of the children:

The review hearing provides an opportunity to evaluate case progress and to revise the case plan as needed. They also guide efforts toward achieving permanency for the child. The review also considers the extent of progress that has been made toward alleviating or mitigating the causes necessitating placement in foster care . . . .<sup>173</sup>

Moreover, the juvenile courts have continuing jurisdiction over the actions of the IV-E agency (themselves) throughout the time when the child is in the care of the courts’ dual role,<sup>174</sup> and any party can bring a matter regarding agency actions or services to the courts attention by motion at any time, again with the courts review-

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170. See Griffin & Halemba, *supra* note 153, at 3 (citing 45 C.F.R. § 1356.21(b)-(c), 42 U.S.C. § 671(a)(15), 65 Fed. Reg. 4053 (Jan. 25, 2000)).

171. See Verkuil, *supra* note 146, at 305.

172. OHIO ADMIN. CODE 5101:2-47-22.

173. ADMINISTRATION OF CHILDREN AND FAMILIES, CHILD AND FAMILY SERVICES REVIEWS, REVIEW HEARINGS, <https://training.cfsrportal.acf.hhs.gov/section-2-understanding-child-welfare-system/3024> [<https://perma.cc/LQ6Z-5APL>] (last visited Apr. 15, 2020).

174. OHIO ADMIN. CODE 2151.23 (“(14) To exercise jurisdiction and authority over the parent, guardian, or other person having care of a child alleged to be a delinquent child, unruly child, or juvenile traffic offender, based on and in relation to the allegation pertaining to the child[.]”).

ing themselves.<sup>175</sup> In fact, due to the dual executive and judicial branch roles, the juvenile courts are also in the conflicting position where they can issue orders controlling the conduct of the current custodians of the children, who again are the courts themselves in their contractual role as the IV-E care and placement agencies.<sup>176</sup>

In addition to ignoring these significant conflicts with their dual contractual roles, the juvenile court judges' resolution also incorrectly seeks to minimize the separation of powers concerns regarding the influence of the executive branch agency as a result of the interagency agreements, which the judges argued is merely "analogous to an audit."<sup>177</sup> In fact, the actual contract language in the interagency agreements provides the executive branch agency with significant control and influence, including explicit contract language granting the executive branch "final and binding" control over the courts.<sup>178</sup> As part of the contract between an Ohio juvenile court (subgrantee) and the Ohio Department of Job and Family Services (ODJFS), the juvenile court "agrees to allow ODJFS to periodically assess and monitor SUBGRANTEE's [the juvenile court's] adherence to all the requirements" of the contract (which includes carrying out the IV-E placement and care obligations in accordance with all the legal requirements discussed above).<sup>179</sup> When ODJFS assesses the court's performance of their contractual obligations, the agency is to "produce and submit a written report of its findings" to the court, and then the court must:

[F]ile a written response to ODJFS noting areas of disagreement. The response will include a continuous improvement plan (CIP) to remedy, within 90 calendar days, any deficiencies noted in the assessment with which [the court] concurs. In the event that [the court] disagrees with any portion, it agrees to note the areas of disagreement in its response state its reasons why.<sup>180</sup>

Within 60 days after the court submits its written reply to the state agency, "ODJFS will inform [the court], in writing, of its final determination related to the matters in the dispute."<sup>181</sup> Then, the court "*agrees to accept the decision of ODJFS as final and binding,*" and the court "further agrees to develop and implement, within 30 cal-

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175. Ohio R. Juv. P. 19, 35.

176. OHIO REV. CODE ANN. § 2151.61. (West 2020).

177. *Id.*

178. See LUCAS CNTY. JUV. CT. SUBGRANT AGREEMENT, *supra* note 57.

179. *Id.*

180. *Id.*

181. *Id.*

endar days of the final decision, a written CIP [continuous improvement plan] to remedy any deficiencies within 90 calendar days of the final decision.”<sup>182</sup> This contract language illustrates concerning control of the state executive branch agency over the court, and the language continues, requiring that “[t]he ODJFS Agreement Manager may periodically communicate specific requests and instructions to [the court] concerning the performance of activities described in this agreement,” and the court “agrees to comply with any requests or instructions to the satisfaction of ODJFS within 10 business days.”<sup>183</sup> Further, multiple other contractual provisions exist regarding the executive branch agency’s resulting control over the court, including the state agency control and contractual ownership of records and documents produced by the court.<sup>184</sup>

Thus, the interagency agreements result in a conflicted and convoluted arrangement where the juvenile courts are conducting judicial reviews regarding their own actions as the IV-E placing agencies, with financial incentives—which is a significant conflict in itself—and then the courts are simultaneously agreeing to submit to the final determinations of the state executive branch agency regarding the courts’ performance of those IV-E agency responsibilities. Such intertwined conflicts are precisely a reason why the separation of powers doctrine exists and why the doctrine is so clearly violated by the juvenile court interagency agreements in Ohio. The U.S. Department of Justice’s Civil Rights Division found comparable separation of powers concerns when investigating the Family Court in St. Louis, and concluded:

The organizational structure of the Family Court, wherein both prosecutor and probation officer are employees of the court, the prosecutor is counsel for the probation officer, and the probation officer acts as both an arm of the prosecution as well as a child advocate, causes inherent conflicts of interest. These conflicts of interest are contrary to separation of powers principles and deprive children of adequate due process. U.S. Const., art. I, art. II, § 2, cl. 5; art. III, § 2.<sup>185</sup>

The DOJ’s opinion supports the conclusion that the Ohio juvenile courts’ interagency agreement structure is blatantly violating

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182. *Id.* (emphasis added).

183. *Id.*

184. LUCAS CNTY. JUV. CT. SUBGRANT AGREEMENT, *supra* note 57, at Article VII.

185. U.S. DEP’T OF JUST., CIVIL RIGHTS DIVISION, INVESTIGATION OF THE ST. LOUIS COUNTY FAMILY COURT 3 (2015), <https://sites.ed.gov/underservedyouth/files/2017/01/Report-Investigation-of-the-St-Louis-County-Family-Court.pdf> [<https://perma.cc/57WJ-KL6E>].

the separation of powers doctrine, and also leads us to further consideration provided below of due process concerns.

