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Preserving Families: Parent Representation, Immigration Reform, and LGBTQ+ Rights

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How U.S. Policy Has Failed Immigrant Children: Family Separation in the Obama and Trump Eras
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Please submit your manuscript as a Word document attached to an email. Send it to the editor in chief, Lisa F. Grumet, lisa.grumet@nyls.edu. Your Word document should:

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- Be approximately 13,000 to 15,000 words long, including endnotes;
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1. To improve the family law system.
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3. To serve our members.
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5. To increase the diversity and participation of our membership.
6. To educate the public about family law and the professionals involved in family law.
7. To improve professionalism of all participants in the administration of family law.”

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Chair’s Note

MICHAEL A. MOSBERG

For more than 50 years, *Family Law Quarterly* (FLQ) has served as a trusted source to the bench, to the bar, and in academia. Relied upon by practitioners and cited by courts nationwide, FLQ’s commitment to the intellectual discourse in family law remains unparalleled. With this issue, FLQ begins the next chapter in its rich and storied history.

It is with great personal pride that I welcome on behalf of the entire ABA Section of Family Law our new Editor in Chief, Lisa F. Grumet, and our new home, New York Law School. Together with our diverse student and editorial boards, FLQ is poised to continue as a leader in family law for many years to come.

Michael A. Mosberg
Chair, ABA Section of Family Law
Partner, Aronson Mayefsky & Sloan, LLP
New York, New York
Editor’s Note

It is my honor to introduce this double issue of the *Family Law Quarterly*, which for the first time is being published in conjunction with New York Law School (NYLS). This double issue comes at a time of considerable challenge and change in our country and in family law.

Thank you and congratulations to our authors and to the *FLQ* Board of Editors for their wonderful and timely contributions to family law literature. The first issue, *Preserving Families: Parent Representation, Immigration Reform, and LGBTQ+ Rights*, includes articles by Professor Martin Guggenheim, Claudio J. Perez, and Kharis Lund. The second issue, *Recent Developments in Family Law*, features articles by Professors Clare Huntington and Elizabeth S. Scott, Professor Ann Laquer Estin, and Professor J. Thomas Oldham and Dr. Jane Venohr. These articles are discussed in more detail in separate introductions to each issue.

Congratulations also to all of the NYLS Student Editors for their outstanding contributions throughout the Fall 2020 semester; for their flexibility in working entirely online during the pandemic; and for their dedication to this publication and to the field of family law, even while facing extraordinary challenges. I would like to specifically recognize Student Editorial Board members Aliyah Polner, Shelby Arenson, Kelly Barrett, Erin Peake, Sabrina Smith, and Kathy Torres. In addition to providing leadership, training, and support for all Student Editors, these students created and implemented protocols for editing, researching, and writing for *FLQ*, providing a strong foundation for NYLS’s inaugural year and for the future.

Because this is the beginning of NYLS’s role in publishing *FLQ*, a number of additional thank yous are in order. First, thank you to ABA Family Law Section Chair Michael A. Mosberg, Chair-Elect Candace B. Peeples, Editor Emeritus Linda D. Elrod, and the *FLQ* Board of Editors for their amazing leadership, collaboration, and support. Thank you to Lisa V. Comforty, Managing Editor, ABA Publishing, for making this publication possible and for teaching me and the NYLS Student Editorial Board everything there is to know about producing *FLQ*. Thank you as well to ABA Designer Betsy Kulak and proofreader Betsy Blumenthal.

Additionally, thank you to NYLS Dean Anthony W. Crowell; Associate Dean William P. LaPiana; the NYLS faculty, administration, and staff; and Diane and Arthur Abbey. They have provided extraordinary support for *FLQ*, for the Diane Abbey Law Institute for Children and Families.
at NYLS, and for NYLS students interested in children’s and family law generally.

Furthermore, I would like to thank and congratulate Kendra Huard Fershee, who served as Editor in Chief for the *FLQ* issues from Summer 2016 through Winter 2020. Professor Fershee oversaw issues that addressed such significant topics as “Intimate Partner Violence and Restorative Justice”; “Becoming a Family Lawyer”; and the Uniform Parentage Act and the Uniform Nonparent Custody and Visitation Act, among others. Additionally, she has been a terrific guide and mentor for me personally, and she worked tirelessly to ensure a smooth transition from the West Virginia University College of Law to NYLS.

Finally, thank you to our readers for your interest in *FLQ*. The overwhelming circumstances of the pandemic may lead to long-term changes in family law practice, some of which will be explored in upcoming *FLQ* issues. We hope that you and your families are healthy and safe, and that you find these articles engaging and helpful for your work.

All my best,

Lisa F. Grumet
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Introduction to Family Law Quarterly, Volume 54, Number 1

Many Family Law Quarterly issues are organized around a specific theme. This particular issue was not planned in this way, but, rather, it features three independently submitted articles that all recommend changes in policies and practices pertaining to child welfare. The title of the issue, Preserving Families: Parent Representation, Immigration Reform, and LGBTQ+ Rights, embodies this theme, as well as the range of issues addressed by the authors.

In the first article, How Family Defender Offices in New York City Are Able to Safely Reduce the Time Children Spend in Foster Care, Professor Martin Guggenheim describes the work of family defender offices in representing individual parents in child welfare proceedings. Professor Guggenheim is a leading advocate and scholar in the area of child welfare and parent representation, with almost 50 years of experience in the field. The family defender offices described in the article employ social workers and/or parent advocates as well as attorneys. In addition to their in-court work, the offices provide extensive out-of-court advocacy at meetings with child welfare agency personnel. They may also help clients to access services and public benefits and to address other issues such as housing or immigration needs.

As documented in a prior article co-authored by Professor Guggenheim, an extensive quantitative study showed that these offices achieved better outcomes than solo practitioners in that children whose parents were represented by the offices spent less time in foster care. Another article discussed a qualitative study that provided context for these findings through interviews of multiple practitioners and parents. The article published in this issue of FLQ uses specific examples to show how the family defender offices’ holistic approach benefits clients and families in individual cases. As Professor Guggenheim writes, the article “bring[s] to life the proactive nature of the multidisciplinary practice” and shows how it succeeds.

The second article, by Claudio J. Perez, is titled How U.S. Policy Has Failed Immigrant Children: Family Separation in the Obama and Trump
Eras. As the title suggests, this article reviews the recent history of detention of undocumented immigrant families and the “zero tolerance” and family separation policies implemented under President Donald Trump. Mr. Perez discusses the harms that these policies and practices caused immigrant children and families, as well as statutory and constitutional issues raised by the Trump administration’s approach. The author discusses proposals for reform and concludes with hope for bipartisan support for change under the administration of President Joe Biden.

The final article, Wolves in Sheep’s Clothing: How Religious Exemption Laws for Discriminatory Private Agencies Violate the Constitution and Harm LGBTQ+ Families, was selected as the first-place winner of the ABA Family Law Section’s 2020 Howard C. Schwab Memorial Essay Contest. In this article, Benjamin N. Cardozo School of Law student Kharis Lund analyzes conflicts involving publicly funded adoption and foster care agencies that raise religious objections to working with LGBTQ+ individuals or couples. These conflicts are before the Supreme Court in the pending litigation Fulton v. City of Philadelphia, in which the City of Philadelphia was sued for ending a contract with a religious foster care agency that opposes same-sex marriage and that refused to comply with nondiscrimination requirements.

Ms. Lund argues that permitting publicly funded faith-based foster care and adoption agencies to discriminate against LGBTQ+ individuals or couples violates the Equal Protection and Establishment Clauses of the U.S. Constitution. The Essay expresses hope for a ruling favoring Philadelphia in the pending Supreme Court litigation and for changes in federal policy under President Biden to provide support for LGBTQ+ individuals and couples seeking to be foster or adoptive parents.

All three of these timely articles include meaningful discussion of policies and practices for preserving families in the best interests of children. Thank you to our authors for contributing their perspectives and proposals for reform during this time of significant change.

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How Family Defender Offices in New York City Are Able to Safely Reduce the Time Children Spend in Foster Care

MARTIN GUGGENHEIM*

Introduction

This is the third in a series of articles discussing the results of child welfare cases in which parents in New York City were represented by a new form of legal services provision: family defender offices whose staff include social workers, parent advocates, and lawyers. The first article, Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare, was published in 2019. It described the results of a multiyear study in New York City that compared the outcomes of child welfare cases in which parents were represented by multidisciplinary family defender offices with cases in which parents were represented by

* Martin Guggenheim is the Fiorello LaGuardia Professor of Clinical Law at New York University School of Law. He gratefully acknowledges the outstanding research assistance provided by Sean Eagan, New York University School of Law Class of 2019, and also thanks Luke Gerber, Chris Gottlieb, Sue Jacobs, Peter Pecora, and Tim Ross for their support and the careful attention they gave to this Article. This Article is dedicated to the outstanding professionals who work in the family defense practices at the Bronx Defenders, the Brooklyn Defender Services, the Center for Family Representation, and the Neighborhood Defender Service of Harlem. There are too many heroes in those offices to name here; this Article is a celebration of the remarkable work they do every day supporting and fighting for justice for the many parents living in poverty who have to endure the coercive intervention of the child welfare system. Special thanks go to Caitlin Becker, Michelle Burrell, Michele Cortese, Emma Ketteringham, and Lauren Shapiro for making it possible for this Article to have been written.

solo practitioners assigned from a rotating panel of lawyers. The outcomes were dramatically better in cases handled by these offices, as measured by the reduced amount of time children were kept from their parents’ custody as compared with parents whose lawyers were solo practitioners.

The second article was a qualitative analysis that described the interviews conducted of a wide group of professionals and former clients who work closely with the two different kinds of legal representation models that were compared. That article revealed the opinions of a broad range of professionals working in the courts on what distinguishes the family defender offices’ practice from the work done by panel lawyers.

This Article serves to provide the reader with a deeper understanding of how the family defender offices actually do their work, in order to better explain how they achieve the results found by the quantitative study. The Article proceeds in five parts. Part I provides a brief history of parental representation in New York. Part II briefly describes the findings in the quantitative analysis. Part III briefly describes the findings in the qualitative study. Part IV, the heart of the Article, describes accounts of actual cases undertaken by this new breed of family defenders, to help explain their superior ability to achieve the objectives of keeping children safely with their families. This is written both to clarify why this kind of representation is so successful and to help export the model to jurisdictions that have yet to embrace it. Finally, in Part V, the Article clarifies the leading characteristics of successful parent representation in child welfare cases with a particular emphasis on proactive representation out of court. The Article ends with the conclusion that those committed to a child welfare system that avoids the needless separation of children from their families should embrace the new family defender model exemplified by the New York City offices whose work is described and celebrated in the Article.

2. Id.
3. Id. at 52.
5. Id. at 4–9.
How NYC Family Defender Offices Safely Reduce Foster Care Time

I. A Brief History of Parental Representation in Child Welfare Cases in New York City

In 1972, New York’s highest court ruled that parents have a constitutional right to counsel in child welfare proceedings. In 1975, the legislature codified the ruling and created a statutory right to counsel for indigent parents in child welfare proceedings. The legislation delegated authority for funding and managing parental representation to the counties.

Once parents had the right to counsel in child welfare proceedings, it fell to the local New York City court administrators to design the legal services delivery system to meet this new constitutional and statutory right. But no one in the court administration or local government positions in New York had any experience designing or maintaining a legal services delivery system for parents in the child welfare field. Instead, in New York City, the task was given to the Mayor’s Office of the Criminal Justice Coordinator, which had deep knowledge of the criminal justice system but no experience with the child welfare system. As we will see, the lack of anyone in that office with substantive knowledge of family court or child welfare deeply disadvantaged parents and families for the next forty years.

These criminal justice–oriented officials gave the role of representing parents in child welfare cases to solo practitioners from an assigned panel of available lawyers. These lawyers, known colloquially as “panel lawyers,” were already being used to represent parties eligible for court-assigned counsel in juvenile delinquency proceedings, among a number of

6. Unless otherwise noted, the discussion in this Article concerning the history and practice of parental representation in New York City is based on my own experience and knowledge from almost fifty years of working in this area as a litigator, clinical professor, scholar, policy advocate, and board member and advisor for government agencies and nonprofit organizations. My professional experiences in New York City include founding and co-directing the Family Defense Clinic at New York University School of Law; serving as a Founding Board Member for the Center for Family Representation; being a member of the Board of Advisors for the New York City Administration for Children’s Services from 1996 to 2013; and, most recently, since 2017, serving as a member of the New York State Commission on Parental Legal Representation.
9. See Id. § 262(c); MERRILL SOBIE, PRACTICE COMMENTARIES (McKinney 2020).
10. See N.Y. COUNTY LAW § 722(3) (McKinney 2020). To be eligible for assignments from the panel, lawyers must have a certain number of years of experience in the field and apply to be placed on the panel by a committee that reviews applications. In addition, they must be reviewed periodically and formally retained to remain active members of the panel.
other specialized areas of the law. These lawyers generally did not work in an interdisciplinary way. In 2003, a New York State Supreme Court Justice found that the payment rates for assigned counsel resulted in a shortage of panel attorneys and deprived litigants of effective assistance of counsel. Panel lawyers would rarely engage the services of a social worker and have their fees paid by the court. These lawyers spent virtually their entire professional time in the courtroom, waiting either for a new assignment or for their cases to be called. As a result, they were rarely available to their clients out of court. Half of court-assigned lawyers billed for less than five hours of out-of-court work in family court proceedings.

Between 1975 and 2007, this was the kind of representation most parents were able to receive when they were eligible for court-assigned counsel. In 2007, the then-named Mayor’s Office of Criminal Justice agreed to engage in an experiment that had a dramatic impact on child welfare practice in New York City: it offered contracts to three offices to become the primary lawyer assigned to represent parents in child welfare cases. Beginning that year, the Office funded a new model of public defense for families facing charges of abuse or neglect in three counties in New York City.

Beginning cautiously, New York City first awarded separate contracts for three of its five counties to three different not-for-profit organizations, each one authorized to accept court assignments in one county. Each office was expected to accept approximately half of the new case assignments to represent parents charged with abuse or neglect of their children (what this

11. Panel lawyers may be assigned to represent adult parties in a large range of other types of family court cases, including custody and visitation disputes, paternity proceedings, child support contempt proceedings, and cases involving domestic violence, in which the represented party might be the accused batterer or the alleged victim. See N.Y. FAM. CT. ACT § 262.


13. See N.Y. COUNTY LAW §722-c (allowing judges to authorize counsel assigned through the 18-b panel to engage social workers to assist in the representation of indigent clients); N.Y. Cty. Lawyers’ Ass’n, 763 N.Y.S.2d at 407 (finding that “because of the rate levels assigned counsel do not . . . make applications for investigators or other experts where appropriate . . . [or] ensure that clients receive necessary services and prepare appropriate service plans . . . .”).


15. Id.

16. Id. at 401–02.

How NYC Family Defender Offices Safely Reduce Foster Care Time

Article calls “child welfare cases”).

The remainder of the filings were to be assigned, as before, to panel attorneys.

The three offices—Brooklyn Defender Services (Kings County), The Bronx Defenders (Bronx County), and the Center for Family Representation (New York County)—are each structured somewhat differently.

The characteristic all three offices have in common is that they are multidisciplinary: they employ lawyers on their staff along with social workers and/or parent advocates (individuals who themselves experienced the child welfare system as a parent accused of neglecting their child). Each office spends considerable time on their cases out of court, working closely with their clients and advocating for and with them at child welfare agencies’ meetings.

Several years later, a fourth office—the Neighborhood Defender Service of Harlem—was awarded a contract to share the representation of parents in Manhattan with the Center for Family Representation, using their community-based model to represent...
families living in Harlem zip codes. In 2011, the Center for Family Representation was awarded a second contract to provide parental representation in Queens County. To date, these four providers handle the vast majority of parental representation in New York, Kings, Queens, and Bronx Counties.

Since it began, the Brooklyn Defender Services’ Family Defense Practice has represented nearly 11,000 parents involving more than 20,000 children. The Center for Family Representation represents approximately 1,300 new clients each year in child welfare cases and between 2007 and 2018 has represented more than 7,000 parents with more than 15,000 children. Between 2007 and 2017, the Bronx Defenders represented more than 11,000 parents and, as of 2018, had a staff of more than 50 attorneys, social workers, and parent advocates. In fiscal year 2018, the office was assigned to represent more than 1,500 parents with approximately 3,500 children. The Neighborhood Defender Service has represented over 1,600 parents between 2014 and 2017.