Similar to the concerns with the IV-E contracts in Ohio, significant separation of powers violations result from interagency IV-D contracts. Considering Texas again, in addition to its traditional role of serving as the state's top legal advisor and law enforcement agency, the Texas Attorney General's office has become the state IV-D child support agency.<sup>186</sup> Those multiple functions are within the executive branch, but the Attorney General's office—through its role as the state child support agency—has in turn contracted with the Texas judicial branch. Through interagency contracts, the domestic relations courts and office of court administration are contractually funded to work for the Attorney General's office in helping to establish and enforce child support obligations in a manner that triggers the receipt of federal funds.<sup>187</sup> The Attorney General's office hired the courts to work for the Attorney General's office while those courts are also supposed to issue judicial decisions regarding the Attorney General's office enforcement efforts—enforcement efforts that the courts are simultaneously contracted to provide.

As further evidence of violations of the separation of powers doctrine in the Texas structure, impoverished custodial parents who receive public benefits are required to assign their child support rights to the Attorney General's office, and the child support is converted to a state debt owed to the agency.<sup>188</sup> Thus, in such cases, the Attorney General's Office is hiring the courts to establish and help enforce the debts that are owed to the Attorney General's office, and the courts also receive federal incentive payments for enforcing such state-owed debts at twice the amount of regular child support obligations that are owed to children.<sup>189</sup> Through the contracts, the courts can receive "incentive funding" if they meet performance standards, and the courts must agree to be monitored and reviewed by the Attorney General's office.<sup>190</sup> The interagency contract even provides for a division of the court "to file motions regarding child support under Title IV-D of the Social Security Act, in the same manner as any Texas Attorney General's Office." So, motions filed by the court, on behalf of the executive branch Attor-

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186. TEX. FAM. CODE ANN. § 231.001 (West 1995).

187. *Supra* notes 131-136 and accompanying text.

188. *Id.*

189. *Supra* note 10 and accompanying text.

190. TRAVIS CNTY. INTEGRATED CHILD SUPPORT SYSTEM, *supra* note 131; EL PASO CNTY. INTEGRATED CHILD SUPPORT SYSTEM, *supra* note 133.

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ney General's office, will be heard by the court—which is funded by the Attorney General's office.<sup>191</sup> Such a structure undermines, and virtually ridicules, the separation of powers doctrine.

Hawaii is similar to Texas in that the Hawaii legislature established a branch of the state Attorney General's office as the state-wide IV-D child support agency.<sup>192</sup> However, Hawaii has taken a different structural approach to violating the principles of separation of powers in combining executive and judicial branch functions. Rather than contracting with the courts like in Texas, the Hawaii Attorney General's office established its own internal judicial branch functions within the executive branch agency. The Hawaii legislature passed a law requiring the Attorney General's office to establish its own "office of child support hearings" and for the Attorney General's office to commission hearing officers to preside over the contested hearings and issue orders. Thus, the legislative branch required the executive branch to effectively establish its own judicial branch—with a result that the Attorney General's office seeks to initiate and enforce child support petitions in its role as the child support agency, and the Attorney General's office then appears before itself for it to rule on contested cases<sup>193</sup>—and through both executive and judicial branch roles, the Attorney General's office can receive federal incentive payments if it reaches performance criteria.<sup>194</sup>

Returning to consider the Michigan structure under the separation of powers lens, the Michigan judicial branch actually created their own executive branch child support enforcement agency—the "Friend of the Court Bureau" (FOC)—within the courts, which in turn enters "IV-D Cooperative Reimbursement Agreements" with the Michigan Department of Human Services.<sup>195</sup> The Friend of the Court child support enforcement agency functions are "performed

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191. TARRANT CNTY. DOMESTIC RELS. OFF., ENFORCEMENT OF CHILD SUPPORT, IV-D MONITORING PROGRAM, <https://access.tarrantcounty.com/en/domestic-relations-office/legal-enforcement/enforcement-modification-of-child-support.html> [<https://perma.cc/75PX-2BND>] (last visited Apr. 15, 2020).

192. HAW. REV. STAT. § 576D-2 (2013).

193. HAW. REV. STAT. § 576E-10 (2013).

194. HAW. REV. STAT. § 576D-9 (2013). In one case the Supreme Court of Minnesota held that such a structure with even fewer separation of powers concerns violated the constitution. *Holmberg v. Holmberg*, 588 N.W.2d 720 (Minn. 1999).

195. *See, e.g.*, MICH. SUP. CT., FRIEND OF THE COURT HANDBOOK (2018); THIRD JUD. CIR. CT. OF MICH., 2017 ANNUAL REPORT 29 (2017), <https://www.3rdcc.org/Documents/Administration/General/AnnualReports/2017%5EAnnual%20Report%20for%202017%5E%5E.pdf> [<https://perma.cc/N6PB-H3NG>] ("The FOC is an administrative arm of the Court. . .").

under the direction and supervision of the chief judge” and the chief judge also appoints “referees” to hold hearings for the Friend of the Court Bureau in establishing and enforcing recommended child support orders.<sup>196</sup> Thus, a division of the courts has taken on the executive branch function of initiating child support actions against litigants (who are usually poor) and then the actions initiated by the courts are ruled upon by the courts, all in order for the courts to obtain Title IV-D child support revenue—including federal incentive funds.<sup>197</sup> Through the contracts, the courts are also required to be monitored and overseen by the statewide executive branch human services agency.<sup>198</sup> Further, in at least one of the Michigan counties, the court also entered a cooperative agreement with the county prosecutor’s office,<sup>199</sup> and although intended to be two separate branches of government, “the Muskegon County Prosecutor’s Office Child Support Division was moved into the Family Court and became the Muskegon County Family Court Establishment Division.”<sup>200</sup> Again, the separation of powers doctrine is destroyed through this structure.

Moving to Pennsylvania, all of the state’s county domestic relations courts have entered interagency contracts to carry out the child support agency functions.<sup>201</sup> So again, the courts carry out the executive branch functions of preparing and filing complaints, motions, and other enforcement requests, which the courts then rule upon.<sup>202</sup> Further, through their agreements with the executive branch, the courts are contractually required to prioritize cases where parents have received public assistance and must assign their child support rights to the state.<sup>203</sup> When the parents apply for pub-

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196. MICH. COMP. LAWS §§ 552.503, 507, 508 (1997).

197. See FRIEND OF THE COURT TITLE IV-D COOPERATIVE REIMBURSEMENT AGREEMENT, *supra* note 116.

198. *Id.*

199. MICH. DEP’T HUM. SERVS., *supra* note 120.

200. MUSKEGON CNTY. PROSECUTORS, CHILD SUPPORT DIVISION, <https://www.co.muskegon.mi.us/581/Child-Support-Division> [https://perma.cc/XY3Y-DXU6] (last visited Apr. 15, 2020).