This arrangement, assigning a portion of new filings to a family defender law office and the remainder to panel lawyers, created an opportunity to study which kind of representation works best. Funding for the study was secured from Casey Family Programs, one of the leading child welfare foundations in the country committed to supporting practices designed to ensure that children are able to be raised safely in their families of origin. An important question the study hoped to learn was whether the kind of

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23. Effects of an Interdisciplinary Approach, supra note 1, at 45.
28. Effects of an Interdisciplinary Approach, supra note 1, at 53.
29. See About Us, Casey Fam. Programs, https://www.casey.org/who-we-are/about/ (last visited Oct. 18, 2020).
legal representation made available to parents would have any impact on reducing the time children spend in foster care.\textsuperscript{30}

\section*{II. Quantitative Findings}

The quantitative study was a multiyear study of child welfare cases brought in the New York City courts to determine whether the kind of legal representation provided to parents can make a difference in the outcome of cases.\textsuperscript{31} The researchers examined child welfare cases filed in New York City Family Court between 2007 and 2014; the final sample involved 9,582 families with 18,288 children.\textsuperscript{32} They used “Propensity Score Matching” as the statistical design, which equalized the groups of families compared on nearly twenty factors or covariates split into variables.\textsuperscript{33} This methodology allowed the researchers to attribute differences in outcomes between the two groups to the type of representation the parents received.\textsuperscript{34}

The study compared the outcome of cases based on whether parents were represented by panel lawyers and parents who were represented by one of the family defender offices.\textsuperscript{35} Ultimately, the researchers traced the outcomes of nearly 10,000 families and their more than 18,000 children through a four-year follow-up period.\textsuperscript{36}

The study found that the kind of representation afforded to parents makes a dramatic difference in the length of time children spend in foster care.\textsuperscript{37} Giving parents the right kind of legal team results in families being

\begin{itemize}
  \item \textsuperscript{30} \textit{Effects of an Interdisciplinary Approach, supra} note 1, at 43.
  \item \textsuperscript{31} \textit{Id.} The study was the first of its kind ever conducted, although two previous studies were undertaken in Washington State that compared cases in which parents were represented by a new Parent Representation Program with the outcomes of cases in which parents were represented by traditional parent lawyers. But those studies included comparisons between counties (some of which had the program and some of which did not) in addition to comparisons within counties (pre- and post-implementation of the new model). \textit{See Mark E. Courtney & Jennifer L. Hook, Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care, 34 Child. & Youth Servs. Rev.} 1337, 1338–39 (2012). \textit{See also Jason A. Oetjen, Nat’l Council of Juv. & Fam. Ct. Judges, Improving Parents’ Representation in Dependency Cases: A Washington State Pilot Program Evaluation} (2003), http://www.opd.wa.gov/documents/0047-2003_PRP_Evaluation.pdf (presenting results of an earlier study of pilot programs in two juvenile courts in different settings and locations).
  \item \textsuperscript{32} \textit{Effects of an Interdisciplinary Approach, supra} note 1, at 45–46.
  \item \textsuperscript{33} These factors included demographic characteristics of parents and children, family size, severity of allegations and types of allegations, judge, court borough, and prior involvement with the child welfare system. \textit{Id.} at 46–48.
  \item \textsuperscript{34} \textit{Id.} at 46.
  \item \textsuperscript{35} \textit{Id.} at 43.
  \item \textsuperscript{36} \textit{Id.} at 46.
  \item \textsuperscript{37} \textit{Id.} at 52.
\end{itemize}
reunited far sooner than would otherwise happen. The family defense offices were able to secure the safe return of children to their families 43 percent more often in their first year than panel attorneys, and 25 percent more often in the second year. Giving parents lawyers from family defense offices allowed children to be permanently released to relatives more than twice as often in the first year of a case and 67 percent more often in the second year. These families may otherwise have been permanently dissolved or the children may have spent their childhood separated from their family. Of those children who could not be returned to their families, 40 percent more children ended up with a permanent disposition of guardianship when their parents had multidisciplinary representation than children whose parents were represented by panel lawyers.

The study concluded that family defender office representation also saves an enormous amount of money that would otherwise have been spent on children remaining unnecessarily in foster care. The study found that full implementation of a multidisciplinary representation model in New York City would reduce the foster care population by 472,000 bed days per year and annually reduce foster care costs by $40 million as compared with exclusive reliance on panel lawyers.

III. Qualitative Findings

The qualitative findings in the study were equally impressive. Not only did former clients praise the kind of representation and support they received from the new offices, the professionals working in the court system also indicated significant satisfaction with the new kind of representation the offices provide. Of the three categories of professionals interviewed in the qualitative study, two were unequivocally positive in describing the important contributions the new offices had on practice in the courts. These groups were the judges and court attorneys who serve as the judge’s trial-level law clerks and children’s lawyers employed by The Legal Aid

38. Id.
39. Id.
40. Id.
42. Effects of an Interdisciplinary Approach, supra note 1, at 52–53.
43. Id.
44. Understanding the Effects of an Interdisciplinary Approach, supra note 4, at 9–10.
45. Id. at 5–6.
46. Id. at 4–11.
Society who appear in most child welfare cases as the attorney for the child. The third group, the lawyers prosecuting the cases, also expressed very positive things about the contributions made by the new offices but, perhaps expectedly, some attorneys in this group also complained that lawyers in these offices were too litigious and fought too hard on cases that did not deserve it.

The study found that the professionals in the court system regarded the critical tools the family defender offices introduced into the practice as an insistence that the court conduct evidentiary hearings when the agency seeks a court order that children be placed into foster care, combined with filing motions to ensure that judges oversee case planning decisions promptly. Court stakeholders unanimously described a dramatic increase in motion practice, most commonly brought to challenge the agency’s request to remove children from their families, to seek the return of children home, and to request other specific orders from judges. The study concluded that the increased use of these motions played a significant role in the offices’ success in securing court orders returning children to their families. Using each court appearance to advance the parent’s case, filing motions to seek better services or eliminate needless ones, and asking for more visits and for the return of children from foster care promptly are leading characteristics of the family defender office model.

The qualitative study also found that the stakeholders identified out-of-court advocacy undertaken to be a significant, and distinctive, characteristic of the family defender offices. This includes accompanying clients to out-of-court case conferences held at the childcare agencies. Finally, the qualitative study found that the multidisciplinary offices achieve distinctive results in part because they attend much better to their client’s well-being than the panel lawyers do throughout the time the case is active in court. The study found that the family defender offices place a premium on attending to the emotional well-being of their clients. Emotional supports that help parents believe in their abilities are crucial,

47. Id. at 4.
48. Id. at 6.
49. Id. at 5–6.
50. Id.
51. See id. at 6.
52. Id.
53. Id. at 6–7.
54. Id. at 7.
55. Id. at 8–9.
56. Id.
since the outcomes of many cases depend on the parents bearing up well during the process, engaging in required services, maintaining a regular visitation schedule with their children when they are in foster care, and otherwise satisfying the requirements of service plans.  

IV. How the Offices Do Their Work

The previous studies limited their focus to quantitative outcomes achieved at court or to reporting the views of stakeholders focused on the differences between the two kinds of representation made available to parents in New York City.  

This Article starts where the prior two articles left off. What the previous articles did not disclose in any depth is what is actually involved in representing parents in child welfare cases and what the staff do in individual cases. This Article is designed to bring to life the proactive nature of the multidisciplinary practice. Because the qualitative study focused so much on what the new family defender offices did in court, the case descriptions that follow focus on the out-of-court work that is crucial to the holistic model employed by the offices.

A goal of this Article is to lay the groundwork for leaders in child welfare throughout the United States to embrace the work new family defenders do. There are many ways to reform child welfare practice and policy in this country. Many of those changes need to happen upstream from the time and place children are reported to child welfare officials as being at risk of harm. But among the most important reforms needed in child welfare once investigations into families are started is to offer the family the services of a committed preventive and reunification service, precisely what the family defenders in New York are. What follows is their story.

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57. Id.

58. See Effects of an Interdisciplinary Approach, supra note 1; see also Understanding the Effects of an Interdisciplinary Approach, supra note 4.

59. The national family defender movement is based at the American Bar Association’s Center on Children and the Law under the leadership of Mimi Laver. The Center houses the National Alliance for Parent Representation, a leadership group of more than thirty professionals committed to upgrading the quality of legal representation made available to parents in child welfare proceedings throughout the country. See National Alliance for Parent Representation, AM. BAR ASS’N, https://www.americanbar.org/groups/public_interest/child_law/project-areas/parentrepresentation/ (last visited Oct. 19, 2020). Among jurisdictions other than New York City that have been national leaders and innovators in parent representation is Washington State under the leadership of Joanne Moore. In addition, major improvements have been made to parental representation systems in a number of other states, including Colorado, New Mexico, New Jersey, and North Carolina.
The essence of the kind of representation offered by the three offices that were part of the study (as well as the template for the work done by the Neighborhood Defender Service of Harlem, the fourth office doing this work in New York City) is that clients receive a team of advocates, commonly including an attorney, a social worker, and a parent advocate. This kind of advocacy can only be implemented by multiperson offices. It requires more professionals and more room than solo law practices. The offices also are likely to have expertise in immigration, housing, and criminal court practice, areas of the law in which their clients are likely to become involved. The defender offices employ a wide range of professionals on each client’s legal team, including social workers, parent advocates, interpreters, specialized attorneys, experts, and investigators. These team members support the families they serve in everything from applying for public benefits to representing a client in criminal court to finding employment training, mental health counseling, and substance abuse treatment.

Clients benefit enormously from having a team represent them. Not only does it mean they will not be obliged to attend important meetings alone, but it also means that it is considerably more likely that there will be someone available to speak with them between court appearances and to return their phone calls timely. The staff lawyers also benefit by having access to motions previously filed by colleagues in other cases and an administrative staff to help them efficiently file motions with the court. These offices have developed a deep knowledge of the communities their clients live in and strong ties with local resources and service providers. That knowledge commonly results in the offices’ achieving better, faster results for their clients than the child welfare agency is capable of, with considerably less disruption of the family, eliminating or significantly shortening the time children are forced to live apart from their families.

It also is important to appreciate how the offices support the professionals emotionally. As Chris Gottlieb explained:

60. Succinctly summarizing the advantages of the multidisciplinary offices to clients, Chris Gottlieb wrote: “For clients, being represented by organizations rather than solo practitioners means having a team on your side: an advocate you can reach on the phone when your lawyer is in court; another lawyer from the office available to step in when yours is on leave or stuck in a different courtroom; the benefit of a brief bank so your lawyer doesn’t have to draft every motion from scratch; and office space where your kids can play while you meet with your lawyer.” Chris Gottlieb et al., Discovering Family Defense: A History of the Family Defense Clinic at NYU School of Law, 41 N.Y.U. REV. L. & SOC. CHANGE 539, 559 (2017).

61. For new lawyers, the existence of these organizations means not only jobs, but jobs one can get straight out of law school that come with the kind of training and supervision only larger offices can provide.
Perhaps most important for staff, these organizations offer the emotional support and grounding needed to do extremely hard work in the trenches: a professional home to go back to after a difficult day in court; knowing your colleagues will listen and understand; being part of a team. They provide the opportunity to enter a field with an ambitious social justice vision.

Child welfare cases are prosecuted along two tracks: the judicial and the administrative. On the judicial side, petitions are filed in family court and the allegations in the petitions are (sometimes) resolved through contested evidentiary hearings. Along the path of the case, courts typically order that parents perform various services and ultimately order that children be allowed to remain with their families or be placed in another arrangement. But, arguably even more importantly, there is an administrative process that, in many cases, begins before the court proceedings and, in all cases, continues on a separate path during the court process.

In the agency process side of the case, parents are obliged to meet with caseworkers, supervisors, and other employees of the agency responsible for monitoring the parent’s actions throughout the life of the case. It would be difficult to overstate the importance of these agency meetings. One might reasonably suggest they are much more important than what happens in the courtroom itself. In many cases when parents are well-represented at the administrative level, what happens in court is anti-climactic—the outcome of all that went before at the agency meetings.

Ultimate success in many cases can be achieved by creating and developing plans designed to keep children safely at home—or to return them home as soon as can safely be accomplished—and by pushing hard for the plan’s prompt implementation. These plans are best developed out of court in conjunction with the agency overseeing the case. No good lawyer can afford to ignore the administrative process, which commonly begins when a family comes to the attention of an investigating caseworker following a report of suspected maltreatment made to the child protection agency.

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62. Gottlieb et al., supra note 60, at 559.
63. Such services might include attending parenting skills or anger management classes, or participating in therapy, counseling, or drug treatment programs.
64. See, e.g., N.Y. SOC. SERV. LAW § 409-e(2) (McKinney 2020) (mandating preparation of case plans by the social services district in active consultation with the child’s parent or guardian). See also id. § 384-b(7)(O)(1).
Over the many years of doing this work, the four offices that have contracts to represent parents in child welfare cases in New York City have developed and refined innovative approaches to secure the safe return of children from foster care. The leading characteristic of the offices’ method of representing parents is to participate actively in the case conferences held at the agency where the case plan for each case is established. These plans set the stage for all that follows and are often the single most important factor in a case’s outcome. They specify the steps an agency must undertake to reunify a family and the tasks the parent must perform as the condition for keeping or regaining custody of his or her child. When parents are unrepresented at these conferences, the plans are more likely to be boilerplate, requiring parents to do things of little value. Even worse, when parents are unrepresented, the plans may fail to identify services the agency should be providing for the particular needs and circumstances of the family.

Among the reasons it is crucial that parent defenders actively participate in these conferences is that when an inappropriate case plan is developed, that plan may be in place for many months even before a court might review it. Moreover, in my experience, judges rarely overrule (or reconsider) the agency’s assessment of what services are appropriate. Parent lawyers who fail to participate in the development of a case plan and who wait until going to court to advocate for their clients often discover that the original plan developed at the case conference will remain in place throughout the proceeding.

Wholly apart from holding conferences during the time a case is being prosecuted in court, an even more critical component of the administrative process is ongoing. Caseworkers visit parents in their homes and talk to them and their service providers on a regular basis. Caseworkers are a critical player in each case. Ignoring them as part of the defensive strategy is only a tiny step away from ignoring the case conferences.

With this in mind, as the following case examples will reveal, the family defenders in the interdisciplinary offices devote considerable attention to all that is happening outside of court. They communicate frequently with

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65. N.Y. COMP. CODES R. & REGS. tit. 18, § 428.6 (2020). Federal law requires states to have written case plans for every child in care in order to ensure that an appropriate long-term plan is identified for each foster child. 42 U.S.C. § 675(1). These reviews are essential to the success of reunification efforts. See generally Subha Lembach, The Right to Legal Representation at Service Plan Reviews in New York State, 6 U.C. DAVIS. J. JUV. L. & POL’Y 141 (2002).

66. These plans are routinely included in the reports agencies are required to submit every six months whenever children remain in foster care. See N.Y. FAM. CT. ACT § 1089 (McKinney 2020).
caseworkers to rearrange meetings and services, to plan for the next steps, and for many other reasons. Agencies too often offer parents little help or guidance in obtaining services, commonly doing little more than providing a parent an address and expecting the parent to find the service, make the appointment, and wind his or her way through a maze of confusing requirements. The offices help parents negotiate all aspects of the process throughout the life of the case. They help their clients persevere what is otherwise a long, lonely, and frightening journey by staying in close, regular contact with them.

The in-the-weeds work holistic practices undertake often leads to outcomes that are invisible when all that is described are data in categories of “return to parent,” “dismiss,” and the like. Quite often, the family defender offices in New York City achieve results for their clients that meaningfully advance children’s interests that could not have been achieved without spending considerable amounts of time out of court. In sharing some of these accounts, the reader should pay particular attention to the frequency with which investigators from the child welfare agencies make mistakes, get facts wrong, fail to show up for critical meetings, or base recommendations on faulty information that is either flatly wrong or materially incomplete. It is here, at the exquisite level of facts, that the defender offices make their greatest difference.

In order for the reader to appreciate fully the contribution of these offices, and the critical need for them to spread throughout the country, it is vital that the reader grasp a fundamental truth about the child welfare system in the United States: it far too commonly makes fateful decisions about children and families that are based on errors that, in the absence of a significant check and balance provided by holistic family defenders, would never come to light. When these errors are not revealed, the official record supports the erroneous conclusion that a child was removed from a parent’s home for a substantial reason. The true meaning of the findings in the quantitative study that these offices secure the return of children to their families significantly sooner than would happen without them is that child welfare practice without the kind of oversight accomplished by the offices wrongfully separates children from families in a significant percentage of cases.

What follows are case examples of how the offices achieved great success for their clients.67 They are offered both to bring to life how the

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67. These case summaries were provided by the professionals employed by various family defender offices in New York City. Each of the cases described took place between 2015 and 2018. The notes of the interviews are on file with the author.
How NYC Family Defender Offices Safely Reduce Foster Care Time

offices do their work and why everyone committed to a better-functioning child welfare system should want offices like this practicing throughout the country.

A. A Case Involving “Mental Illness” and “Cognitive Disability”

In late 2016, Ms. Barrow, the parent of a ten-year-old child and a one-year-old child, was charged in family court with neglect resulting from her struggle to manage the challenges of mental illness and a cognitive disability. The petition was filed shortly after she was discharged from a short-term hospitalization for mental health treatment. The court ordered the children to be placed in foster care at the first court appearance and limited the mother’s access to them to twice-weekly visits supervised at the agency.

Ms. Barrow was assigned a family defender office. Her defense team at first consisted of a family court lawyer and a social worker. The team met with Ms. Barrow and began the task of coordinating the substantial support needed in managing Ms. Barrow’s mental illness and disability. Ms. Barrow and the defense team jointly developed a new plan for her that included referring her to a therapist, a psychiatrist who was able to prescribe new medication, and a medication management provider. The medications began working after only a few weeks and Ms. Barrow quickly regained her focus. When this happened, not only did she visit her children regularly, her defense team succeeded in persuading the judge (over the agency’s objection) to permit unsupervised visits, commonly a necessary interim stage before courts will return children to a parent’s custody.

As Ms. Barrow and her defense team were making these strides, two intervening actions were taking place, either of which had the potential to negatively impact the prospects of a successful outcome. The first was that Ms. Barrow was in jeopardy of being evicted from her apartment. Had Ms. Barrow been evicted from her apartment, she would have had to enter New York City’s public shelter system. But because she would be applying for shelter housing at a time when her children were not in her custody, she would be counted as a single person living alone and would be eligible only for a studio-sized apartment, unsuitable for children. Once Ms. Barrow was living in an apartment too small for her children to live in with her, a new barrier to the children’s return would be to secure suitable housing, which would certainly extend the children’s stay in foster care. This catch-22 problem made preventing Ms. Barrow’s eviction vital on

68. All names used throughout this Article are fictitious.
multiple fronts. The office added one of its attorneys with expertise in housing court to the case.