201. PHILA. FAM. CT., *supra* note 117 (“Philadelphia Domestic Relations serves as the county Title IV-D child support agency.”); *Bureau of Child Support Enforcement*, PA. DEP’T OF HUMAN SERVS. (Sept. 17, 2016), [https://www.humanservices.state.pa.us/CSWS/csws\\_controller.aspx?PageId=CSWS%2Fbcse\\_about.ascx&Preference=Desktop&Owner=Client](https://www.humanservices.state.pa.us/CSWS/csws_controller.aspx?PageId=CSWS%2Fbcse_about.ascx&Preference=Desktop&Owner=Client) [https://perma.cc/F754-93WH].

202. PA. DEP’T OF HUM. SERVS., 2015-2020 PENNSYLVANIA TITLE IV-D COOPERATIVE AGREEMENT WITH SUMMERSET COUNTY DOMESTIC RELATIONS § 1.1 (2015), [https://contracts.patreaury.gov/Admin/Upload/331135\\_4100070496\\_201510201057.pdf](https://contracts.patreaury.gov/Admin/Upload/331135_4100070496_201510201057.pdf) [https://perma.cc/TM6B-ZWEP].

203. *Id.* at § 2.

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lic assistance, the county assistance office electronically informs the courts—and the courts themselves complete and file the complaint for child support that will be owed to the state—and those complaints for state-owed support filed by the courts are then ruled upon by the courts. The courts contractually agree to process these cases faster than other child support cases.<sup>204</sup>

Such structure already squarely conflicts with the intended separation of powers doctrine, and yet the interagency contracts in Pennsylvania go further, requiring the courts to directly report to the executive branch Department of Human Services (DHS). For example, a sample agreement in Somerset County requires that the domestic relations court “shall provide access to DHS, The Pennsylvania Auditor General . . . with respect to all books, documents, papers, financial transactions, or other records which are pertinent to the functions of the DRS [domestic relations court] under this agreement.”<sup>205</sup> Through a contract section titled “Cooperation with DHS Staff Required,” the agreement requires that the court “shall cooperate with DHS in the performance of DHS’s responsibilities,” and the court “shall provide adequate work space, computer access, telephone and copying/scanning facilities as reasonably possible for DHS employees who are assigned work at the [court].”<sup>206</sup> Further, “[f]or intergovernmental cases, the DRS [domestic relations court] shall provide responses within 5 working days of receipt of such requests from DHS/BCSE employees for case specific information, documentation and/or supportive services . . .”<sup>207</sup> The contract also requires the courts to provide attorneys in the IV-D cases, even though those attorneys can represent the interests of the state human services agency.<sup>208</sup> An attachment to the contract indicates that court must provide an attorney whenever “DHS’s interest is jeopardized.”<sup>209</sup> The contract also creates a “DRS Memorandum process” through which the state executive branch agency ultimately directs the process of issuing the binding memoranda that controls the actions of the courts.<sup>210</sup> Also, like in Michigan, the contracts allow the Pennsylvania courts to obtain federal incentive funding—which is discussed in more detail in the sections below.

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204. *Id.* at § 2.2(a) (The DRS must process referrals within two days or no later than 20 days).

205. *Id.* at § 3.8.

206. *Id.* at § 3.11(a).

207. *Id.* at § 3.11(b).

208. PA. DEP’T OF HUM. SERVS., *supra* note 212, at § 3.13.

209. *Id.* at Attachment B, § 2(i).

210. *Id.* at § 4.4(p).

And despite all of this, the contract incorrectly and almost comically asserts that the independence of the judiciary is still “guaranteed.”<sup>211</sup>

Other state structures similarly violate the principles of separation of powers. In New Jersey, the statewide executive branch child support agency (the Office of Child Support Services, or OCSS) entered similar interagency agreements:

OCSS has a cooperative agreement with the Administrative Office of the Courts (AOC) for assistance in the establishment and enforcement of child support orders, central registry and reconciliation of accounts related to support payments. OCSS also has contracts with twenty of the county sheriff’s offices and one of the county prosecutor’s offices for the execution and service of warrants related to child support and has contracts with two county departments of law for legal services in Title IV-D cases.<sup>212</sup>

An OCSS organizational chart that is provided in contract documents, shown below, illustrates how the courts report to the state executive branch agency:<sup>213</sup>

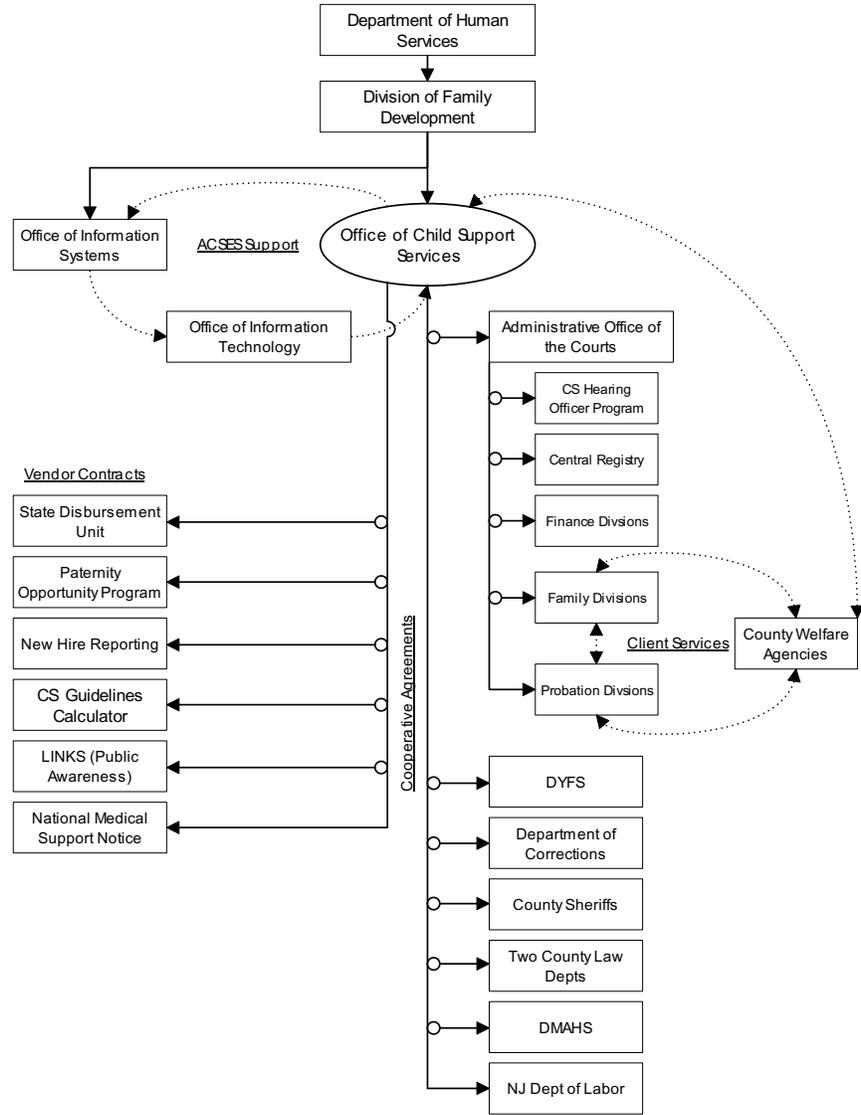
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211. *Id.* at § 1.2.

212. N.J. DEP’T OF TREASURY, PROJECT MANAGEMENT STRUCTURE, APPENDIX E, <https://www.state.nj.us/treasury/purchase/bid/attachments/37829-e.pdf> [<https://perma.cc/E6QQ-84CN>] (last visited Apr. 1, 2020).

213. *Id.*

Figure 1: OCSS Organization Chart



Similar to New Jersey, the Maryland judiciary enters inter-agency contracts with the state executive branch child support agency.

Each year the Maryland Judiciary enters into a “Cooperative Reimbursement Agreement” (CRA) with the Maryland Child Support Enforcement Administration (CSEA). The

CSEA is the entity in our State designated to receive and administer federal funds for child support. Through our CRA, the Maryland Judiciary receives federal funds to reimburse us for the work our courts do to establish, modify and enforce child support orders involving the Offices of Child Support Enforcement. . . .

The Judiciary receives several million dollars each year under the CRA. . . . The Judiciary may include in the CRA costs associated with establishing, modifying and enforcing child support in cases involving the local support agency. Those costs may include salaries and benefits for clerk's office staff, Magistrates and non-judge employees.<sup>214</sup>

Thus, clear separation of powers concerns are again present. The executive branch child support agency in Maryland is contracting with and funding the courts—including paying the salaries of the judicial magistrates—before which the agency appears. Further, the contract language used as a template in these interagency agreements requires that the courts provide the child support program services, and turning the principle of judicial review of agency actions on its head, the courts' work is subject to supervision by the state executive branch agency:

[S]ubject to the supervision of the DEPARTMENT OF HUMAN RESOURCES (DEPARTMENT) to include the Child Support Enforcement Administration (CSEA) and Local Department of Social Services or local office of child support enforcement and shall be in compliance with such rules and regulations as the DEPARTMENT may adopt covering operation of the PROGRAM. Supervision will consist of but not be limited to compliance reviews, case record reviews, statistical analysis, audits, monitoring of operational systems and procedures and any other reviews deemed necessary by CSEA . . . .<sup>215</sup>

The constitutional concerns with interagency agreements do not stop with the separation of powers violations. The next section sheds light on the ongoing due process violations that are occurring in juvenile justice systems across the country.

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214. MD. JUDICIARY, *supra* note 111.

215. STATE OF MD., DEP'T. OF HUM. RES., CHILD SUPPORT ENF'T ADMIN., COOPERATIVE REIMBURSEMENT AGREEMENT, COURT AND LAW ENFORCEMENT AGENCIES, <http://www.co.worcester.md.us/sites/default/files/meetings/Commissioner%20Meeting/packet/2016/07-05-16.pdf> [<https://perma.cc/F895-ZRD2>] (last visited July 29, 2020).

### B. Due Process Concerns

“No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.” James Madison, Federalist 10.

Linked to the separation of powers doctrine is the necessity of an independent and impartial judiciary. The right to an impartial tribunal is at the core of the due process protections guaranteed in the Constitution.<sup>216</sup> Due process requires both the reality of impartiality—that the judiciary is not actually biased—and the appearance of impartiality—that a reasonable person with full knowledge of the facts would not consider the tribunal to be biased.<sup>217</sup> The importance of impartial tribunals cannot be overstated, as U.S. Supreme Court Justice Robert Jackson explained: “The right to fair trial stands guardian over all other rights.”<sup>218</sup>

The example state court structures resulting from the multiple interagency agreements discussed above are affronts to this crucial due process protection. Considering again the Ohio juvenile court interagency agreements, the resolution by the Ohio Judicial Conference Juvenile Law and Procedure Committee ignored Due Process Clause concerns that are present when the juvenile courts have a financial interest in the outcome of judicial hearings. The Ohio judges on the Committee did not consider long-standing U.S. Supreme Court precedent that originated in Ohio. First, in a case from the prohibition era, *Tumey v. Ohio*, the Supreme Court found the structure of the Ohio mayor’s court to violate due process where the mayor (sitting as judge) received a financial incentive to convict defendants, and also his village received revenue upon each conviction:

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

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216. See generally Mark A. Grannis, *Safeguarding the Litigant’s Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382 (1987); ERIC T. KASPER, IMPARTIAL JUSTICE: THE REAL SUPREME COURT THAT DEFINE THE CONSTITUTIONAL RIGHT TO A NEUTRAL AND DETACHED DECISIONMAKER (2013).

217. Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge’s Impartiality ‘Might Reasonably be Questioned’*, 14 GEO. J. LEGAL ETHICS 55, 58–59 (2000).

218. *Dennis v. United States*, 339 U.S. 162 (Jackson, J., concurring).

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."<sup>219</sup>

Then, forty-five years later, the Supreme Court again found due process violations with the Ohio mayor's courts in *Ward v. Village of Monroeville*, where although the mayor-judge did not receive direct compensation for each conviction, his village did receive revenue for each conviction.<sup>220</sup> In finding the structure violated the defendants' due process guarantee to an impartial tribunal, Justice Brennan relied on the "possible temptation" standard from *Tumey*:

[T]he test is whether the mayor's situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused. . . ." Plainly that "possible temptation" may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court.<sup>221</sup>

Through the interagency agreements and separation of powers concerns discussed above, the juvenile court judges in Ohio face direct financial incentives—when they rule children are delinquent or unruly and order the children removed from their homes, the judges can maximize IV-E foster care funds for their courts. But the judges ignored the Supreme Court decisions of *Tumey* and *Ward* and instead simply claimed in their resolution that no conflict results from the contracts.<sup>222</sup>

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219. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 877–78 (2009) (discussing and quoting *Tumey v. Ohio*, 273 U.S. 510, 520–35 (1927)).

220. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *see generally* Grannis, *supra* note 216.