She was facing eviction after she had fallen into rental arrears for six months because she was under the mistaken understanding that the rental subsidy she recently secured from New York City covered her entire rent.\(^69\) In fact, she was responsible for the portion not covered by the subsidy. Before going to housing court, the defender office’s housing specialist contacted the City office that was providing the rental subsidy to explain the problem and was able to get the office to write an additional check to her landlord to eliminate all arrears on her rent. When Ms. Barrow went to housing court, her housing attorney presented a letter showing the City’s commitment to pay the arrears, and the case was settled in Ms. Barrow’s favor.

With the housing crisis abated, the rest of the family defense team could keep its focus on the family court case. But then, a second intervening event occurred, dramatically changing the entire picture. Ms. Barrow disclosed to her defense team that she was pregnant. This meant the team not only had to work towards regaining the custody of her two children; it would have to prepare for the possibility that the agency would seek the removal of her newborn. As her due date neared, the defense team turned its focus to planning with Ms. Barrow for the baby’s arrival.

Because of Ms. Barrow’s concern that continuing her medication during her pregnancy was dangerous for the fetus, she stopped taking the medication that was court-ordered. Disclosing the news of her pregnancy and her decision to stop taking the court-ordered medication was an extremely delicate action risking not only her right to continue visiting with her children but losing custody of the newborn upon birth. The team’s social worker met with Ms. Barrow’s medication management provider to develop a plan for re-engaging with her medication upon the birth of the baby. Then the team strategically planned with Ms. Barrow how to share the information with the agency and the court.

Most importantly, the team also began planning for the “Initial Child Safety Conference” that the agency would certainly convene when the baby was born.\(^70\) Unfortunately, the New York City child protection


agency would not conduct the conference before the child was born (because New York does not recognize fetuses as within the purview of child welfare law). Instead, the agency has conducted the conferences within a day or two after a newborn’s birth, at a time when the mother is not in a position to participate effectively. Nonetheless, Ms. Barrow’s defense team ensured that it was fully prepared for the conference, having secured letters from Ms. Barrow’s mental health providers laying out her treatment plan and documenting her increased engagement in services and subsequent progress in her mental health. When the conference took place one day after the baby’s birth, the defense team’s social worker and parent advocate attended with Ms. Barrow. The team successfully persuaded the agency to agree to release the newborn to Ms. Barrow’s care with court-ordered supervision.

In child welfare cases, victories often prove to be short-lived. It turned out the agency’s support for releasing Ms. Barrow’s newborn did not last one week. Several days after Ms. Barrow was permitted to bring her baby home with her from the hospital, the agency removed the infant and placed her in foster care after a caseworker visited the apartment and found it to be excessively dirty and filled with cockroaches. Once again, Ms. Barrow’s defense team went into action. First, the social worker went to the home to assess for herself the conditions in the apartment. Then she engaged a cleaning service to address the cockroaches and the condition of Ms. Barrow’s home. The team’s lawyer then filed a motion for an immediate court hearing to determine whether removal was necessary to protect the child’s safety. The clogged court’s calendar, however, meant that the court could not conduct the evidentiary hearing immediately. Instead, her lawyers requested that the court order an “Imminent Risk Assessment” with the court’s mental health clinic once the defense team was convinced that Ms. Barrow would be evaluated to present no risk to her newborn.

The strategy worked. Once the report was provided to the court, the judge ordered that the newborn be returned to Ms. Barrow’s custody in light of the risk assessment and proof that the conditions in her apartment were vastly improved. Then the team moved forward on expanding Ms. Barrow’s access to her older children. With the positive evaluation from the court mental health clinic and letters the team gathered from Ms. Barrow’s service providers, the judge agreed to allow the children to return home for overnight visits, commonly a crucial step that leads to the eventual return of children to their parent’s custody. Three months later, the two children in foster care were reunited with their mother and the family has lived together without further intervention by the agency.
As this case discussion reveals, the amount of out-of-court advocacy involved is well beyond what panel lawyers generally are able to provide or have ever been able to provide in New York City’s history of parental representation. Yet it was the out-of-court advocacy that made all the difference. Without the office’s housing advocacy, Ms. Barrow would have had no home for her newborn to return to. Without the defense team’s constant communication with Ms. Barrow and her providers about her service plan, she would not have had the support necessary to achieve the progress in her mental health treatment. Even these remarkable efforts would have been insufficient. Had Ms. Barrow not had a team committed to being with her when she gave birth, to preparing assiduously for the conference held when the baby was born, and to being ready to fight for her when the baby was removed less than a week later, her case would surely have come out differently. Instead of the family being reunited, the case might have resulted in a termination of parental rights. The representation she received simply would have been impossible for most individual panel attorneys to match.

B. A Case Involving “Child Abuse”

Ms. Green was a single parent of an eight-month-old daughter, Sophia. One day, Ms. Green noticed a bump on Sophia’s head that concerned her. She asked her mother to take Sophia to see a doctor because Ms. Green had to be at work. Her mother took Sophia to the emergency room. An X-ray revealed that Sophia sustained a skull fracture. The examining doctors asked Ms. Green’s mother what may have happened to Sophia and her mother was unable to provide them with a satisfactory answer. The hospital then called Ms. Green and asked her what she could tell them. Ms. Green did not provide a clear answer, and she said she wondered whether it happened when Sophia fell off a bed. Because the bump did not immediately appear on Sophia’s head, Ms. Green could not be certain how the injury was sustained. Because Ms. Green was unable to provide a clear explanation for the injury, the hospital called the child protection agency, which immediately began an investigation.

When the agency interviewed her, Ms. Green told the investigators the same thing she told the doctors at the hospital. Because she was unable to provide a satisfactory explanation for the injury, the agency removed Sophia from Ms. Green’s custody at the hospital, placed her in foster care, and filed an abuse petition in family court the following day. The petition alleged that the skull fracture could only have been the result of child abuse and Ms. Green’s failure to provide a sufficient explanation for the injury justified placing Sophia in foster care.
Very commonly, abuse petitions involving physical injuries to children are filed in the absence of direct evidence concerning how the injury was sustained. New York law does not require that the agency prove how certain injuries were sustained. Instead, when the injuries appear to be the result of abuse, it is sufficient for the agency to allege that the child sustained an injury that most likely was the result of child abuse, creating a rebuttable presumption where the parent may present evidence either proving how the injury was sustained or why the parent should not be held legally accountable for the injury. When a petition alleges no direct evidence of abuse, but rather that the nature of the injury is such that it must have been the result of abuse, parents and attorneys are placed in a difficult position.

The family defender office assigned to represent Ms. Green handles many of these cases each year and has become expert both in cross-examining medical experts called by the agency and at engaging and communicating with knowledgeable physicians able to provide their expert medical opinion on whether an injury is more likely to be the consequence of abuse or an accident. As soon as this case was assigned to Ms. Green’s counsel, her team of attorneys and social work professionals began to put in place a strategy to try to have Sophia returned to her care as soon as possible.

Because Ms. Green could not say with certainty what caused the skull fracture, the defense team relied on an expert who analyzed the X-rays and determined that they were fully consistent with an accidental fall, thus providing the needed evidence that Sophia’s injury was not necessarily the result of abuse. Ms. Green’s attorneys used this knowledge to start planning their settlement and trial strategy.

Simultaneously, Ms. Green’s attorneys and the social work staff worked closely together to help Ms. Green navigate the agency’s service and

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71. See, e.g., In re Philip M., 624 N.E.2d 168 (N.Y. 1993). See also N.Y. FAM. CT. ACT § 1046(a)(ii) (McKinney 2020) (“[P]roof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the care of such child shall be prima facie evidence of child abuse or neglect, as the case may be, of the parent or other person legally responsible.”).
72. See In re Philip M., 624 N.E.2d at 172.
73. For an excellent recent article describing the sophisticated family defense practice The Bronx Defenders has established when representing parents charged with child abuse based on unexplained serious injuries sustained by children, see Jessica Horan-Block & Elizabeth Tuttle Newman, Accidents Happen: Exposing Fallacies in Child Protection Abuse Cases and Reuniting Families Through Aggressive Litigation, 22 CUNY L. Rev. 382 (2019) [hereinafter Accidents Happen].
visitation policies. Even though Sophia’s injury was an accident, court calendars are so backed up that it takes many months from the date of a filing to get to a trial on the facts. Generally, two of the most important factors in securing the return of a child to parental custody are participation in agency-recommended services and favorable foster care agency reports about parent visits with the child.

Based on the allegations alone, the agency believed that Ms. Green needed to complete both anger management and a parenting class to secure the return of her daughter. The social workers on Ms. Green’s defense team tapped into their knowledge of local community resources and helped Ms. Green find accessible services that would fit into her busy school and work schedule. Within nine months, Ms. Green had completed both the anger management and parenting class, all while working full time and finishing her GED.

In addition, the social work staff helped Ms. Green coordinate and expand visitation. Generally, family court judges look most favorably upon parents who attend visits frequently and are able to work with the foster care agency to gradually increase the independence of visits from those supervised at the foster care agency to unsupervised overnight visits in the home of the parent. Unfortunately, the foster care worker assigned to Ms. Green’s case proved to be very difficult for Ms. Green to work with. The parent advocate from the defense team working with Ms. Green’s case provided an invaluable role in buffering the relationship with the caseworker, acting as a bridge and facilitating communication between the two.

When the case was first filed in court, the judge only permitted Ms. Green twice-weekly supervised visits at the foster care agency—a sterile environment conducive to an engaging opportunity for parents and children to maintain ties. In response to persistent advocacy, the agency agreed to permit the visits to take place in a more hospitable environment so long as the visits were supervised by Ms. Green’s mother. But the team was unable to secure the agency’s support for unsupervised visits. After waiting two additional months, the team filed a motion for enhanced, unsupervised visits, arguing that the agency’s refusal to grant unsupervised visits was arbitrary and damaging to the long-term purpose of child protection.

Unfortunately, a complication temporarily derailed the effort just when the team was hopeful for a satisfactory resolution of the visitation motion and the underlying petition itself. Sophia sustained a new facial injury after tripping on a door frame when attending a birthday party at Ms. Green’s sister’s home while under Ms. Green’s supervision. Even though Ms. Green had completed all required services and her visitation rights
had been substantially expanded, the agency was now arguing that this new injury proved that Ms. Green lacked the capacity to raise her child safely.

To counter this concern, the team asked that the court order an additional service calculated to provide the best opportunity to demonstrate that Sophia should be in Ms. Green’s care. It requested that Ms. Green participate in dyadic therapy with Sophia, in which a licensed therapist participates in visits between parents and children to develop a healthy attached relationship. The goal was to secure evidence from an independent, well-respected therapist that Ms. Green possessed the temperament and capability of raising her child safely. Once the judge could be persuaded of this, the prospects of significantly increasing the amount of time Ms. Green could spend with her child were greatly advanced. And once the amount of visits was increased, the next step eventually would be returning Sophia to Ms. Green’s custody.

The strategy worked. Over the course of five months, Ms. Green fully engaged in therapy and her therapist wrote enthusiastic letters of support that her defense team was able to present in court. Once these favorable reports were introduced, the team focused on settling the case instead of undergoing a highly contested trial focused on whether the original injury was sustained as a result of an accident. The agency agreed to settle the case and allow Sophia to be returned to her care if Ms. Green accepted responsibility for the original injury sustained by her daughter (as an act of neglect instead of abuse) with a plan to end entirely supervision of the case in six months if nothing untoward happened during that time. At the end of the six months, the case was dismissed.

C. A Case Involving Late-Stage Pregnancy

Among the most unsettling aspects of child protection intervention in New York City is the practice of the local child protection agency removing newborns from their mothers’ custody at the hospital. This sometimes happens when the mother has no prior involvement with the child welfare system but behaves at the hospital in a manner that leads hospital personnel to call in a report of suspected child abuse. In these cases, the agency has never met the mother and is brought in to begin a fresh investigation. But often the agency seeks to remove newborns from the hospital in a case in which the agency has an ongoing involvement with the mother. The ongoing relationship may mean the mother became pregnant during the pendency of an ongoing court case (a frequent occurrence). Other times, the agency has been involved with the person in other ways, for example,
when a young woman in foster care becomes pregnant. In most of these cases, the mother is already represented by a lawyer.

Despite a formal agency policy known as “Child Safety Alert 14,”74 which called for the agency to conduct a meeting prior to the birth in every case,75 “agencies routinely fail to hold pre-birth planning conferences with pregnant women unless a client or her legal team advocates for or requests the court to order its convening.”76 Even when such conferences do take place, experienced practitioners complain that “the discussion and recommendation from the pre-birth conference is, in reality, largely irrelevant to whether the baby will be taken after delivery.”77 Instead, the really important meeting takes place at the hospital, within hours of the baby’s birth. For most parents, this conference, occurring at one of the most emotionally laden moments of their lives, and which will fatefuly determine whether they will be allowed to bring their child home with them from the hospital, is something they endure alone without representation or support. This may contribute to unwarranted requests by the agency for the hospital to place a “social hold” on the baby, preventing the mother from taking the baby home.78 This practice is opposed by the family defenders in New York as causing inappropriate disruption of parent–infant bonding and imposing unnecessary stress and anxiety on parents and families at a precious moment in their lives, often resulting in the needless and wrongful separation of children from their families.79

One of the family defender offices responded to this practice by creating a special unit assigned to handle cases of this kind.80 The special unit is

74. John B. Mattingly, Safety Planning for Newborns or Newly Discovered Children Whose Siblings Are in Foster Care: Child Safety Alert #14 (Revision), N.Y.C. ADMIN. FOR CHILD.’S SERVS. (June 5, 2008), https://perma.cc/L2CZ-Z64X.
75. Id. at 1.
77. Id.
79. The practice was recently the focus of a critical report issued by the New York City Commission on Human Rights. See id. at 14.
80. Each of the four family defender offices in New York City has created specialized projects of one sort or another.
designed to better represent pregnant mothers who become enmeshed with the child welfare system. It is used whenever the office is representing a mother who becomes pregnant during the course of the case, whether she already is court-involved or not. The office created a community intake program, allowing residents in the community to secure legal representation before they have been charged in court with neglect and before they are legally entitled to court-assigned counsel.

The unit is staffed by trained social workers with deep experience negotiating the complexities of child welfare investigations during the time a woman is pregnant and immediately after she gives birth. By planning carefully with the mother during the pregnancy and preparing for the child to come home with her, the team ensures that living arrangements are set and baby paraphernalia (cribs, diapers, food) are at the ready. The unit’s signal distinction is making sure that someone from the defense team is present at the hospital when the baby is born and is available to participate in all meetings the agency will arrange to discuss the plan.

That is what it prepared for when it represented Ms. Anderson. Ms. Anderson grew up in foster care, moving through over 20 foster homes as a child. Several years earlier, she gave birth when she was still in foster care. The father abused her after the baby’s birth and the agency brought a case against Ms. Anderson for failing to protect her child. Her child was placed in foster care. After three years, the agency successfully prosecuted a termination of parental rights case against her. The final order terminating her parental rights was entered a mere six weeks before Ms. Anderson, now in the late stages of her pregnancy, met with social workers at the unit.

Recognizing that as soon as the baby was born, the agency would conduct a child safety conference at which it would make fateful decisions involving the family, the new team immediately started planning with Ms. Anderson. The team’s social workers worked with Ms. Anderson to identify what she needed to support her child and advised her on what the agency and family court judge would want to see. Through these discussions, they connected her to a social services organization in the community. Ms. Anderson began therapy that was designed to address her history of physical and sexual abuse in foster care and her previous relationship, helping her to understand how those experiences had shaped her adult life and her approach to parenting. They also prepared for the birth of the baby, finding a trauma-trained doula and helping Ms. Anderson to set up her home with all the essentials for a baby.

After the baby was born, the agency convened the anticipated child safety conference. Without Ms. Anderson having the team working with her, she would be expected to attend this conference alone with agency
caseworkers and supervisors. Although the agency does not permit lawyers to attend these conferences, it does allow parents to bring anyone else to be present. At her conference, Ms. Anderson was accompanied by a parent advocate who had lived the child welfare experience and a social worker from the defender office who carefully laid out the details of the efforts Ms. Anderson had undertaken in recent weeks. Although impressed by all the work Ms. Anderson and her team had begun, the agency nonetheless was unwilling to allow Ms. Anderson to go home with her baby. Because Ms. Anderson’s parental rights to her older child had only recently been terminated, the agency took the position that it was premature to allow her to take custody of her newborn child. Instead, the agency staff members told Ms. Anderson and her team that they would not allow Ms. Anderson to leave the hospital with her baby and to prepare to go to court the next day when they would be filing a petition alleging neglect based on the allegations in the case of Ms. Anderson’s previous child.

Undeterred by failing to achieve success at the conference, the defense team looked toward the first court appearance as a new opportunity to argue for the newborn to remain in Ms. Anderson’s custody as well as the first opportunity to leave the judge with a positive impression of the mother. At this appearance, Ms. Anderson’s lawyer presented the arguments supporting the application that the baby be allowed to remain in Ms. Anderson’s care, highlighting all the work she had done and providing the court with stacks of supporting documentation. Similar to the agency’s response at the pre-court conference, Ms. Anderson’s advocates were unable to persuade the judge to order the baby’s return to Ms. Anderson. Instead, the judge told Ms. Anderson that it would be in her interest for her to agree to undergo a mental health evaluation and to cooperate with the agency over the coming weeks.

Accepting these conditions, Ms. Anderson’s lawyer requested that the court hold a status conference for the case within the following month to be convened by the judge. These conferences are expected to take place in front of the judge’s court attorney, rather than the judge, and are commonly used to provide a forum to resolve issues and move toward settlement. However, the defense team knew that having this conference in front of the judge provided another advocacy opportunity to build on the judge’s favorable impression of Ms. Anderson. The plan was to update the judge on Ms. Anderson’s progress and to request that the court schedule a formal hearing to determine if it still was necessary to keep the baby in foster care. The team’s strategy was to have two opportunities to present the judge with positive impressions of the mother even before conducting the formal hearing seeking the baby’s return to her custody.
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The strategy worked even better than expected. In the weeks leading up to the status conference, Ms. Anderson and the team worked to ensure she was able to attend all visits with her daughter, that she completed the mental health evaluation the judge requested, and that her service providers were serving her well. The team’s social workers attended many visits with Ms. Anderson and her daughter to ensure a member of the team was there to witness the successful interactions for reports back to the judge. All of this was reported to the judge at the status conference. After hearing these positive developments, the judge set a hearing to be held in one month, signaling that if things continued to go well, the judge would likely return the child then.

However, Ms. Anderson progressed so well that the hearing never needed to be conducted. On the morning the hearing was to be held, the agency attorney agreed that there no longer was a risk to returning the baby to her mother. The parties agreed to a settlement, where Ms. Anderson’s daughter would be returned to her care immediately. The defense team not only was able to achieve the return of Ms. Anderson’s daughter to her custody, it resolved the entire case, eliminating further need for court appearances. In exchange for Ms. Anderson consenting to a finding that she neglected her child, the parties agreed to what is known in New York as an adjournment in contemplation of dismissal. The parties agreed to a settlement order that ensured that Ms. Anderson would have custody of her daughter and be subject to supervision for nine months on the understanding that the finding of neglect would be vacated and the petition dismissed in nine months unless the agency could show that Ms. Anderson placed her daughter at risk in the interim. At the end of the nine-month period, the case was dismissed. Altogether, Ms. Anderson was separated from her baby for less than nine weeks.

D. A Case Involving “Medical Neglect”

“Medical neglect” is a common charge brought against parents in child welfare cases. Under New York law, the definition of “[n]eglected child” includes “a child less than eighteen years of age (i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care (A) in supplying the child with adequate . . . medical, dental, optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so . . . .” See N.Y. Fam. Ct. Act § 1039 (McKinney 2020).

[81. See N.Y. Fam. Ct. Act § 1039 (McKinney 2020). 82. Under New York law, the definition of “[n]eglected child” includes “a child less than eighteen years of age (i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care (A) in supplying the child with adequate . . . medical, dental, optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so . . . .” Id. § 1012(f).]
care to protect the child from the parent’s failure to provide the child with adequate treatment or, less drastically, to secure court authorization to require that a child have a medical procedure it believes is necessary but that the parent refuses to allow. American law protects a parent’s constitutional rights to make critical decisions concerning a child’s upbringing, including decisions involving medical care for their children. But in my experience, it frequently happens that poor parents are deprived of the same rights accorded to wealthy parents and are charged in court with failing to provide a specific kind of medical care for their child even when the parent is not entirely ignoring his or her child’s health needs.

One such case involved the representation by one of the family defender offices. In this case, the office was assigned to represent Carlos Sanchez, after a petition was filed by the local child welfare agency accusing him of neglecting his son by failing to consent to what the agency asserted was “necessary” surgery. Even when the outcome of cases like this do not involve termination of parental rights or placement for an extended period in foster care, these cases should be viewed as an extremely important example of a clash between the right of parents to make the important decisions regarding their children’s upbringing and the state’s independent power to make decisions for children over a parent’s objection. Mr. Sanchez was charged with medical neglect after the agency learned that he refused to consent to surgery to fix his son’s hip disorder. His son, Eduardo, suffers from a genetic hip disorder and, as a consequence, he is highly prone to injury. In the year before the petition was filed, Eduardo sustained an injury that required medical attention. Mr. Sanchez brought Eduardo to a public hospital for medical attention. After consulting with an orthopedic surgeon at the hospital, Mr. Sanchez opted for a nonsurgical option to be secured in Mexico. Mr. Sanchez took his son to Mexico and completed the treatment. They then returned to their permanent residence in New York. Less than a year later, Eduardo sustained another injury in his hip. Mr. Sanchez again brought his son to the hospital and, again, Mr. Sanchez informed the treating physician that, rather than consenting to surgery, he intended to take Eduardo back to Mexico for more nonsurgical treatment. When Mr. Sanchez told the surgeon that he would not consent to the recommended surgery, the surgeon made a call to the New York Statewide Central Register of Child Abuse and Maltreatment, which

resulted in an investigation being commenced by the local child protection agency.84

The agency sent an investigating caseworker to meet with Eduardo’s teachers at school. The investigator also met with Eduardo’s primary care physician, but not with the orthopedic surgeon. The caseworker, her supervisor, and the investigating team concluded that Eduardo required surgical treatment and his father’s failure to consent to it constituted medical neglect. The agency then filed a neglect petition in family court charging Mr. Sanchez with failing to provide his son with medically necessary treatment and seeking an order that the agency be granted permission to consent to the required surgery.

At this point, the court appointed one of the family defender offices to represent Mr. Sanchez. When Mr. Sanchez met with his lawyers and social worker, he provided the fuller picture. After the second injury, he explained, he brought Eduardo back to the same surgeon with whom he met the year before. He explained that even though the surgeon recommended that Eduardo undergo surgery to repair the hip, the surgeon also acknowledged the risks associated with the surgery. Mr. Sanchez further explained that he did not rule out giving his consent to the surgery, only that he wanted one more time to see if it could be avoided by securing alternative treatment.

The defense team then went into action. It set up a meeting with the surgeon and invited the child protection agency to attend so that it could hear the more complete picture. Despite agreeing to attend the meeting, however, the agency caseworker never came to the meeting. The social worker from the defense team examined the extensive x-rays of Eduardo’s hip with Mr. Sanchez and the surgeon. The social worker, fluent in English and Spanish, also served as a translator for Mr. Sanchez whose primary language is Spanish and whose command of English is limited. The social worker helped facilitate a more complete understanding between Mr. Sanchez and the hospital’s medical team. After the social worker advocated for Mr. Sanchez with the medical team at the hospital, and after thoroughly going through the options available, the medical team better understood why Mr. Sanchez preferred to choose the less-invasive nonoperative treatment one more time before performing an invasive surgical procedure that does not carry with it any guarantee of ameliorating the hip condition.

When the meeting ended, the surgeon continued to recommend surgery, but he now acknowledged that there are many children with this hip condition who can participate in sports, live happily, and never receive

84. N.Y. SOC. SERV. LAW § 424 (McKinney 2020).
surgery. When the surgeon understood that Mr. Sanchez was willing to consent to the surgery if the next round of nonsurgical treatment in Mexico did not prove helpful, the surgeon concluded that Mr. Sanchez’s choice was perfectly reasonable.

Because the agency caseworker failed to attend this medical conference, however, the agency continued to insist in court that the surgery was required and assert that the surgeon considered Mr. Sanchez’s refusal to consent to the surgery as placing Eduardo at serious risk of harm. In an effort to settle the case promptly, the defense team requested a court conference where they explained to the agency attorney and caseworker, as well as Eduardo’s court-appointed lawyer, what transpired since the petition was filed. The agency was unwilling to accept the defense team’s claims without doing its own investigation. As a result, a second meeting was scheduled with the surgeon, Mr. Sanchez’s defense team, and the agency. By now, two additional months had passed, and the surgeon thought it wisest to order a new series of x-rays before making any decision that day. When the doctor requested more x-rays, the caseworker explained that she could not remain for the conference after the tests came back. Before she left, the defense team’s social worker called the caseworker’s supervisor requesting that she be permitted to remain in the conference because the x-ray results were due in another half hour. The supervisor denied the request, approved the caseworker’s leaving the conference, and explained that the agency had all the information it needed.

When the new tests were made available to the surgeon later that day, he continued to support Mr. Sanchez’s plan for treating his son. Appreciating the likelihood that the agency’s failure to hear this information in person would, at minimum, severely delay a resolution of the case, the defense team’s social worker requested that the surgeon write a letter to the court explaining that, although he recommended that Eduardo have the surgery, the surgery was not medically necessary and Mr. Sanchez’s preference to give nonsurgical treatment one more try was an appropriate exercise of parental discretion. At the next court date, the defense team presented the letter to the agency and the court. Mr. Sanchez was permitted to take his son to Mexico for the treatment he preferred.

This case reveals the amount of time and attention the holistic offices give to their clients and reveals what is needed to serve parents well when they become enmeshed in the child welfare system. Mr. Sanchez needed a champion for his cause, one who would persuade the surgeon that he was making a reasonable choice that parents have the lawful authority to make. That was the critical step that led to the successful resolution of the case. But it simply could not have happened without an interdisciplinary
team assigned to the case. If Mr. Sanchez’s lawyer had been a very good solo practitioner from the court-assigned panel, he would have advised Mr. Sanchez to get the surgeon to write a letter saying that Mr. Sanchez’s preference to take his son to Mexico for another try at nonsurgical treatment was reasonable.

The problem, of course, is that the surgeon would not have written that letter without the very effective advocacy Mr. Sanchez’s team brought to the meeting with him. This is among the distinguishing characteristics of this kind of daily defense advocacy these offices employ. Without the surgeon’s letter, the case almost certainly would have ended with the court ordering the surgery in a legal proceeding that would have lingered for months. The defense team was able to dispose of it in less than three months. Moreover, the amount of time the lawyer put on the case was a minor fraction of the time and attention the social worker gave the case. The team’s successful representation of Mr. Sanchez began with a careful, nuanced interview with him allowing the social worker, who was fluent in Mr. Sanchez’s native language, to grasp that he never was unalterably opposed to the surgery but merely wanted one more opportunity to see if it were preventable.

A case like this would not even show up in the results found in the quantitative study, which focused on the length of time children remain in foster care and other outcomes of cases. This case, however, reveals how meaningful efforts by the parent’s defender team to understand the family and the child’s medical condition changed the case’s course, without the need to litigate, to call witnesses, or to rely on the court to do anything more than enter an order that all parties ultimately preferred, once the full details of the case were exposed. In addition, by being such a careful listener and advocate, the defender team also ensured that Mr. Sanchez felt supported during an especially challenging time in his life when he was forced to divert his attention from taking care of his son to defending his right to remain his son’s parent. Keeping families together requires striving to establish understanding and ensuring that the parent’s voice is heard through support and advocacy.

V. The Importance of Proactivity, Out-of-Court Work, and Paying Careful Attention to the Needs of Clients

The case examples described in the previous section were provided to give the reader some sense of how the defender offices are able to achieve dramatically better results for their clients as compared with the panel members assigned to represent parents. In every example, the key to this
success is the extraordinary amount of out-of-court time spent on each case and the proactivity engaged in by the defense team.  

The critical characteristics of each of the cases described in the previous section concern the defender team’s proactive planning, anticipating next steps, and developing a plan for success calculated to persuade either the agency caseworkers investigating the case or the court. None of this work is possible when parents are assigned panel attorneys who work as solo practitioners on their cases. As the qualitative study revealed, solo practitioners who were interviewed “explained that they do not work with their clients out of court and, if matters involving their service plan ever arise, they will speak with the ACS attorney to look into the matter.”

When one solo practitioner was asked, “is there any other type of out of court support you provide to your clients, like talking to their landlords or helping them maintain childcare,’ the simple answer was ‘No, to be honest, no.’”

Two people who were the subject of child welfare proceedings in the New York City courts and were represented by several different panel attorneys over the course of several years testified before the New York State Commission on Parental Representation in 2018. One parent told the Commission she attended between twelve and fifteen conferences over a three-year period, and in every instance, she attended them alone. The second parent testified that she attended between twelve and eighteen such conferences over a longer period of time. She, too, was never accompanied by anyone to a conference. By way of comparison, the social work director at one of the family defender offices testified at the same hearing that her office has a team of nineteen parent advocates and

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85. A detailed description of strategic uses of court appearances, including the opposition of out-of-court removals; the filing of motions for discovery, for visitation, and for early release from foster care; and the conducting of contested evidentiary hearings, is provided in Accidents Happen, supra note 73, at 406–24. There is no question that the in-court advocacy engaged in by the family defender offices is of a much higher order than that practiced by the panel lawyers, as the qualitative study attests. See Understanding the Effects of an Interdisciplinary Approach, supra note 4, at 5–6. To provide even a sense of the breadth of this work, the Brooklyn Defender Services Family Defense Practice litigates more than forty emergency hearings each month (or about 500 a year) to keep children home or have them returned from foster care sooner than the agency is prepared to allow. Schreibersdorf & Shapiro written testimony, supra note 24, at 5.

86. Understanding the Effects of an Interdisciplinary Approach, supra note 4, at 7.
87. Id.
89. Id. at 17, 38–39 (oral testimony of Angeline Montauban, parent).
90. Id. at 39.
social workers who attended nearly 1,000 conferences with parents in fiscal year 2018.91

The lack of out-of-court work that characterizes panel attorney legal representation in New York City goes well beyond leaving parents to fend for themselves in emotionally challenging meetings such as family team conferences and case planning conferences. It also means that parents represented by panel attorneys almost never are able to benefit from creating pushback by their legal team to reshape a proposed case plan to better address the particular needs of each client.

If the study discussions in the previous section show anything, it is that being at the table when the agency fashions the case plan is a critical stage in the proceeding with profound long-term implications for all that follows. An ill-advised case plan not only wastes money; it wastes the most precious commodity in the field: time. Being involved at the earliest stages of a case in designing a case plan, or in accurately assessing the needs (if any) of a parent, is a critical step in minimizing the amount of time children need to spend in foster care because the most important factor courts consider when deciding whether to return children from foster care to their family is whether the circumstances that led to the placement have sufficiently changed. This, in turn, most commonly means focusing on how parents have changed since the case began. What insights have they gained? What services have they completed? How, if at all, have they addressed the concerns that led to the initial placement? When parents’ lawyers are entirely uninvolved in shaping these plans, the fate of children and families is left to the skill and ability of the agency alone to identify correctly the critical needs of the family.

The family defender offices in New York City do not settle for inadequate plans, nor do they encourage their clients to engage in services that are unlikely to ameliorate the barriers to regaining the custody of their children. In this sense, family defenders make child welfare work better. And by so doing, these defenders improve child welfare practice for everyone: the agencies, the court, and, of course, the families who are brought into the system.

The cases described in the previous section go well beyond demonstrating the importance of helping shape the services parents will be required to complete as a condition to regaining the custody of their children. They also reveal the critical importance of addressing the needs of clients concerning matters beyond the child welfare system itself.

For better or for worse, preventing a parent from becoming homeless is not within the portfolio of the agency caseworker (even if it should be). Similarly, preventing a parent from being removed from the country for an immigration-related reason is also beyond what agency caseworkers do. But real-life events such as these must be given the highest possible priority if parents are to achieve their objective of regaining the custody of their children from foster care.

Above all else, what characterizes the differences between the family defender offices and their solo practitioner counterparts in New York City is the purposeful assembly of a holistic team designed to work closely with clients throughout the proceedings. The offices, unlike the panel lawyers, do not think solely in terms of when is the case next in court. For most panel lawyers, if a matter is continued on the court calendar for six weeks, the lawyer is able to put the case in a folder and reopen it one or two days before the next court date. Even when these lawyers are skilled courtroom advocates, their advocacy is too frequently hamstrung by antecedent deficits engaged in by the agency when, for example, it proposed and implemented an inadequate case plan. Although the courtroom remains an important site for excellent representation of parents in child welfare cases, no less important legal work needs to occur elsewhere. The family defender offices organize themselves around the real-world needs of their clients and continue to work closely with them even when the next court appearance is not scheduled in the immediate future.

Conclusion

Family defense has been transformed in New York City. By 2014, five family defender offices had contracts to represent parents. In some parts of New York City, family defender offices handle the vast majority of new

92. All of the family defender offices in New York City either have special units to represent parents in housing-related matters, in immigration proceedings, and/or in criminal proceedings, or have made alliances with legal offices that do that work. Approximately 20 percent of the Brooklyn Defender Services’ Family Defense Practice clients are immigrants, and many do not speak English as their first language. The office’s social work team, along with the Brooklyn Defender Services’ immigration practitioners, “have developed close relationships with community-based programs serving New York’s immigrant communities and [are] able to connect clients to culturally competent service providers and access to services in their native language.” Schreibersdorf & Shapiro written testimony, supra note 24, at 9.

93. See supra note 18. Neighborhood Defender Services of Harlem shares cases in New York County with the Center for Family Representation, and the Center for Family Representation has a second contract to provide parental representation in Queens.
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cases filed. As the field continues to improve, all parents should be given lawyers working in an interdisciplinary practice.

The prior quantitative and qualitative studies focused exclusively on outcomes of cases and on the views of professionals who see the work of the family defenders in family court. But, as the examples in this Article show, the offices undertake significant out-of-court work that dramatically impacts the child welfare practice in New York City. As impressive as the results of the quantitative findings are in showing a significant deduction of unnecessary days children spend in foster care in New York City, this Article strongly suggests that the defender offices have a far greater impact on the reduction of foster care.94

Missing from the quantitative study are the number of times out-of-court advocacy persuades the local child welfare agency not to file a court case in the first place. When that happens, the impact of the defender offices is invisible. No case is filed; no court time is taken up; no court personnel are assigned to the matter. Add to those situations the countless cases where, even though the out-of-court advocacy failed to dissuade the agency from filing a petition, the agency was persuaded not to seek a removal of the child. In those situations, there is no way to give credit to the kind of legal representation the parent was given when comparing outcomes of cases between those handled by panel lawyers and multidisciplinary offices. But the offices nonetheless prevented foster care entirely because of out-of-court advocacy.