221. Grannis, *supra* note 216 (internal citations omitted).

222. OHIO JUD. CONF., RESOLUTION TO SUPPORT OPTIONAL JUVENILE COURT PARTICIPATION AS A TITLE IV-E PLACING AGENCY 7 (Nov. 17, 2006), <http://>

However, the interagency agreements reveal that both the state and the Ohio juvenile courts realize the conflict exists. In fact, due to the financial incentives, the state agency and the courts determined that a juvenile court party to the agreement must be admonished in the contract that it “agrees that it will not deliberately adjudicate a child unruly or delinquent for the sole purpose of receiving Federal Financial Participation (FFP) [federal IV-E funds].”<sup>223</sup> Also, a slide presentation prepared for the juvenile courts by the state human service agency’s Bureau of Fiscal Operations also cautions the courts of this conflict, including a more direct bullet point warning: “No Cherry picking” children for removals in order to receive more funds.<sup>224</sup> Even more bluntly, an Ohio juvenile court judge from Franklin County explained his concern with the conflict 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?”<sup>225</sup>

As further evidence of the financial conflict of interest, the juvenile court in Cuyahoga County (including Cleveland) signed such an interagency agreement in order to maximize IV-E funds after ordering children removed from their homes. The court then used the IV-E funds resulting from court-ordered child removals for over \$1.8 million in juvenile court system salary increases in 2017. The county council explains the use of the funds: “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.”<sup>226</sup> The large revenue

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[www.ohiojudges.org/Document.ashx?DocGuid=400faab0-352d-474a-bcb9-d85a82f81bd7](http://www.ohiojudges.org/Document.ashx?DocGuid=400faab0-352d-474a-bcb9-d85a82f81bd7) [<https://perma.cc/U84L-6N4C>].

223. SUBGRANT AGREEMENT G-1213-06-0242, *supra* note 57.

224. OHIO DEP’T. OF JOB AND FAM. SERVS., BUREAU OF FISCAL OPERATIONS, OVERVIEW OF THE TITLE IV-E JUVENILE COURT PROGRAM 14, <http://jfs.ohio.gov/ocf/overviewoftitleive.pdf> [<https://perma.cc/93Z6-NU6C>] (last visited Apr. 14, 2020).

225. Pyle, *supra* note 154.

226. CNTY. COUNCIL OF CUYAHOGA CNTY, RES. R2017-0142, 6 (2017). Budget maneuver illustrates how the salary increases were to be paid out the county general fund, but the juvenile court simultaneously transferred money from its 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

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amounts illustrate that there is unfortunately no shortage of poor children in Cleveland from which the juvenile court can obtain IV-E payments after ordering child removals, with over half of the city's children living in poverty.<sup>227</sup>

Similar due process concerns are present in the other inter-agency agreements discussed above, again due to financial interests. In addition to the Ohio juvenile courts' IV-E foster care contracts, the courts also enter contracts with the state child support enforcement administration (part of the executive branch). Through these agreements, the courts work for the state child support agency to establish, modify, and enforce child support, in exchange for an hourly rate to be paid through the receipt of federal IV-D child support funding. Thus, the state child support agency is funding the courts before which the agency appears, and the courts are financially incentivized in ordering and enforcing the child support obligations. In Lucas County, the "IV-D contract" explains how the courts gain additional revenue of an hourly rate of \$248.93, but which the courts only receive if they comply with the requirements for claiming the IV-D funds.<sup>228</sup> A resulting due process concern is present because the courts are supposed to decide whether to enter child support orders, and how and when to enforce those orders, based only on the best interests of the child. Particularly in cases where the child is in foster care, with any support owed to the state as a result, the court should consider whether ordering and enforcing child support could be contrary to case planning goals such as possible reunification with the parents.<sup>229</sup> However, the courts are financially incentivized to order as many child support obligations as possible and engage in enforcement efforts, because the more child support orders the courts decide to establish, the more the courts can charge their hourly rate to establish, modify, and enforce the orders.

The Pennsylvania courts provide another example of the due process concerns resulting from judicial financial incentives in the interagency agreements. As explained above, the domestic relations

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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.

*Id.* at 10.

227. *Just the Facts: Poverty and Homelessness in Our Community*, NE. OHIO COAL. FOR THE HOMELESS (2017), <https://www.neoch.org/poverty-stats-2017/> [https://perma.cc/8JBC-9XYJ].

228. See OHIO DEP'T OF JOB AND FAM. SERVS., *supra* note 57.

229. See Hatcher, *supra* note 8, at 1136.

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courts in Pennsylvania have entered into contracts with the state's executive branch Department of Human Services, through which the courts themselves have taken on the county child support enforcement agency functions.<sup>230</sup> In addition to being financially incentivized to enter and enforce child support obligations through the contractual ability to maximize federal IV-D funds, the courts are additionally incentivized by what are essentially bonus payments depending on how the courts enter and enforce the orders. Through the courts' contracts with the executive branch agency, the courts are able to share in the receipt of federal "incentive payments."<sup>231</sup> The contract explains:

The DRS [domestic relations court] is entitled to earn a portion of the incentive monies paid to DHS by the federal government for performance in Title IV-D cases. . . . DRS's share shall reflect its relative score for each category of performance . . . .<sup>232</sup>

If the courts reach certain percentages in their "performance," they can reap more of these incentive funds. For example, "[t]he support order performance level for a DRS [court] for a FFY [fiscal year] is determined by dividing the number of court orders for support by the number of cases in the DRS caseload." Thus, in each case, the courts are financially incentivized to enter a child support order. Then, once the child support orders are entered, the courts are further incentivized to enforce the orders through any means possible.<sup>233</sup> And these incentives are also calculated for the courts' performance in paternity establishment, child support arrearages collections, and cost-efficiency.<sup>234</sup> Then, each court's incentive payments are pooled together, and the individual courts are contractually required to compete against each other on the same performance criteria to claim their percentage of the pooled funds:

The incentive payment for a DRS for a fiscal year is equal to the total DRS incentive payment pool for the fiscal year, multiplied by the DRS incentive payment share for the fiscal year. The DRS incentive payment share for a fiscal year is the incen-

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230. *See supra* notes 201-204 and accompanying text.

231. *See* 42 U.S.C. § 658a.

232. *See* 2015-2020 PENNSYLVANIA TITLE IV-D COOPERATIVE AGREEMENT WITH SUMMERSET COUNTY DOMESTIC RELATIONS, *supra* note 202, at 23.

233. *Id.* (explaining that "[t]he current support payment performance level for a DRS for a FFY is determined by dividing the current amount of total support collected during the FFY by the total amount of current support owed for the FFY").