In countless cases over the past decade in New York City, pregnant parents have had the benefit of representation by one of the family defender offices before any case was brought against them. Even when the defenders were unsuccessful in preventing a case from being filed in court, the defender office was already familiar with the facts of the case...
and had a relationship with the parent. In those cases, the parent would not have had anyone to attend the child safety conference with her at the hospital. Instead, she would have met her lawyer for the first time minutes before her first hearing, and that lawyer would have to make the argument for the return of her baby knowing only what could be learned in that short time. In contrast, the family defender office attorney who worked with the parent during the late stages of her pregnancy is well prepared to advocate on the parent’s behalf from day one.

The family defender system characterized by the work performed by the New York City offices is a significant contribution to the child welfare field. Child welfare has long been in search of evidence-based programs designed to keep children safely in their own homes. Because the new offices’ ethical duty is to strive to accomplish their clients’ objectives, and because almost all of their clients want to keep or regain custody of their children as quickly as possible, family defender offices are in the business of trying to achieve the identical objective everyone else in the child welfare field has: keeping children safely with their families and avoiding the needless placement of children into foster care.95

The interdisciplinary approach is recognized as a best practice.96 In 2019, a panel commissioned by Judge Janet DiFiore, the chief judge of the Court of Appeals in New York, recommended an expansion of interdisciplinary law offices from New York City throughout the state of New York due to their success.97

95. Additional data from The Bronx Defenders presented in testimony to the New York State Commission on Parental Representation indicated that of the 81 children born to clients who already had children in foster at the time they gave birth to the newborn, the office was successful in ensuring that 58 (72 percent) remained at home with their mothers and 17 (20 percent) were placed with caretakers of their mothers’ choosing. Only six babies (8 percent) were placed in foster care with strangers. Ketteringham & Becker written testimony, supra note 26, at 8–9. This figure, eight percent placed in foster care, compares with the most recent data maintained by New York State, indicating that 64 percent of newborns born to women with children already in foster care in 2015 were placed in foster care. See id. (citing N.Y. STATE ADMIN. FOR CHILD. SERV. OFFICE OF RESEARCH & ANALYSIS, EMERGENCY REMOVALS SUBCOMMITTEE (Sept. 16, 2015).


The impact created by high-level law offices devoted to representing parents in child welfare cases goes well beyond the statistics from the study. Since the family defender offices opened in 2007 in New York City, the community whose children have been wrested from poor families has had a collective voice in the form of lobbying efforts by the newly created family defender advocates. The family defender offices met regularly over the first decade of practice to strategize how to challenge unacceptable practices engaged in routinely by child welfare agencies. Instead of striving to win on a case-by-case basis in court, the defender community insisted on securing a seat at the table to discuss poor practices with the officials in charge of child welfare in New York City. Countless aspects of practice have been improved through these macro advocacy efforts, none of which had ever been undertaken twenty years ago. To provide some perspective, without intending to give the defender community too much credit for the results, the foster care population in New York City has shrunk to an astonishing degree over the past twenty years (a trend not followed nationally). Consider this: In 2003, there were over 28,000 children in foster care in New York City; at the end of 2019, there were approximately 7,800.

The active family defender community cannot take full credit for this dramatic shrinking of the foster care population. Every administrator of New York City’s child welfare system in this century has been committed to the principle of eliminating the unnecessary placement or...

98. One such example involves what should happen when a parent is required to perform a certain service that is covered by Medicaid or other programs when the service provider will not commence the service until the funds are made available to it. This problem, known as “gap of payment for services,” meant that parents were substantially delayed in beginning a service because of poverty, resulting in extending the time children remained in foster care. After family defender offices complained about the problem and lobbied for a solution, the New York City Administration for Children’s Services changed its policy in 2019 in an announced All Staff Bulletin clarifying that “If the parent is eligible for coverage, or assistance that they are not receiving, such as Medicaid or private insurance, the CPS or case planner must assist the family with applying for such assistance. Until such assistance is available, the CPS or case planner must ensure that appropriate services are provided, including payment for such services.” N.Y.C. ADMIN. FOR CHILD.’S SERVS., ALL STAFF BULLETIN (July 16, 2019) (on file with the author).

99. Compare CHILD WELFARE WATCH, TOUGH DECISIONS: DEALING WITH DOMESTIC VIOLENCE 15 (2003), https://static1.squarespace.com/static/53ee4f0ce4b0159b3690d84/t/54138debe4b037d2d85036fb/1410567659179/CWW-vol9.pdf [https://perma.cc/P79M-8T6A], with N.Y.C. ADMIN. FOR CHILD.’S SERVS., CHILDREN IN FOSTER CARE BY BOROUGH/CD OF FOSTER CARE PLACEMENT (Dec. 31, 2019), https://www1.nyc.gov/assets/acs/pdf/data-analysis/2020/incarefostercare.pdf. It is impossible to wholly disentangle the many interrelated factors that affect how many children are in foster care at any given time, but there is little doubt the outstanding work of the family defenders, both in the courtroom and at high-level policy meetings, has contributed to the continued shrinking of New York City’s foster care population.
retention of children in foster care. But the defender community maintains meaningful pressure on the system to live up to this rhetoric. And when trouble brews and the local newspapers criticize government officials for failing to protect a child from harm (an unavoidable part of this work), the defender community actively participates in supporting the relatively low foster care population.
How U.S. Policy Has Failed Immigrant Children: Family Separation in the Obama and Trump Eras

CLAUDIO J. PEREZ*

Introduction

In 2018, U.S. citizens and people across the globe decried President Donald Trump’s “zero tolerance” immigration policy and the resulting separation of children from their families, but some may be surprised to learn that President Barack Obama also separated families at the Mexican border. During the Obama Administration, U.S. immigration policy required the Department of Homeland Security (DHS) to process immigration violations as civil violations, but after President Trump’s executive order to federal prosecutors, those crossing the border without inspection were charged with criminal offenses. Undocumented border crossers with children were then moved to criminal detention facilities where their children were not allowed to be held. This resulted in an unprecedented number of family separations at the U.S. border. President Trump built upon the immigration policies of his predecessors in such a manner that the Fifth Amendment right to family integrity—which extends to all people, not just American citizens—was violated time and time again as families were separated at the border. Furthermore, these criminal prosecutions also arguably violated the constitutional rights of

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migrant parents seeking asylum. As a result, hundreds of children suffered psychological damage that, according to medical professionals, will be difficult if not impossible to reverse.

Even though the plenary powers doctrine grants the executive branch broad authority over immigration enforcement, it does not eliminate the right of family integrity in immigration contexts. No U.S. law mandates detention or prosecution of families caught illegally crossing the border. The desire to strictly enforce immigration laws in the service of “saving the American worker from the dissolution of our borders” or under other nativist political slogans must be secondary to humanitarian goals of maintaining family health and integrity of all people within our borders.

This Article will first give a historical and legal background to the immigration policies of the Obama and Trump Administrations. It then discusses the Trump Administration’s “zero tolerance” policy and the psychological impact of family detention and separations. Following this background, the Article examines current federal law and precedent regarding the separation of immigrant families in civil law and then discusses possible constitutional ramifications in the criminal law context.

The Article then proceeds to offer some suggestions for addressing these prevailing legal and social challenges. These suggestions include expanding the dialogue surrounding family separations to encompass U.S. immigration policy as a whole, as well as eliminating (or greatly restricting) family detentions, creating an Article I court for immigration, and passing legislation outlining how immigrant families should be treated at the border. Finally, the Article offers some summary and concluding remarks.

The future of the U.S. policy after the 2020 presidential election is currently uncertain. Perhaps 2021 will bring a new political moment that would allow the U.S. government to address the immigration issues outlined here.

2. See infra Part I.
3. See infra Part II.
4. See infra Part III.
5. See infra Part IV.
6. See infra Part V.
7. See infra Part VI.
8. This Article was initially written before the 2020 presidential election and was completed in December 2020. The issues discussed in this article are still relevant but now have a new political context.
I. Obama Era Immigration Policy and Family Separation

U.S. immigration policy, as a whole, has a lengthy and complex history that is beyond the scope of this paper. However, to more fully understand the Trump Administration’s immigration policy it is helpful to compare it with the immigration policy of the Obama Administration.

The Obama Administration’s policies dealing with undocumented immigrants have been subject to a substantial amount of misinformation or simply lack of information. For example, the Obama Administration began the practice of reporting “voluntary” removals at the border as involuntary removals, thereby inflating removal numbers compared to previous administrations and giving the appearance of tougher border enforcement. Furthermore, official statistics on family separations at the border are unavailable because, according to DHS officials, the Obama Administration did not collect these data.

The Obama Administration changed the focus of immigration enforcement to “removal of recent border crossers and criminals rather than ordinary status violators apprehended in the U.S. interior.” The apparent reasoning was to “deter illegal border crossing and remove unauthorized immigrants before they become integrated into U.S. communities.” Statistical evidence of this shift is found in the fact that interior removals decreased from 181,798 in 2009 to 65,332 in 2016, and during the same time period border removals increased, from 207,525 to 279,022.

While the Obama Administration did prosecute some individuals who attempted to cross the border illegally, exceptions were made for asylum seekers and families. Additionally, the Obama Administration tried to limit family separations to specific situations where the child’s well-
being might be at risk, such as when drugs were found on the parent.\textsuperscript{16} In practice, the Obama Administration generally did not criminally prosecute apprehended families, and if they sought asylum, they were detained together while those claims were processed.\textsuperscript{17}

\textbf{A. The Rise of Family Detention Under President Obama}

By operating border enforcement in this manner, with respect to migrant families, President Obama resurrected the almost totally discontinued practice (since the 1997 \textit{Flores Settlement Agreement}\textsuperscript{18}) of detaining mothers and children apprehended at the border to deter future undocumented immigration. To begin with, the government had one 100-bed family detention facility in central Pennsylvania and added two larger facilities in Texas and New Mexico that could hold thousands.\textsuperscript{19} Leon Fresco, a deputy assistant attorney general under President Obama, stated that although some fathers apprehended at the border were separated from their children, most fathers and children were released together, often with ankle bracelets.\textsuperscript{20} “ICE [U.S. Immigration and Customs Enforcement] could not devise a safe way where men and children could be in detention together in one facility,” Fresco said. “It was deemed too much of a security risk.”\textsuperscript{21}

\textbf{B. The Secure Communities Program During the Obama Administration}

President Obama continued immigration policies of his predecessor, President George W. Bush. Perhaps one of the most relevant policy initiatives to the discussion at hand is the “Secure Communities” program that ultimately led to the deportation and separation of families under the Obama Administration.\textsuperscript{22} Secure Communities began in 2008 under the administration of President Bush.\textsuperscript{23} The goals of the program included (1) identifying criminal aliens through biometric information sharing,
(2) prioritizing apprehension and removal of dangerous criminal aliens, and (3) transforming the criminal alien enforcement system, including enhancing process efficiency and reducing time in ICE custody.  

By July 2011, Secure Communities had expanded to over 1,470 jurisdictions. Subsequently, Secure Communities was expanded to all 3,181 jurisdictions within the fifty states, the District of Columbia, and five U.S. Territories, with full implementation completed on January 22, 2013. From Secure Communities’ commencement through 2011, approximately 88,000 families with members who are U.S. citizens had a family member arrested under the Secure Communities program, meaning that tens of thousands of immigrant families were separated by this program. 

In a memo dated November 20, 2014, then–Secretary of Homeland Security Jeh Johnson discontinued the Secure Communities program: 

[T]he program has attracted a great deal of criticism, is widely misunderstood, and is embroiled in litigation; its very name has become a symbol for general hostility toward the enforcement of our immigration laws. Governors, mayors, and state and local law enforcement officials around the country have increasingly refused to cooperate with the program, and many have issued executive orders or signed laws prohibiting such cooperation. A number of federal courts have rejected the authority of state and local law enforcement agencies to detain immigrants pursuant to federal detainers issued under the current Secure Communities program.


29. Id. at 1.
Some of the Secure Communities program’s most serious constitutional violations were litigated in *Moreno v. Napolitano*\(^{30}\) and *Makowski v. United States*.\(^{31}\) These two cases and others were cited in a memorandum about the discontinuation of Secure Communities.\(^{32}\)

Secretary Johnson replaced the Secure Communities Program with the Priority and Enforcement Program in November of 2014.\(^{33}\) Enforcement then shifted and “unless the alien pose[d] a demonstrable risk to national security, enforcement actions through the new program [would] only be taken against aliens who [were] convicted of specifically enumerated crimes.”\(^{34}\) These enumerated crimes were generally higher-level offenses, and this change scaled back the reach of the program.\(^{35}\)

### C. Family Detention and Revisiting the Flores Settlement Agreement

Nevertheless, the Obama Administration continued to detain immigrant families in make-shift detention centers with deplorable conditions.\(^{36}\) When the Administration was challenged on this policy, it defended family detention by citing deterrence of undocumented immigration and potential flight risks of the families.\(^{37}\) However, federal courts found both interests to be inadequate to sustain the practice.\(^{38}\) Beyond this, the 2014 influx of unaccompanied minors from Central America had stretched immigration enforcement to its breaking point and created a full-fledged humanitarian

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30. No. 11 C 5452, 2014 U.S. Dist. LEXIS 136965, at *2, *9 (N.D. Ill. Sept. 29, 2014) (addressing the issue of whether ICE violated the Fourth, Fifth, and Tenth amendments and exceeded its statutory authority when it issued detainers to local law enforcement agencies “without probable cause, without providing the subject with notice, and without providing a sufficient mechanism by which the subject can challenge the grounds for the detainer”).

31. 27 F. Supp. 3d 901 (N.D. Ill. 2014).


33. Id. at 2–3.

34. Id. at 2.

35. See Memorandum from Jeh Charles Johnson, Sec’y of U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., ICE, et al., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memoProsecutorial_discretion.pdf. For example, offenses such as terrorism, unlawful entry into the U.S., gang affiliation, felonies, and “aggravated felonies” under INA § 101(a)(43) would be top priority. Id. at 3.


37. Id.

38. Id.
crisis. At the end of June 2015, around 2,600 immigrant women and children were held in three family detention centers across the United States.

On July 24, 2015, Judge Dolly Gee of the federal District Court for the Central District of California ruled that the Obama Administration’s long-term detention of children and their mothers who were apprehended crossing the border illegally violated the longstanding Flores Settlement Agreement (FSA) and that the families should be released immediately. There was uncontradicted evidence presented in federal court of deplorable conditions in family detention facilities at that time. While ordering the Administration to develop a plan to release the families, Judge Gee decided that if a parent was detained with her child, immigration officials should release her with the child, provided that they were not a flight or security risk.

The FSA is key to understanding the current status of family separations at the border, and it is worthwhile to discuss its background. In 1997, the FSA “established a nationwide policy for the detention, treatment, and release of all alien children, both accompanied and unaccompanied.” It was Judge Gee’s interpretation of the FSA, cited above, that established that children accompanying apprehended adults could not be held in family detention for more than an average of twenty days. Under the FSA, officials should first attempt to place a child with a parent, whether or not

41. Id.; see Flores v. Lynch, 212 F. Supp. 3d 907 (C.D. Cal. 2015), aff’d in part, rev’d in part, 828 F.3d 898 (9th Cir. 2016).
42. Flores, 212 F. Supp. 3d at 916.
43. Id. at 916–17.
45. Judge Gee wrote:

At a given time and under extenuating circumstances, if 20 days is as fast as Defendants, in good faith and in the exercise of due diligence, can possibly go in screening family members for reasonable or credible fear, then the recently-implemented DHS polices [sic] may fall within the parameters of Paragraph 12A of the [FSA], especially if the brief extension of time will permit the DHS to keep the family unit together.

Flores, 212 F. Supp. 3d at 914.
they are apprehended. If the parents are detained and cannot be released with the children, such children are typically treated as unaccompanied children and referred to the Office of Refugee Resettlement (ORR). For children who cannot be released, the FSA generally requires officials to place them in nonsecure facilities run by agencies licensed for child care.

Near the end of President Obama’s second term in office, family detentions were generally limited to less than three weeks and the immigrant families in question were released under supervision with ankle monitors until their asylum claims were processed. Secretary Johnson reported that apprehensions of family units at the southwest border peaked in the 2016 fiscal year at 77,674, and DHS managed this influx of family units under these new guidelines.

II. The Trump “Zero Tolerance” Policy and Family Separation

President Trump’s immigration policy expanded enforcement at the southwest border and arguably implemented the policy recommendations outlined by Jeff Sessions in his Immigration Handbook for the New Republican Majority. The hardline approach to reducing undocumented immigration was understood to be a top political priority (if not the top priority) by President Trump and former Attorney General Jeff Sessions. It was not an influx of undocumented immigration that caused President Trump to tighten border security, like President Obama faced in 2014.

46. Judge Gee’s order provided as follows:

Unless otherwise required by the Agreement or the law, Defendants shall comply with Paragraph 14A of the Agreement by releasing class members without unnecessary delay in first order of preference to a parent, including a parent who either was apprehended with a class member or presented herself or himself with a class member. Class members not released pursuant to Paragraph 14 of the [FSA] will be processed in accordance with the Agreement, including, as applicable, Paragraphs 6, 9, 21, 22, and 23.


48. Id.


51. See SESSIONS, supra note 1.
President Trump was fulfilling campaign promises and sought to appease his constituency by increasing border enforcement. Security and the protection of the American worker were the stated twin aims of this policy approach.

On January 25, 2017, Trump signed an executive order to restart the Secure Communities program. This order directed all agencies to “deploy all lawful means to secure the Nation’s southern border, to prevent further illegal immigration into the United States, and to repatriate illegal aliens swiftly, consistently, and humanely.” The plan included the following: (1) construction of a border wall and increase in detention capacity, (2) systematic reporting mechanisms across levels of government, (3) increase in number of administrative officials, (4) increase in the number of judges, and (5) ending the policy of “catch and release.”

Although apprehensions at the border were close to historical lows, the Trump Administration publicly stated that undocumented immigration was a security threat and chastised any domestic resistance to harsher immigration policy. The proposed solution to this problem was the “zero tolerance” policy, specifically the criminal prosecution of all undocumented border crossers and the end of “catch and release.” “Catch and release” referred to the practice of releasing some individuals or families in the U.S. interior under supervision while their asylum cases or other immigration proceedings were pending.

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53. See id.
56. Id. at 8794–96.
A. The “Zero Tolerance” Pilot Program

In fall of 2017, DHS started a secret pilot program in El Paso to prepare for the full rollout of the “zero tolerance” policy.\(^{60}\) During this program, Customs and Border Protection (CBP) officials reported that their software prevented them from keeping records of which families had been separated, thereby creating an obstacle to reunification.\(^{61}\) Hundreds of families were separated during this pilot program and officials tried to create spreadsheets and white board lists to keep track of families.\(^{62}\) Unfortunately these makeshift records were inadequate for tracking family separations. When these concerns were brought to the Trump Administration in Washington, the response was that these issues were “not a high enough priority to warrant the time and resources required for system modifications.”\(^{63}\)

Furthermore, none of the agencies involved (i.e., CBP, ICE, ORR, and U.S. Department of Health and Human Services (HHS)) had the capacity to synchronize their systems to keep track of separated families; yet despite all this, the Trump Administration went forward with the “zero tolerance” policy knowing these issues were unresolved.\(^{64}\)

B. The El Paso Five and the End of the Pilot Program

The pilot program of “zero tolerance” ended with the criminal trials of the El Paso Five, four parents and one grandparent, all from Central America, who were all separated from their children.\(^{65}\) They were all caregivers with children who crossed the southwest border. They were prosecuted for improper entry\(^{66}\) and detained without their children. Later, the El Paso Five were all convicted and received no information about their children until after their trials were over.\(^{67}\) The end of these trials also signaled the end of the “zero tolerance” pilot program, and the government evaluated the outcomes of the program at that point.\(^{68}\)


\(^{61}\) Id.

\(^{62}\) Id.

\(^{63}\) Id. (internal quotation omitted).

\(^{64}\) Id.


\(^{67}\) See Timmons, supra note 65.

\(^{68}\) Id.
Consequently, the government was emboldened by the results in the El Paso Five cases, and by the fact that border officials reported in a memo to Secretary of Homeland Security Kirstjen Nielsen that these prosecutions and family separations resulted in a 64% drop in unlawful family border crossings in the El Paso Sector.69 This seemed to be the deterrent effect that the Trump Administration wanted. In the eyes of the Trump Administration, the ground was now ready for a full rollout of the “zero tolerance” policy.

C. The Full Implementation of “Zero Tolerance”

As stated above, the policy of “zero tolerance” involved the criminal prosecution of all individuals, including parents with children, who crossed the border between ports of entry without the requisite immigration documents.70 Unlike previous administrations, no exceptions to prosecution were made for asylum seekers if they crossed the border between ports of entry without immigration documents.71

Rather than processing apprehended immigrants through civil removal proceedings, the Trump Administration chose to prosecute immigrants under criminal statutes.72 Under the Immigration and Nationality Act (INA), unauthorized border crossers can be prosecuted for illegal entry, illegal reentry, or assisting someone in illegal entry.73 In contrast, previous administrations decided to remove offenders rather than use the criminal justice system to prosecute. As a consequence of this unprecedented shift, the system was not equipped to handle the number of prosecutions because families and parents were rarely prosecuted for illegal entry in the past.74

In prior administrations, family detention centers were used to house whole families together while their immigration cases were pending, or

70. KANDEL, supra note 44, at 7–8.
74. O’Shea & Brown, supra note 72.
these families might be released under some sort of supervision.\textsuperscript{75} In the past, children would only be separated from their families in cases where identity and familial relationship could not be established, where there was suspicion of child trafficking, or when there was no more space in family detention centers.\textsuperscript{76} Both the Obama and Trump administrations attempted to increase capacity to detain families and children, rather than release them until their court dates. However, the “zero tolerance” policy was “the first time that a policy resulting in [family] separation [was] being applied across the board.”\textsuperscript{77}

Eventually, the Trump Administration apprehended 90,563 family units from October 2017 through August 31, 2018,\textsuperscript{78} a more-than 16\% increase from the Obama Administration’s highest family unit apprehension numbers in the 2016 fiscal year cited above.\textsuperscript{79} With the new “zero tolerance” policy, immigration courts and family detention centers were stretched to their breaking point.

With these policies in place, if a family unit was apprehended crossing illegally between ports of entry (or even if a family presented themselves at a port of entry and requested asylum), the “zero tolerance policy” mandated that border patrol refer all adult immigrants to the Department of Justice (DOJ) for criminal prosecution. Processing all of these individuals created a backlog in the immigration courts, and because immigration enforcement agencies could not detain a child for more than twenty days under the FSA,\textsuperscript{80} immigration agencies separated children from their parents and funneled them into the foster care system. The children who accompanied apprehended adult parents were not allowed to be incarcerated in adult criminal detention centers with their parents; thus, the children were processed as unaccompanied children. Then these children were transferred to the custody of ORR, which placed them in agency-supervised, state-licensed shelters. If possible, the ORR attempted to place the children with relatives, sponsors, or foster care.

\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{79} See \textit{Unaccompanied Alien Children Apprehensions 2016}, supra note 50, and accompanying text.
\textsuperscript{80} See Park, supra note 39.
Prior to “zero tolerance” in the 2017 fiscal year, border patrol separated 1,065 (1.4%) of 75,622 alien family units. In the five months prior to the enactment of the “zero-tolerance” policy, border patrol separated 703 (2.3%) of 31,102 alien families.

D. The End of “Zero Tolerance”

After family separations began, there was great national outcry and confusion about the scale of implementation. DHS first reported figures in June 2018, showing that 2,342 children were separated from their parents between May 5 and June 9. The Trump Administration subsequently reported that 2,815 children who were separated from their parents were in ORR custody as of June 26, 2018 (the date when a preliminary injunction was issued).

President Trump issued an executive order on June 20, 2018, that ended family separations, prioritized the cases of detained families, and ordered the establishment of more family detention facilities. The order also required the Attorney General to seek a modification of the FSA so that families could be detained together for a longer duration.

Soon thereafter, on June 25, 2018, CBP temporarily stopped referring for criminal prosecution adults who crossed the border with children because ICE lacked bed space in family detention centers. On the same day, the Trump White House announced that “zero tolerance” would be in force as soon as more resources were acquired.

On June 26, 2018, the Trump Administration’s practice of separating families was finally reversed by Judge Dana Sabraw of the U.S. District Court for the Southern District of California, who issued a preliminary

81. KANDEL, supra note 44, at 8.
82. Id. at 8–9.
86. Id.; see KANDEL, supra note 44, at 9.
88. Id.
injunction in a class action lawsuit filed by the American Civil Liberties Union (ACLU). The court ordered all separated families to be reunited within thirty days, and fourteen days for children under the age of five. Furthermore, the order stipulated that immigrant children could only be separated from their parents if the adults were determined to be unfit or to present a danger to the children, and it also generally provided that parents could not be deported without their children.

Besides these developments, on July 9, 2018, Judge Gee, who oversees the FSA, ruled against DOJ’s request to modify the agreement. Judge Gee held that there was no basis for amending the FSA and therefore alien minors could not be detained past twenty days, irrespective of any pending prosecution of the parents.

Subsequently, on July 10, 2018, ICE officials stated that reunited families would take part in alternatives to detention programs, such as ankle monitor supervision, and would be released into the U.S. interior. A status report filed in Ms. L. in March 2020 showed that 2,166 out of 2,815 children covered by the court’s reporting requirements had been reunified with their parents.

In a more recent status report filed in October 2020, plaintiffs in Ms. L. indicated they had identified 1,556 children of potential expanded class members (a number that includes families separated by immigration

89. The ACLU case, Ms. L., was originally filed on behalf of two families separated at the southwest border: a woman from the Democratic Republic of the Congo who, at a port of entry, was separated from her six-year-old daughter for five months, and a woman from Brazil who, crossing into the United States illegally between ports of entry, was separated from her fourteen-year-old son for eight months. Ms. L. v. U.S. Immigr. & Customs Enf’t, 310 F. Supp. 3d 1133, 1137 (S.D. Cal. 2018), modified, 330 F.R.D. 284 (S.D. Cal. 2019), enforcement granted in part, denied in part sub nom. Ms. L. v. U.S. Immigr. & Customs Enf’t, 415 F. Supp. 3d 980 (S.D. Cal. 2020).
90. Id. at 1149.
94. JOINT STATUS REPORT, supra note 84, at 1–3, Table 1. Six hundred thirty-one children were discharged from ORR under other circumstances, such as placement with sponsors or turning eighteen years old. Id. at 3.
Family Separation in the Obama and Trump Eras

of officials as early as July 1, 201795), with 1,134 being confirmed by the government.96 Of this undisputed group of children of expanded class members, the government provided a contact number for a sponsor or parent for 1,030 of the children.97 Ultimately, the reunification effort for this group of children had, as of the date of the report, failed to reach the parents of 545 children (apart from the 104 children for whom the government had provided no contact information).98

The reunification process was delayed because the family separations were mismanaged from the beginning. From the outset, immigration enforcement had no plan to reunify parents with children and no memos were drafted to provide guidelines to deal with family separations. Border Patrol agents were classifying children, whose accompanying parents were being criminally prosecuted for illegal border crossings, as unaccompanied minors and could not register a family identification number for all members of the family unit.99 The lack of family identification numbers that could be used to locate parents and children made reunifying families extremely difficult.100 In prior administrations, a child and parent would be given a family identification number just in case they were separated in order to facilitate reunification.101 Adding insult to injury, the Trump Administration separated families even when there was no finding made that the parent was a threat to the child.102

By September 2018, more children were in immigration detention centers than ever before.103 The overall number of children reached 12,800, over five times the number of migrant children detained in May 2017 (a total of 2,400 children).104 This massive increase was not due to “an influx of children entering the country, but a reduction in the number being released to live with families and other sponsors.”105

97. Id. at 6–7, 6 n.11.
98. See id.
100. Id.
101. Id.
102. Id.
104. Id.
105. Id. (interpreting data collected by the Department of Health and Human Services).
The Trump Administration weighed its options with regard to immigration enforcement and migrant families.\textsuperscript{106} Family separations were not resurrected, but the Trump Administration considered other ways to deter immigrant families from attempting to enter the U.S. without immigration documents. The Trump Administration’s approaches included building an $11 billion border wall\textsuperscript{107} and implementing the Migration Protection Protocols unveiled in early 2019.\textsuperscript{108}

\textbf{III. The Psychological Impact of Family Detentions and Separations}

A multitude of social workers, immigration attorneys, legal organizations, and medical organizations have spoken out against the unacceptable psychological consequences of family separations brought about by the “zero tolerance” policy. There have been reports of developmental regression and lasting psychological damage in children even after they have been reunited with their parents.\textsuperscript{109} These children often exhibit fear of abandonment and experience attachment issues.\textsuperscript{110}

The president of the American Psychological Association, Dr. Jessica Henderson Daniel, issued a brief statement in May 2018 regarding the detrimental impact of family separations forced upon families who were attempting to enter the United States without proper documentation. Dr. Daniel stated the “longer that children and parents are separated, the greater the reported symptoms of anxiety and depression for the children.”\textsuperscript{111}

\begin{footnotesize}
\begin{enumerate}
\item Press Release, U.S. Dep’t of Homeland Sec., Migrant Protection Protocols (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols (“The Migrant Protection Protocols (MPP) are a U.S. Government action whereby certain foreign individuals entering or seeking admission to the U.S. from Mexico—illegally or without proper documentation—may be returned to Mexico and wait outside of the U.S. for the duration of their immigration proceedings, where Mexico will provide them with all appropriate humanitarian protections for the duration of their stay.”).
\item Id.
\end{enumerate}
\end{footnotesize}
Similarly, around the same time, the American Academy of Pediatrics (AAP) released a policy statement written by Dr. Colleen Kraft condemning immigrant family separations and family detentions at the southwest border. Dr. Kraft emphasized that “[s]tudies of detained immigrants have shown that children and parents may suffer negative physical and emotional symptoms from detention, including anxiety, depression and posttraumatic stress disorder.”\textsuperscript{112} Dr. Kraft reported that immigrant children are traumatized in detention centers when they are forced to sleep on cement floors and use open toilets, are constantly exposed to light, are given insufficient food and water, lack bathing facilities, and deal with extremely cold temperatures.\textsuperscript{113} Dr. Kraft also wrote a prior letter asserting that “family separation causes irreparable harm to children.”\textsuperscript{114} She explained that “[t]his type of highly stressful experience can disrupt the building of children’s brain architecture. Prolonged exposure to serious stress—known as ‘toxic stress’—can lead to lifelong health consequences.”\textsuperscript{115}

Furthermore, the AAP released a policy statement in 2017 that outlined the issues surrounding family detention, and provided a number of recommendations including the following:

Separation of a parent or primary caregiver from his or her children should never occur, unless there are concerns for safety of the child at the hand of parent. Efforts should always be made to ensure that children separated from other relatives are able to maintain contact with them during detention.\textsuperscript{116}

The American Medical Association (AMA) also urged the Trump Administration to stop its “zero tolerance” policy because it would only exacerbate the stress and trauma refugee families face when seeking refuge in a foreign nation.\textsuperscript{117} AMA Chief Executive Officer and Executive Vice President Dr. James Madara noted that the trauma of family separations

\begin{itemize}
  \item \textsuperscript{112} Colleen Kraft, \textit{AAP Statement on Executive Order on Family Separation} (June 20, 2018) (on file with author).
  \item \textsuperscript{113} \textit{Id}.
  \item \textsuperscript{114} Colleen Kraft, \textit{AAP Statement Opposing the Border Security and Immigration Reform Act} (June 15, 2018) (on file with author).
  \item \textsuperscript{115} \textit{Id}.
  \item \textsuperscript{116} JULIE M. LINTON ET AL., \textit{AM. ACADEM. PEDIATRICS, DETENTION OF IMMIGRANT CHILDREN} 7 (2017), https://pediatrics.aappublications.org/content/pediatrics/139/5/e20170483.full.pdf.
\end{itemize}
could “create negative health impacts that can last an individual’s entire lifespan.”

IV. The State of the Law Regarding Unlawful Immigration of Family Units

Neither the Constitution nor the federal or administrative law of the United States requires the separation of immigrant family units that cross the U.S. border without documentation. However, it should be recognized that there are national interests, such as security and economic stability, that are often balanced against the interests of the immigrants attempting to enter the United States. The Trump Administration’s attempt to criminally prosecute all unlawful immigration led to the legal paradox of family separation outlined below. The increase in criminal prosecutions of unlawful immigrant parents with children led to conflicting mandates between federal precedent and federal regulations. Federal precedent allows for only short-term detention of children, and federal regulations do not allow children to be held in federal detention facilities for immigrant parents awaiting prosecution. The following is a sketch of the legal landscape that ultimately led to the family separation controversy.

In terms of statutory authority, the Immigration and Nationality Act (INA) codifies both civil and criminal penalties for foreign nationals who attempt to enter the U.S. without inspection, and for those who enter the U.S. legally but overstay their visas. These offenders are subject to removal (deportation) and go through a formal court process. Additionally, the INA codifies criminal penalties for “(1) persons who enter or attempt to enter the United States illegally between ports of entry, (2) persons who elude examination or inspection by immigration officers, or (3) persons who attempt to enter or obtain entry to the United States through fraud or willful misrepresentation.” Unlawful reentry into the United States is also criminalized in the INA. Therefore, all parents of unlawfully entering family units are subject to prosecution by DOJ in federal criminal courts, at least in theory. Thus, one of the Trump Administration’s main arguments supporting family separation was that it was necessary for the enforcement and prosecution of immigration law

118. Id.
119. See 8 U.S.C § 1325.
120. KANDEL, supra note 44, at 3.
121. Id.; see 8 U.S.C. § 1325.
because parents would need to be transferred to federal detention facilities where children were not allowed.

It is worth mentioning that courts have long recognized that the legislative and executive branches wield plenary power within the immigration context: the power to exclude aliens from the United States, which is among the most comprehensive powers of government.123 But are there constitutional arguments that would prevent the executive branch from using its plenary power to separate immigrant families? Judge Dana Sabraw, of the U.S. District Court for the Southern District of California, seems to have answered in the affirmative.124 Judge Sabraw held that the plaintiffs in the Ms. L case, a class action case challenging the validity of the zero tolerance policy and family separations, had a strong likelihood of success in their due process claim against the federal government. The judge also ordered that all separated families be reunified, and status reports of reunification progress are still regularly being filed.125

Although immigrants may lack some procedural due process rights,126 the protections of the Fifth Amendment’s due process clause apply to all “persons,” not merely U.S. citizens.127 In most of the Trump Administration’s child separation cases there were no showings in court that the parents were unfit to care for their children, and this violated the Fifth Amendment protections of the family liberty interest to stay together (substantive due process) and procedural due process.