234. *Id.*

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tive base amount for the DRS for the fiscal year divided by the sum of the incentive base amounts for all of the DRSs for the fiscal year.<sup>235</sup>

Of further concern, the courts' incentive payments are doubled when the courts order and enforce child support that is owed to the state (in "current assistance" or "former assistance" cases where the children have been in foster care or parents received public assistance), as opposed to cases where child support is actually owed to the custodial parents and children.<sup>236</sup> Thus, of all the potential cases appearing before the courts, the judges are incentivized at twice the amount to focus court resources and enter orders and enforcement actions on behalf of state-owed support debts, rather than potential child support payments for children.

The DRS collections base for a fiscal year is equal to two times the sum of the total amount of support collected for current assistance cases plus two times the total amount of support collected in former assistance cases, plus the total amount of support collected in never assistance cases in the fiscal year, *i.e.*, 2 x (Current Assistance collections + Former Assistance collections) + all other Title IV-D collections.<sup>237</sup>

Moreover, the courts are further incentivized with a contingency fee arrangement to enter and enforce orders requiring impoverished parents to pay back the state cost of Medicaid. The courts receive a percentage of the collections by contracting into the federal incentive intended for the executive branch agency: "As long as provided by federal law, a 15 percent incentive shall be paid based on actual medical support payments collected by the DRS in TANF, IV-E, and Non-TANF Medicaid cases, representing reimbursement of title XIX Medicaid expenditures . . . ."<sup>238</sup>

Similar to Pennsylvania, the Michigan courts explain how they are motivated to use their "Friend of the Court" (FOC) divisions to pursue the child support incentive payments, even adding their

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235. *Id.*

236. *Id.*

237. *Id.*

238. See PA. DEP'T OF HUM. SERVS., *supra* note 202; see also Memorandum from Steven D. Capps, Dir., Mich. Sup. Ct. Friend of the Ct. Bureau, to Michigan State Judges and Administrators 2, 6 (Aug. 26, 2015), <https://courts.michigan.gov/Administration/SCAO/OfficesPrograms/FOC/Documents/Memoranda/IncentivePayments.pdf> [<https://perma.cc/H3CR-M2HK>] (advising Michigan courts they should seek their share of the medical support incentive payments, and listing the total amount of the incentive payments for one year at over \$1.4 million).

own court-backed incentive competition, literally dividing the court into teams in the pursuit of the federal child support incentives:

In these tough economic times, courts are financially strapped. Friends of the court must meet performance measures in order to maintain and increase funding and to protect against reductions because of decreased local revenue.

. . . .

In 2009, Michigan received a \$27 million incentive payment because of its outstanding efforts in the five key performance measures. This payment was split between the state government and local funding units with FOCs and prosecuting attorneys receiving their share of funding based on the same formula that the federal government uses to distribute incentive payments to the states.

. . . .

In May 2011, a cooperative effort led by the Genesee County FOC implemented an 11-week program to increase its support collections . . . .

. . . .

FOC employees were split into teams and, as an additional personal incentive, FOC Director Jack Battles agreed to bring back previously terminated flex-time for the three top winning teams. The winning team received 12 weeks of flex-time, second place received 10 weeks, and third place received 8 weeks. The overall focus of the friendly competition was to help employees learn more about the various functions of the FOC and, ultimately, in that same manner, encourage employees to do their part to increase incentive payments . . . .<sup>239</sup>

The above examples and others in this article cross the constitutional line, to the point where the due process right to an impartial tribunal is violated. Two recent opinions support this conclusion, where the U.S. Court of Appeals for the Fifth Circuit found that practices of Louisiana state courts violated the Due Process Clause because of financial conflicts. In *Caliste v. Cantrell*, the Court held that the trial court violated defendant’s due process rights when the court received fees every time a judge required a secured money bond as condition of release.<sup>240</sup> And in *Cain v. White*, the Court similarly held that the institutional financial inter-

239. *Incentive Payments: How to Maintain & Increase Funding*, 24 THE PUNDIT 5, 8 (Nov. 2011).

240. *Caliste v. Cantrell*, 937 F.3d. 525 (2019).

est of the courts from judges ordering court fines violated the Due Process Clause.<sup>241</sup>

### C. *Judicial and Prosecutorial Ethics*

Considering the several example jurisdictions described in this article with clear structural due process and separation of powers violations, an ethical truism should be embraced: it is unethical for judges to carry out their judicial functions in justice systems where their independence and impartiality are undermined. A recent case from the State of Washington provides an example. In *Matter of Dependency of A.E.T.H.*, the Court of Appeals of Washington agreed with the juvenile court judge's decision to recuse herself because she concluded the juvenile court structure violated the due process right to an impartial tribunal.<sup>242</sup> The case involved a structure where the volunteer guardian ad litem program (VGAL) is an agency of the court. In her recusal decision, the trial court judge entered a 317-page memorandum decision explaining her concern with the structural due process violation, including explanation that "the acts of VGAL Program employees are the acts of the Superior Court, and judging or sanctioning the acts of VGAL Program employees is the Judge judging or sanctioning himself or herself."<sup>243</sup> As the Court of Appeals explained:

Judge Farris concluded that the parents were "denied their due process constitutional right to an impartial judge by having a Snohomish County Superior Judge preside over this case." Judge Farris explained that "[t]he manner in which the [VGAL Program] was operated during this case creates doubt about the Snohomish County Superior Court's ability to be impartial in this case involving court employees directly participating in the litigation."

The Court of Appeals recognized that the "right to a fair trial before an impartial tribunal is a basic requirement of due process," which is "especially critical" in child welfare proceedings involving parental rights and the best interests of children.<sup>244</sup> The Court further explained how "'even if there is no showing of actual bias in the tribunal, . . . due process is denied by circumstances that create the likelihood or the appearance of bias.'"<sup>245</sup> The court concluded:

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241. *Cain v. White*, 937 F.3d 446 (5th Cir. 2019).

242. *Matter of Dependency of A.E.T.H.*, 446 P.3d 667, 670 (Wash. Ct. App. 2019).

243. *Id.*

244. *Id.*

245. *Id.*

[U]nder the appearance of fairness doctrine . . . “The law requires more than an impartial judge; it requires that the judge also appear to be impartial.” . . . “The test for determining whether the judge’s impartiality might reasonably be questioned is an objective test that assumes a reasonable observer knows and understands all the relevant facts.”

Here, Judge Farris displayed no personal bias and attempted to conduct an unbiased proceeding. But the sticky wicket is that the tribunal in which A.H.’s dependency and termination proceedings took place was biased because of the involvement of superior court employees working against the parents in this case. . . .

. . . .