Family integrity is one of the most fundamental liberty interests the Constitution protects. Indeed, the Supreme Court declared in *Santosky v. Kramer*128 that there is a “fundamental liberty interest of natural parents in the care, custody, and management of their child.”129 This parental liberty interest includes the control over the establishment of the home

126. See Kwai Fun Wong v. United States, 373 F.3d 952, 971–73 (9th Cir. 2004) (discussing that non-admitted aliens have “no procedural due process rights in the admission process,” but have other constitutional protections).
127. Plyer v. Doe, 457 U.S. 202, 210 (1982) (“Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”).
129. Id. at 753.
and the upbringing of a child. 130 The Fifth and Fourteenth Amendments guarantee more than fair procedure for interference with family integrity. There is also a substantive component that “provides heightened protection against government interference” with this right. 131

In this sense, the Constitution protects parents from being separated from their children without due process of law. 132 The government must prove that a parent is unfit in order to separate their children from them. 133 Thus, if we view family separation as a sort of punishment or substantial encroachment on a liberty interest, then the federal government is prohibited from meting out this punishment, which deprives these families of liberty without due process.

The Trump Administration’s violation of this longstanding fundamental liberty interest is a definite break with past enforcement. In terms of administrative policy, in June 2018 the DHS reported that it had a policy of separating children from adults when (1) it could not determine identity or family relationship, (2) it found that the child was being smuggled or trafficked or was at risk (including possible child abuse), or (3) the parent or legal guardian was referred to criminal prosecution. 134 Under “zero tolerance” prosecutions, family separations were extended to all families apprehended at the border trying to cross without inspection.

A. The Ms. L. Case and Legal Challenges to Family Separation in the Civil Law Context

In Ms. L., the Trump Administration argued that since no citizens have the right to be detained with their children in pretrial criminal proceedings, immigrants apprehended at the border do not have that right either. 135 This comparison loses sight of the misused discretion involved in criminally prosecuting immigrant parents with children, which forced the separation

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132. Even parents accused of abuse or neglect of their children are afforded procedural due process prior to the government terminating their parental rights. See Santosky, 455 U.S. at 747–48, 758–70.
of families in the first place. Even if one believes that the executive branch can theoretically enforce the law to its fullest extent and prosecute these parents and separate them from their children, if these parents are fit to care for their children, then humanitarian concerns and constitutional liberties outweigh the desire for a draconian application of the law. Forcibly separating families for extended periods of time causes irreparable harm to parents and children, a fact that hardly needs scholarly support, and the federal government should respect family integrity by only resorting to criminal prosecution and separation when children are endangered.

Furthermore, the rules governing detention of adult aliens are different than those governing alien children apprehended at the border. While the INA grants the federal government wide discretion to detain adult aliens during pending removal proceedings, child detentions function under the FSA (applying to all alien children), and other laws may also apply in unaccompanied children cases.

The primary issue boils down to whether prosecuting adults from family units apprehended at the border and the resulting separation of children from parents to deter future undocumented immigration is legal. Challenging this policy, plaintiffs in the Ms. L. case claimed that family separation violated their due process rights under the Fifth Amendment to the Constitution, the Administrative Procedure Act (APA), 5 U.S.C. § 706, and the Asylum Statute, 8 U.S.C. § 1158. However, Judge Sabraw dismissed the APA and Asylum Statute claims because of the plaintiffs’ failure to state a claim. The APA claim failed because the family


140. Id. at 1167–68.
separations were not alleged to be “final agency actions,”141 and the court held that there was no private right of action under the Asylum Statute.142 So, only the due process claim survived in the Ms. L. lawsuit.143 The most recent order on plaintiffs’ motion to enforce the preliminary injunction in Ms. L. was mostly denied, and the court found that the government had stopped systematically separating families.144 The district court properly found that the plaintiffs in Ms. L. stated a due process claim. Where substantive due process claims are asserted in a lawsuit, “the ‘threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.’”145 This standard aims at prohibiting governmental conduct that violates the “decencies of civilized conduct,” interferes with rights “‘implicit in the concept of ordered liberty[,]’” and is so “‘brutal’ and ‘offensive’ that it [does] not comport with traditional ideas of fair play and decency[,]”146 Accordingly, substantive due process protects all persons against arbitrary government power.147 There is a strong case to be made that separating parents from their children without a showing that the parent is unfit “shocks the conscience.” Family detention and separation causes physical and psychological harm to children.148 Some children come out of these experiences with

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141. Id. (quoting 5 U.S.C. § 704). This term relates to the pending nature of an agency’s decision; if an agency has not made a final decision on a matter, that “decision” or agency action cannot be challenged. See id. (quoting U.S. Army Corps of Eng’rs v. Hawkes Co., 136 S. Ct. 1807, 1813 (2016)).
142. Id. at 1168 (quoting 8 U.S.C. § 1158(d)(7) (“Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.”)).
143. Id. at 1161–67.
145. Ms. L., 302 F. Supp. 3d at 1165 (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998)).
146. Id. at 1166 (citations omitted; quoting Rochin v. California, 342 U.S. 165, 173 (1952); id. at 169 (citation omitted); and Breithaupt v. Abram, 352 U.S. 432, 435 (1957)).
147. Id.
irreparable psychological damage, and others have even died in custody.\textsuperscript{149} Even when reunited, the children are sometimes never the same again. The detention centers are overcrowded and unsanitary and lack adequate food and medical care.\textsuperscript{150} The trauma and pain that have resulted from the “zero tolerance” policy are extremely well documented, and to many this is the epitome of arbitrary government power. Time will tell if the federal courts will ultimately prohibit this practice of family separations in the immigration context.

### B. Separating Families and Prosecuting Parents Is Unconstitutional in a Criminal Context

In criminal courts, migrant parents have full constitutional rights, as would any criminal defendant, and arguably “zero tolerance” prosecutions have violated these rights. The federal public defender who represented the El Paso Five, Sergio Garcia, wrote an article arguing that “zero tolerance” criminal prosecutions of migrant parents who are separated from their children are unconstitutional for the following reasons:

1. the plea bargains involve duress;
2. the prosecutions violate the right to a fair trial;
3. the prosecutions violate the right against self-incrimination;
4. the prosecutors are forced to eschew duties imposed by \textit{Brady v. Maryland};\textsuperscript{151}
5. the deportations may effectively result in termination of parental rights without due process; and
6. the family separations constitute cruel and unusual punishment.\textsuperscript{152}

\begin{itemize}
  \item \textsuperscript{149} Nicole Goodkind, \textit{Trump Officials Acknowledge Sixth Migrant Child Death in U.S. Custody in 6 Months After None the Previous Decade}, NEWSWEEK (May 23, 2019), https://www.newsweek.com/border-family-separation-child-death-democrats-investigate-1434591.
  \item \textsuperscript{151} 373 U.S. 83 (1963).
  \item \textsuperscript{152} Garcia, \textit{supra} note 71.
\end{itemize}
While these arguments failed when the Fifth Circuit reviewed the El Paso Five cases, the claims are legally sound and may have traction in other jurisdictions if raised again. A brief analysis of these arguments follows.

Garcia argues that a migrant parent cannot voluntarily enter a guilty plea when they do not know where their children are being held by the government. To pressure parents into accepting a plea deal when the whereabouts of their children are unknown is duress in Garcia’s analysis. There can be no voluntariness in a decision to plead guilty when a defendant’s child is held hostage. This lack of voluntariness in entering pleas is a violation of due process and, therefore, void by law. Therefore, plea deals struck by the government with parents in this vulnerable position are invalid and unconstitutional.

Moreover, how can one have a fair trial if a key material witness is spirited away by the government and nowhere to be found? This was the situation of parents prosecuted under “zero tolerance.” Key material witnesses, their children, were prevented from testifying by the U.S. government. The government prevented the children from testifying by failing to inform parents of the whereabouts of their children. The testimony of these children could support defenses and provide evidence of conditions of the country of origin that support an asylum claim. If these key witnesses are kept from these migrant parents, only the parents themselves can testify on their own behalf.

This brings us to Garcia’s next point: Forcing migrant parents to testify against themselves violates the Fifth Amendment right against self-incrimination. Essentially, if the government refuses to release a key material witness, then these parents can only present a defense by testifying on their own behalf. Or these parents can choose not to testify and, therefore, present no testimony to the court. These parents find

153. United States v. Vasquez-Hernandez, 924 F.3d 164, 169, 171, 172 (5th Cir. 2019) (affirming district court’s judgment because “[n]othing in [8 U.S.C.] § 1225(b)(1)(A)(ii) prevent[ed] the government from initiating a criminal prosecution before or even during the mandated asylum process”; their deportation without their children “was not a punishment imposed or even caused by [their] § 1325(a) misdemeanor convictions”; there was no Brady violation since the appellants “made [no] effort to call the children as witnesses,” and “the children’s testimony would not have been material to a duress defense”; “[t]he fair trial claim simply repackage[d] the Brady claim”; and the self-incrimination claim failed as “[n]othing in the record suggest[ed] that the government prevented the children from testifying” or “exerted undue pressure on Appellants to testify”) (citation omitted).

154. Garcia, supra note 71, at 54.

155. Id. at 53–54 (citing McCarthy v. United States, 394 U.S. 459, 466 (1969)).

156. See Timmons, supra note 65 (discussing the El Paso Five case and how the whereabouts of defendants’ children were not revealed until after the trials).

themselves between a rock and a hard place with no recourse. This is yet another violation of their constitutional right to a fair trial.\footnote{Id. at 60–62.}

Furthermore, the \textit{Brady} rule is violated by prosecutors who fail to disclose the specific whereabouts of the children of the parents prosecuted under “zero tolerance.”\footnote{Id. at 62.} \textit{Brady v. Maryland} established that prosecutors have a duty to disclose exculpatory evidence to a defendant.\footnote{373 U.S. 83 (1963).} In this case, the exculpatory evidence would be the testimony of the defendant’s child that may support an asylum claim or other defense, but the government did not divulge the specific whereabouts of the defendants’ children until it was too late. Abuse of prosecutorial discretion by not making the children available for testimony in these cases would constitute bad faith and violate due process even if this “testimony is considered only potentially useful rather than exculpatory.”\footnote{Garcia, supra note 71, at 67.}

One might even argue that separating families, prosecuting parents, and deporting them without their children is tantamount to termination of their parental rights.\footnote{Id. at 76–78; see also Olivia Saldaña Schulman, “Now They’ve Robbed Me:” The Use of Termination of Parental Rights in Government-Fractured Immigrant Families, 43 N.Y.U. REV. L. & SOC. CHANGE 361 (2019).} The children may enter foster care and later be adopted.\footnote{See Schulman, supra note 162, at 363.} At that point, the parents lose all rights to reunite with their children. This is a disproportionate penalty for a petty misdemeanor.\footnote{Id. at 363–64.}

Building on this, Garcia also argues that permanently separating families and prosecuting parents is a form of cruel and unusual punishment.\footnote{Garcia, supra note 71, at 73–76.} This prohibition has two prongs: “First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime.”\footnote{Id. at 74 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (citations omitted)).} Not only is family separation an illegal and unnecessary infliction of suffering, but it is also an extreme punishment for a mere petty misdemeanor. “‘The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’”\footnote{Id. (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958))).}

Surely these government acts that create orphans and punish parents even before they have their day in court are forms of punishment past which the United
States has matured. The public outcry against family separations and the executive order that ended this practice bear this out as well.

V. Broadening the Scope of the Crisis of Family Separations

It is a misconception to believe that the separation of immigrant families is an issue that began and ended with the Trump Administration’s “zero tolerance” policy. In many ways, this unfortunate policy is merely the tip of the iceberg. In the interior of the United States, immigrant parents are routinely detained by immigration enforcement and deported. These detentions and deportations often tear apart families of mixed citizenship and have impacts similar to termination of parental rights. The Applied Research Center determined that in 2011, “at least 5,100 children” in foster care had immigrant parents who had been detained or deported; and estimated that by 2016, an estimated 15,000 more children would be in foster care while their parents faced immigration detention or deportation. Immigrant parents have often been detained and deported, with their children sent to foster care and later adopted, never to see their parents again.

For better or worse, labeling something as a “crisis” can inspire change, and it is up to advocates to frame the legal issues surrounding migrant families and children in a way that benefits all migrant families. If the crisis narrative is too narrow, then many problems remain unresolved. If the crisis narrative is too broad, then the movement will lack focus. Furthermore, if crisis is weaponized by the opposition in order to deter or punish migrant families, then this narrative must be vigorously challenged. Perspective is everything when it comes to these issues. For example, if there is a huge influx of immigrant families from the southwest border, then U.S. society can view this as a humanitarian crisis that requires charity or as a threat to national security that requires retribution. How the “crisis” is characterized can have tremendous impact.

With this in mind, it is worthwhile to consider Stephen Lee’s claim that the term “family separation” characterizes the U.S. immigration system in its entirety. For instance, immigration enforcement in the U.S. interior

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170. Id. at 2365–66.

171. Id. at 2322.
also breaks up families. Undocumented immigrants in the United States may choose not to visit their family outside of the country for fear that they will be denied reentry.\textsuperscript{172} Similarly, the difficulties of obtaining visas and modifying immigration status also keep families apart. Even when a family member obtains legal immigration status, it is an uncertain and protracted process to petition for immigration status even for close family members outside of the country.\textsuperscript{173} The U.S. immigration system as a whole should be reoriented to family reunification rather than family separation.

To understand family separation as an isolated episode in U.S. immigration policy during the Trump Administration would result in an unacceptable narrowing of the crisis. Advocates should expand the scope of what is considered the family separation crisis to encompass all policies in immigration enforcement and administration that result (directly or indirectly) in families being separated or kept apart. Family reunification is promoted by U.S. child welfare systems and should also be adopted by the federal government with respect to immigrant families.

VI. Possible Ways Forward

Turning to more solution-oriented considerations, there have been some suggestions that alternative options to family detention, such as supervised release, are more cost-effective. The Family Case Management Program (FCMP), for example, which monitored families requesting asylum, reported a high compliance rate with immigration requirements.\textsuperscript{174} The FCMP began in January 2016 and was terminated by the Trump Administration in June 2017.\textsuperscript{175} The FCMP average daily cost of thirty-six dollars per family reportedly surpassed that of other “intensive supervision” programs (five to seven dollars daily per adult), but both programs are considerably less expensive than the average daily cost of family detention ($319 per person).\textsuperscript{176}

Regardless, there seems to be some truth in the claim that family detention should never be permitted, much less family separation. However, the state of the law at this point allows for family detention for

\textsuperscript{172} Id. at 2323.
\textsuperscript{173} Id.
\textsuperscript{175} Frank Bajak, \textit{ICE Shuts Detention Alternative for Asylum-Seekers}, ASSOCIATED PRESS (June 9, 2017), https://www.apnews.com/32b2408c9e8d47d2971c63a6fca1d86b0.
\textsuperscript{176} Id.
about twenty days. At the very least, with the availability of cost-effective supervised release programs, immigrant families should never have to fear prolonged detention apart from each other. It is also sobering to note that the Obama and Trump Administrations expanded family detentions to a level not seen since the Japanese internment camps during World War II. This is not the path the United States wants to take.

Another reform strategy that has been suggested since 2013 by the Federal Bar Association (FBA) is for “Congress to establish Article I ‘United States Immigration Court’ to replace the Executive Office for Immigration Review (EOIR) in the U.S. Department of Justice as the principal adjudicatory forum under title II of the Immigration and Nationality Act.” This would overhaul an overloaded and broken immigration court system. Creating an Article I court system would also create independence and model the immigration courts after the federal court system at large. The FBA outlines the present lack of independence in immigration courts in the following statement:

Currently, Board of Immigration Appeals members and Immigration Judges are considered to be “attorneys representing the United States in litigation”—not as independent judicial officers. They are subject to discipline if the Attorney General disagrees with their decisions, and thus lack of independence to freely adjudicate the matters before them. The potential for political influence puts due process at risk.

An Article I court system would be more independent from political decision-making and would more readily check abuses of power by the executive branch.

Congress could also pass legislation detailing how families who are caught trying to cross the border should be detained and processed. But this option, like the new Article I immigration court suggested above, seems unlikely in the 2020 political climate in the United States. Bipartisan cooperation for immigration reform is unlikely in a country that is so polarized at the moment. Currently, the federal courts have cleaned up

the mess created in the legislative power vacuum that allowed the Trump Administration to criminally prosecute adults apprehended with their children at the border, thereby leading to family separations. If Congress has the political will, then this option that has already harmed so many families can be blocked in the future and replaced with more humane consequences for these families who have already risked so much.

Overall, children involved in the immigration system should be treated with more care and compassion. The federal government should keep better track of families and children, so that if they are somehow separated, they can be reunified efficiently. Moreover, the government should keep better track of immigrant children (including unaccompanied children) after they are placed with sponsors because reports show that the government has lost track of over a thousand children.180

The U.S. government should also end its policy of detaining immigrant families that have no criminal histories and pose no threat. The practice is damaging to immigrant families and is extremely costly. Perhaps the U.S. should treat these families less like criminals and more like refugees who risked a perilous journey to escape danger for a chance to enter the famed “land of opportunity.”

VII. Conclusion

The separation of immigrant families by U.S. immigration enforcement is an issue that cuts across bipartisan lines. Grave mistakes were made by both President Obama and President Trump with respect to immigrant children and their families. Their mistakes built upon one another until the pain and suffering became intolerable with the rollout of “zero tolerance.” That crisis has ended, but a wider crisis remains. Family separations will not truly stop until U.S. immigration policy becomes fully geared toward family reunification rather than being protectionist and punitive.

Substantive due process legal arguments defending family integrity are what ultimately stopped family separations under “zero tolerance.” However, other constitutional arguments may be available and argued in the future, relating to the right to fair trial and other rights guaranteed to immigrants by the Constitution.

Independent immigration courts are also needed as well as federal legislation that protects migrant children and families detained at the border.