In short, based on the above findings, Judge Farris correctly concluded that “[t]he Superior Court, its direct agents, and its own attorneys, all under the supervision of the judges repeatedly aligned with and literally became a party litigating this case against the parents . . . throughout the case.” These circumstances, which existed before, during, and after the termination trial, resulted in a tribunal that was biased and violated both parents’ right to due process and the appearance of fairness doctrine.<sup>246</sup>

If this reasoning is applied in the Ohio juvenile court IV-E contract structure and other similar examples addressed in this article, not only is there concern with the structural conflicts, but the courts are also directly financially incentivized in their judicial actions. Judicial ethical obligations are arguably violated when judges create or participate in such unconstitutional circumstances.<sup>247</sup>

Ethical concerns are also present in the interagency agreements with the offices of prosecutors and attorneys general, including where the contractual structure and incentives can conflict with prosecutorial discretion and the neutrality doctrine.<sup>248</sup> Similar to judicial decisions and actions, the exercise of prosecutorial discretion can be linked to constitutional due process concerns. The U.S. Supreme Court explained in *Marshall v. Jerrico, Inc.* that “the strict

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246. *Id.* (internal citations omitted).

247. See generally Leslie W. Abramson, *What Every Judge Should Know about the Appearance of Impartiality*, 79 ALB. L. REV. 1579 (2016); Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493 (2013).

248. See generally Josh Gupta-Kagan, *Rethinking Family-Court Prosecutors: Elected and Agency Prosecutors and Prosecutorial Discretion in Juvenile Delinquency and Child Protection Cases*, 85 U. CHI. L. REV. 743, 757 (2018); Bruce A. Green and Rebecca Roiphe, *Rethinking Prosecutors’ Conflicts of Interest*, 58 B.C. L. REV. 463 (2017).

requirements of neutrality cannot be the same for administrative prosecutors as for judges, whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime.”<sup>249</sup> However, despite the less rigid application of the neutrality doctrine for prosecutors, the Supreme Court cautioned:

We do not suggest, and appellants do not contend, that the Due Process Clause imposes no limits on the partisanship of administrative prosecutors. Prosecutors are also public officials; they too must serve the public interest. In appropriate circumstances the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law.

A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.<sup>250</sup>

The case involved the administrative prosecution of child labor violations, including potential financial incentives through the receipt of fines. The Supreme Court concluded that “here the influence alleged to impose bias is exceptionally remote” because the administrative prosecutors could not “profit economically” from the fine structure, and there was no realistic possibility that the prosecutors’ judgment could be “distorted by the prospect of institutional gain as a result of zealous enforcement efforts.”<sup>251</sup> In reaching its conclusion, the Court noted that the fines amounted to “substantially less than 1% of the budget” of the national Employment Standards Administration (ESA) of the Department of Labor,<sup>252</sup> and further explained:

Unlike in *Ward* and *Tumey*, it is plain that the enforcing agent is in no sense financially dependent on the maintenance of a high level of penalties. Furthermore, since it is the national office of the ESA, and not any assistant regional administrator, that decides how to allocate civil penalties, such administrators have no assurance that the penalties they assess will be returned to their offices at all . . . .<sup>253</sup>

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249. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980).

250. *Id.* (internal citations omitted).

251. *Id.*

252. *Id.*

253. *Id.*

Unlike the facts in *Marshall*, the amount of money prosecutors and attorney general's offices are pursuing through the interagency agreements described in this article is substantial, the money is being maximized directly for the offices in which the prosecuting attorneys work, and sometimes the prosecutors are even individually profiting. In Ohio, the Portage County Prosecutor's Office explains that its child support enforcement unit "is fully funded by Federal Title IV-D funds."<sup>254</sup> In Oregon, the Lane County District Attorney's office explains how "[w]e continue to be dependent on grants and other state and federal support," including the pursuit of child support IV-D funds: "This \$1,538,552 grant is continuing, a 66% reimbursement of eligible expenditures spent on enforcing/establishing child support payments, plus 'Incentive' payments for exceeding specific benchmarks."<sup>255</sup> In Calhoun County, Michigan, the "IV-D Cooperative Reimbursement Contract" has been worth over \$550,000 a year for the prosecutor's office, plus federal incentive payments,<sup>256</sup> which amounts to over twenty percent of the office's operating costs.<sup>257</sup> In Texas, the statewide attorney general's office estimates it could receive over \$382 million in federal child support funds, which amounts to over thirty percent of its total funding.<sup>258</sup>

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254. PORTAGE CNTY. PROSECUTOR'S OFF., <http://portageprosecutor.com> [<https://perma.cc/8RCJ-2F3A>] (last visited Apr. 15, 2020).

255. LANE CNTY. DEP'T OF DIST. ATT'Y, FY 17-18 PROPOSED BUDGET, [https://www.lanecounty.org/UserFiles/Servers/Server\\_3585797/File/Budget/FY%2017-18%20Proposed/District%20Attorney.pdf](https://www.lanecounty.org/UserFiles/Servers/Server_3585797/File/Budget/FY%2017-18%20Proposed/District%20Attorney.pdf) [<https://perma.cc/28D3-EFHL>] (last visited Apr. 3, 2020); *see also* OR. DEP'T. OF JUST., AGENCY BUDGET REQUEST 2019-21: DIVISION OF CHILD SUPPORT 8 (proposed Aug. 19, 2018) ("District Attorney Participation: The statewide Oregon Child Support Program represents the combined efforts of the DOJ Division of Child Support and the 23 Oregon county DA offices that contract with DOJ to provide child support services. These 22 counties receive the same federal matching funds as the Division of Child Support and share in the Program's federal incentive payments based on the county's performance.").

256. Letter from Susan K. Mladenoff, Prosecuting Att'y, to Calhoun Cnty. Bd. Of Comm'rs (Sept. 3, 2009), [https://cms5.revize.com/revize/calhouncountymi/Agendas%20&%20Minutes/2009/090903\\_BOC\\_Agenda.pdf](https://cms5.revize.com/revize/calhouncountymi/Agendas%20&%20Minutes/2009/090903_BOC_Agenda.pdf) [<https://perma.cc/46J7-E5RS>].

257. CALHOUN CNTY., 2011 GENERAL FUNDS – 2011 ADOPTED BUDGET: PROSECUTING ATTORNEY 38, <https://cms5.revize.com/revize/calhouncountymi/Finance/Budget%20Information/2011%20General%20Funds%20-%202011%20Adopted%20Budget.pdf> [<https://perma.cc/PB7G-8FYG>] (last visited July 29, 2020) (\$550,000 is over 20 percent of 2009 total operating expenditures of \$2,524, 620).

258. Ken Paxton & John Montgomery, *Office of the Attorney General, Summary of Recommendations-Senate*, OFF. OF THE TEX. ATT'Y GEN. (Jan. 17, 2019) (\$382.6 million in federal child support funding is over 30 percent of the AG's office total listed funding of \$1.24 Billion).

In addition to being financially motivated and contractually required to prosecute and enforce child support orders to maximize federal IV-D child support funds,<sup>259</sup> the prosecutors' offices also are directly incentivized in how they prosecute and enforce the cases to seek federal "incentive payments" on top of the IV-D payments. In Indiana, a Lake County "IV-D Prosecutor" described the incentive payments as "gravy."<sup>260</sup> The Texas Attorney General's Office brags that its Child Support Division leads the way in chasing these incentive payments:

The CSD received more than \$71.4 million in federal incentive payments in FY 2014—the most of any state in the nation in the latest federal reporting period. Texas has been the top recipient of federal incentive payments every year since federal FY 2006.<sup>261</sup>

In a slide presentation titled "Prosecutor's Budgets" for the Indiana Prosecuting Attorneys Council, child support incentives are listed as a key revenue stream and the slides explain that the amount in the incentive fund accounts as of 2014 was over \$31 million, over a third of which is directed to county prosecutors' offices.<sup>262</sup> Once received, the prosecutor's offices can have wide discretion in how to use the child support funds: "Hardin County Attorney may expend reimbursements, allocations and/or incentive payments received pursuant to the IV-D contract at her discretion."<sup>263</sup>

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259. For an example of performance requirements imposed on prosecutors who have entered IV-D child support contracts, see MO. CODE REGS. ANN. tit 13, § 30-2.010 (2001).

260. Susan Brown, *Proper Use of Child-Support Bonuses in Question*, LAKE CNTY. NEWS (Mar. 8, 2010), [https://www.nwitimes.com/news/local/lake/proper-use-of-child-support-bonuses-in-question/article\\_bb4a4364-506e-5083-8576-5a371aa4333b.html](https://www.nwitimes.com/news/local/lake/proper-use-of-child-support-bonuses-in-question/article_bb4a4364-506e-5083-8576-5a371aa4333b.html). [<https://perma.cc/2DT2-P5AV>].

261. OFF. OF THE ATT'Y GEN. OF THE STATE OF TEX., AGENCY STRATEGIC PLAN: FISCAL YEARS 2017-2021, 19 (June 21, 2016), <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/general-oag/AgencyStrategicPlan2017-2021.pdf> [<https://perma.cc/N4NQ-PL2P>].

262. Steve Sonnega, *Prosecutor's Budgets*, IND. PROSECUTING ATT'Y COUNCIL 41, <https://www.docslides.com/pamella-moone/prosecutor-s-budgets> [<https://perma.cc/A8UP-SYHL>].

263. HARDIN CNTY. FISCAL CT., RES. 2014-23, (Mar. 11, 2014), <http://hcky.org/wp-content/uploads/2017/08/2014-023.pdf> [<https://perma.cc/PC7L-LKY8>]; see also DIST. ATT'Y OF THE TWENTY-FIRST JUD. DIST., AMITE, LA., ANNUAL FINANCIAL STATEMENTS (Dec. 31, 2014), [https://app.lla.state.la.us/PublicReports.nsf/01EF760E7E434AD586257E820069192A/\\$FILE/00008EDD.pdf](https://app.lla.state.la.us/PublicReports.nsf/01EF760E7E434AD586257E820069192A/$FILE/00008EDD.pdf) [<https://perma.cc/2H5F-34B9>] ("There are no restrictions on how incentive payments may be expended, except as may be required by state law for any other funds of the District Attorney.").

Further, not only are prosecutors influenced to pursue the substantial amounts of IV-D child support funds and federal incentive payments for their offices, some individual prosecutors have been rewarded directly when they prosecute and enforce IV-D child support cases. A court opinion in Kentucky recognized that: “In order to entice county attorneys to enroll in the program, . . . the Cabinet encouraged and assisted county attorneys in getting their local fiscal courts to pass resolutions allowing the incentive payments received from the federal government to be paid directly to the county attorneys.”<sup>264</sup> Similarly, an Indiana court addressed the pursuit of the federal child support incentive payments by a county prosecuting attorney, and ruled that the prosecutor “could be paid the incentive payments as additional salary.”<sup>265</sup> Prosecutors taking part in such unconstitutional arrangements are in conflict with their ethical obligations.

### CONCLUSION

America’s juvenile court systems are contracting away their independence and impartiality. Through the interagency agreements discussed in this article, judicial impartiality and prosecutorial discretion are traded for money. Harm results as constitutional and ethical lines are crossed, and vulnerable children are monetized by the institutions intended to protect them.

History has witnessed the rise and fall of governments in relation to their treatment of justice and human rights for their inhabitants, especially of those who are in circumstances of heightened vulnerability. The United States was founded on knowledge of such history, thus recognizing the necessity of an independent and impartial judiciary. Around the world, member states of the United Nations similarly recognize this historical principle: “[T]he importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice . . . .”<sup>266</sup>

The necessary struggles to remember this learned history are constant, because the risks inherent in the human political struggle are also constant. Children need us to remember, because the principles of independence and impartiality are particularly crucial in judicial systems that exist to protect their welfare. When children

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264. *Kenton Cnty. Fiscal Ct. v. Elfers*, 981 S.W.2d 553, 55 (Ky. Ct. App. 1998).

265. *Plummer v. Hegel*, 535 N.E.2d 568, 570 (1989).

266. U.N. Docs. ESCOR Res. 2006/23 (July 21, 2006).

are harmed, all of society is harmed. Juvenile court systems and trial courts serving vulnerable adults form the foundations of the judiciary, which in turn forms the foundation of democracy. Thus, the constitutional and ethical concerns present in the interagency agreements discussed in this article must be addressed, as they pose contractual threats to the independence and impartiality of America's juvenile court systems.

Remedying the concerns requires concerted effort. State and county representatives in the legislative and executive branches must be held accountable to better protect the integrity and independence of the judiciary by providing sufficient funding, so the courts do not feel pressure to seek alternative revenue strategies. Attorneys practicing in the juvenile court systems should consider challenges to unconstitutional and unethical practices that result from the interagency contracts, both through individual advocacy and by coordinated efforts of the organized bar. And ultimately, needed reforms should begin with juvenile court system judges, as "primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary . . . ."<sup>267</sup>

Justice for children is not a business. America's juvenile court systems will inevitably face ongoing tensions in their search for adequate state and county funding. But as the budget struggles continue, our juvenile court systems must not lose sight of why and for whom they exist—and always be on the side of serving children, not profiting from them.

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267. *Id.*