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Democratic and Republican lawmakers must come together to protect this politically powerless group. Deterrence is not a persuasive enough government interest to justify implementing policies that needlessly harm innocent children.

As stated above, extended family detentions should be stopped because of the harm they cause to children, and because they violate the FSA. There are also several less-costly alternatives to family detentions that also minimize the risk of flight and failure to appear at immigration proceedings.

The prevailing policies have failed immigrant children in a myriad of ways, and “zero tolerance” family separations are just one example. More humane immigration and asylum policies will avoid a human rights crisis in the future. So far, the courts have held an unsteady line against human rights abuses in immigration enforcement. The time has come to cut off future opportunities to abuse executive power with detailed legislation protecting immigrant families. Immigration law must be overhauled, or another crisis will emerge.

President Joe Biden inherits a nation ravaged by the COVID-19 pandemic and politically polarized. Both parties can agree that immigration policy is broken and is in need of reform. Hopefully this Article has charted a way forward with respect to more humane immigration policies and has identified some pitfalls to be avoided. All families should be protected within U.S. borders, no matter the immigration status of the families or the political affiliation of the party in power.
Wolves in Sheep’s Clothing: How Religious Exemption Laws for Discriminatory Private Agencies Violate the Constitution and Harm LGBTQ+ Families

INTRODUCTION

Kristy and Dana Dumont, who have been together for over a decade, seemed to be the “ideal” prospective parents. They had been preparing for the last several years to welcome children into their home, moving to an idyllic neighborhood in the suburbs with a spacious yard and no shortage of nature trails nearby. They had also made sure that there was a good school district and that their new house was ready for their future children. Despite all of their preparation and enthusiasm, however, they were denied by two tax-funded child-placing agencies in their area. The reason for the denial? Their sexual orientation. The fact that they were a...
same-sex couple meant that they did not meet the religious criteria that the agencies applied.5

Their story is in no way unique. Dr. Christopher Harris—a remarkably accomplished pediatric pulmonologist and former president of GLMA: Health Professionals Advancing LGBT Equality—struggled at first to adopt.6 He would wait months without word from faith-based child placing agencies, only to find out that heterosexual participants in his parenting classes had already been placed with children.7

Faith-based child placing agencies have a long history in the United States. Faith-based agencies were some of the first child welfare

5. Id.; see also Dumont v. Lyon, 341 F. Supp. 3d 706, 714 (E.D. Mich. 2018) (summarizing factual allegations in litigation against Michigan and agency officials). As part of a settlement agreement with the Dumonts and another couple, Michigan’s Child Services Agency agreed to enforce a nondiscrimination clause that would ensure that they no longer contracted with child placing agencies (CPAs) that turned away or referred to other CPAs “an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for services under a Contract or a Subcontract.” See Settlement Agreement § 1(b)-(d), Stip. of Voluntary Dismissal with Prejudice Ex. A, Dumont v. Gordon, No. 2:17-cv-13080-PDB-EAS (E.D. Mich. Mar. 22, 2019), ECF No. 82; see also Leslie Cooper, Same-Sex Couples Are Being Turned Away from Becoming Foster and Adoptive Parents in Michigan. So We’re Suing., AM. CIV. LIBERTIES UNION (Sept. 20, 2017, 10:30 AM), https://www.aclu.org/blog/lgbt-rights/lgbt-parenting/same-sex-couples-are-being-turned-away-becoming-foster-and-adoptive (noting that Michigan was “the first state to reverse course on this issue”). However, there is ongoing litigation over the policy between a faith-based child placement agency and Michigan officials. See Buck v. Gordon, 429 F. Supp. 3d 447 (W.D. Mich. 2019) (preliminarily enjoining Michigan officials from taking enforcement action against faith-based child placement agency), stay denied, No. 19-2185, 2019 U.S. App. LEXIS 34421 (6th Cir. Nov. 19, 2019), and appeal voluntarily dismissed, No. 19-2185, 2020 U.S. App. LEXIS 6125 (6th Cir. Feb. 27, 2020).


7. See id. Dr. Harris was eventually able to adopt his daughter Mia through an LGBTQ+-friendly agency. Id.
organizations to emerge in the United States in the mid-nineteenth century. More recently, in the years following Roe v. Wade, a host of conservative Christian agencies have gained prominence. Some organizations have networks that span the country and the globe. Some organizations make clear their opposition to same-sex relationships. However, some prospective parents who are LGBTQ+ have learned that they failed to meet the agency’s religious criteria only after they had expended significant time trying to work with the organization.

When religious child placement agencies with state contracts are permitted to discriminate in this way, prospective parents who are LGBTQ+ may have few options, especially in states where private agencies control

8. In 1853, Charles Loring Brace, a Protestant minister and social reformer, started one of the first prominent child welfare organizations, the New York Children’s Aid Society. Ellen Herman, Dep’t of Hist., Univ. of Or., Charles Loring Brace (1826–1890), THE ADOPTION HIST. PROJECT (Feb. 2012), https://pages.uoregon.edu/adoption/people/brace.html. Other early faith-based child welfare organizations include the Catholic Home Bureau, the Free Synagogue Child Adoption Committee (later renamed Louise Wise Services), and Catholic Charities. See Ellen Herman, Dep’t of Hist., Univ. of Or., Timeline of Adoption History, THE ADOPTION HIST. PROJECT (Feb. 2012), https://pages.uoregon.edu/adoption/timeline.html; Ellen Herman, Dep’t of Hist., Univ. of Or., First Specialized Adoption Agencies, THE ADOPTION HIST. PROJECT (Feb. 2012), https://pages.uoregon.edu/adoption/topics/firstspecial.html; Our Story, CATH. CHARITIES ARCHDIOCESE OF N.Y., https://catholiccharitiesny.org/about-us/our-story (last visited Dec. 18, 2020).

9. 410 U.S. 113 (1973) (seminal Supreme Court case finding abortion restrictions unconstitutional).


12. Focus on the Family includes on its website that the “six guiding philosophies” of its ministry, which “are apparent at every level throughout the organization,” include its view that marriage is only between one man and one woman. Our Vision, FOCUS ON THE FAM., https://www.focusonthefamily.com/about/foundational-values/ (last visited Jan. 2, 2021).

the placement of a majority of the state’s children. Since states often contract with private child welfare agencies to provide foster care and adoption services, “the distinction between public and private action has become blurred.”

This is all particularly concerning given that LGBTQ+ people are seven times more likely to foster or adopt than their heterosexual counterparts. With over 420,000 children in foster care and 122,000 children waiting to be adopted, additional loving and capable parents are needed. To turn away otherwise-qualified prospective parents, solely based on their sexual orientation or gender identity, is to further deprive a system that is already burdened of one of its key components, which is directly antithetical to the primary goal of the child welfare system.

Additionally, often forgotten from these debates are the actual children in foster care and those awaiting adoption, many of whom identify as LGBTQ+ themselves. These children and youth are particularly vulnerable, and placing them with loving families who will affirm their identities is crucial.
identities is crucial to their mental health and well-being. Furthermore, LGBTQ+ people may be more likely to adopt children who are deemed “hard to place,” including children with disabilities.

While there is no doubt that faith-based organizations often do fill a gap in child welfare services and perform crucial functions for the community, using taxpayer dollars to fund such organizations when they discriminate presents not just ethical questions, but grave constitutional ones as well. In examining both the case law and policy implications related to LGBTQ+ parenting in the United States, the government should refuse to allow faith-based exemptions for organizations that wish to engage in discrimination against same-sex couples and/or transgender couples in child welfare services. Discrimination in child welfare based on sexual orientation and/or gender identity is a violation of both the Fourteenth Amendment’s Equal Protection Clause and the First Amendment’s Establishment Clause. Not only does discriminating against otherwise-qualified LGBTQ+ parents have no rational relationship to a legitimate governmental objective, it actually undermines the government’s stated interest in providing for the safety and well-being of the children in their care. Furthermore, when government agencies contract with faith-based organizations that discriminate in performing a government function, they violate the Establishment Clause, which mandates separation of church and state and bars states from stipulating religious criteria as a prerequisite to receiving services.

24. See U.S. Const. amend. XIV, § 1 (providing that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws”); id. amend. I (providing that “Congress shall make no law respecting an establishment of religion”).
25. See infra notes 112–28 and accompanying text.
26. See infra notes 129–33 and accompanying text.
The Supreme Court has in recent years recognized LGBTQ+ rights in a variety of different areas including marriage and employment. There has also been a counter-wave of mounting pressure from those who argue that the Free Exercise Clause requires religious exemptions to laws that prohibit discrimination based on sexual orientation, even for entities that are licensed by or provide services under contract with government agencies. This conflict may be addressed by the Supreme Court in Fulton v. City of Philadelphia, a pending case concerning whether or not government agencies may stop contracting with private faith-based child welfare services when those services have policies ofturning away same-sex couples.

This Essay advances a critique to challenge the constitutionality of religious-based exemptions in the context of child welfare agencies, contextualized through case law and legislation that have laid the groundwork for the current LGBTQ+ parenting landscape in the United States. In examining important case law for LGBTQ+ parenting rights in the nation, this Essay also attempts to frame the critical constitutional questions at issue here in light of Fulton.

This Essay proceeds in three parts. Part I begins with a background on the history of LGBTQ+ fostering and adoption laws in the United States, focusing on a few major cases on both the state and federal levels. Part II will discuss the merits of the arguments in Fulton, focused specifically on the constitutional arguments in favor of denying religious exemptions to faith-based and government-contracted organizations that discriminate against LGBTQ+ parents. Finally, Part III of this Essay will discuss Establishment Clause and Equal Protection issues presented by religious

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27. See Obergefell v. Hodges, 576 U.S. 644, 675–76 (2015) (holding that same-sex couples have a fundamental right to marry, and state laws prohibiting same-sex marriage violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment).


29. See infra Part II.


31. There are a number of other areas not addressed here in which the Free Exercise and Establishment Clauses have created, and will no doubt continue to create, complicated questions of the permissible scope of religious exemptions.
exemptions. The conclusion will highlight the work that is yet to be done in providing real protections to LGBTQ+ prospective parents.

I. Background

The first laws restricting LGBTQ+ parents’ rights to foster and adopt in the United States started to gain prominence as both the LGBTQ+ civil rights movement and the conservative pro-adoption/anti-abortion movement were pushed to the center of the nation’s collective consciousness. Before the 1960s and 70s, LGBTQ+ people were rarely discussed in the public sphere, and while it was nearly impossible for LGBTQ+ parents to adopt children without great difficulty, few states had laws explicitly banning or limiting LGBTQ+ parents’ ability to adopt.

A. The History of a Florida Statute Banning Same-Sex Adoption

In 1977, the Florida State Legislature enacted Florida Statutes § 63.042(3), which provided that “[n]o person eligible to adopt under this statute may adopt if that person is a homosexual.” This law, which remained in place for over three decades after its enactment, was consistently upheld even into the early 2000s. In fact, in 2004, the Eleventh Circuit rejected a claim by several gay foster parents or guardians and children they had been raising, alleging that the law violated due process and equal protection rights. The court in Lofton refused appellants’ invitation to recognize a fundamental right to family integrity for groups of individuals who had formed deeply loving emotional bonds, stating that “[h]istorically, the Court’s family and parental-rights holdings have involved biological families.” Furthermore,

34. See What to Know About the History of Same-Sex Adoption, CONSIDERING ADOPTION, https://consideringadoption.com/adoptions/can-same-sex-couples-adopt/history-of-same-sex-adoption (last visited Jan. 2, 2021); see also Rudolph, supra note 32.
the court stated that the then-recent Supreme Court decision in *Lawrence v. Texas* could not be inferred to create a fundamental right to adopt for “homosexual persons,” since the context here was different than in *Lawrence*. With regards to the Equal Protection challenge, the court accepted as plausible Florida’s arguments that the statute was rationally related to the state’s interests in furthering “the best interests” of adopted children by placing them in families with a married mother and father for stability and “heterosexual rolemodeling.”

It was not until *Florida Department of Children and Families v. X.X.G.* in September 2010 that the Florida District Court of Appeal for the Third District affirmed an order finding the statute violated the Equal Protection Clause of Florida’s state constitution. In 2015, Governor Rick Scott signed into law a bill to formally repeal the ban on LGBTQ+ adoption in Florida.


As far back as the 1950s, fear-based language similar to that employed in *Lofton* was being utilized in decisions to legitimize discrimination against LGBTQ+ parents in custody proceedings. Some courts applied

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39. 539 U.S. 558 (2003). In *Lawrence*, the Court invalidated a long-standing Texas sodomy law that criminalized “deviate sexual intercourse” among people of the same sex, holding that criminalizing private same-sex sexual acts was a violation of the Fourteenth Amendment’s Due Process Clause. *Id.* at 563, 578–79.

40. According to the court, because *Lofton* involved minor children and a “statutory privilege” to adopt, in contrast to *Lawrence*, which involved a criminal prohibition and private conduct by consenting adults, it could not be inferred from *Lawrence* that a fundamental right for LGBTQ+ parents to adopt existed. *Lofton*, 358 F.3d at 815–17.

41. *Id.* at 818–20.

42. The court upheld a determination that the best interests of the children were not preserved by banning same-sex adoption, and also found that the record did not support the Department’s contention that LGBTQ+ people should be barred from adopting because their homes may have been less stable and more prone to domestic violence. *Fla. Dep’t of Child. & Fams. v. X.X.G.*, 45 So. 3d 79, 86–87, 90–92 (Fla. Dist. Ct. App. 2010).


the “best interests of the child” standard with anti-LGBTQ+ bias, despite evidence that the LGBTQ+ identity of the parents has no impact on the stability of the home or the child’s sexual orientation or gender identity. These courts relied on a range of harmful stereotypes about LGBTQ+ people, including that having gay parents might influence the children to become gay, that the children of gay or transgender parents would face an increased amount of shame and stigma, and that unmarried gay parents were not as good role models as straight married mothers and fathers.

One illustration of the way in which “the best interests of the child” framework was used to delegitimize LGBTQ+ parents was through amendment of § 78-30-9 of the Utah Code. On March 14, 2000, Utah amended its child welfare law to explicitly require a court in an adoption proceeding to “make a specific finding regarding the best interest of the child, taking into consideration information provided to the court relating to the health, safety, and welfare of the child and the moral climate of the potential adoptive placement.” Furthermore, this law included legislative findings “that it is not in a child’s best interest to be adopted by a person or persons who are cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state.” Because marriage equality had not yet reached Utah in 2000, one effect of this legislation was to keep LGB people who lived with their partners from being able to adopt or foster.

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47. See, e.g., Lofton v. Sec’y of Dep’t of Child. & Fam. Servs., 358 F.3d 804, 818–819 (11th Cir. 2004); see also cases cited supra at note 44.

48. UTAH CODE ANN. § 78-30-9(b), (3)(a) (2000) (renumbered and amended; now codified at UTAH CODE ANN. § 78B-6-102(2), (4)).


50. Id. (now codified at UTAH CODE ANN. § 78B-6-102(4)).

51. See Kitchen v. Herbert, 755 F.3d 1193 (10th Cir.) (finding Utah prohibition on same-sex marriage unconstitutional), cert. denied, 135 S. Ct. 265 (2014).
Following Florida’s amendment in 1977, other states similarly restricted same-sex parents from adopting. New Hampshire serves as one such example; it amended its adoption statute in 1987 to provide that “any individual not a minor and not a homosexual may adopt.” This legislation was in effect until it was repealed in 1999.

In addition to statutory provisions explicitly banning adoption by same-sex couples, anti-sodomy statutes were also used to deny LGBTQ+ prospective parents the opportunity to adopt or foster. For example, Johnston v. Missouri Department of Social Services showed how Missouri state officials used an anti-sodomy criminal law to conclude that placement with lesbian or gay foster parents was not in “the best interests of the child.” This case involved Lisa Johnston, a woman who sued the Children’s Division of the Missouri Department of Social Services (MDSS) after they denied her application for a Missouri foster care license while conceding that had she not been a lesbian, she and her partner would have made exemplary prospective foster parents. The Director of MDSS had affirmed the agency’s denial, ruling that the agency’s policy required it to consider “first and foremost the best interests of the child to be fostered”; Missouri law criminalized sexual relations among individuals of the same sex; foster parents were required to have a “reputable character”; it was not in the best interests of a foster child to be placed with gay or lesbian parents; and Johnston did not meet the requirements to be a foster parent. The court reversed this determination and held that the agency’s finding that Johnston lacked the “reputable character” required to be a foster care parent was unsupported by the evidence in the administrative record. The court further found that the Director had erroneously based his determination that Johnston lacked “reputable character” solely on

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52. See supra Part I.A.
57. Id. at *2–4.
58. Id. at *3.
59. Id. at *4–6. The agency made this determination based solely on Johnston’s sexual orientation. Id. at *3–4.
the Missouri sodomy statute, which was unconstitutional in light of the Supreme Court’s decision in *Lawrence v. Texas*.60

Beginning in the early- and mid-2000s, states finally began to drop their outright bans on LGBTQ+ fostering and adopting,61 culminating in 2015 with the seminal marriage equality case *Obergefell v. Hodges*, which explicitly stated that one of the benefits of marriage involved the ability to adopt children.62 In a post-*Obergefell* world, all 50 states now allow adoption by married LGBTQ+ parents.63

Although *Obergefell* certainly changed the landscape for married LGBTQ+ prospective parents, some adoption laws required marriage as a prerequisite for joint adoption,64 and Justice Anthony Kennedy’s opinion had nothing to say about unmarried couples or single people.65 It also failed to address whether or not private organizations could discriminate against same-sex or transgender couples in adoption services.66

Moreover, in what some have described as a backlash to *Obergefell*, some states have since enacted laws that carve out exemptions that allow faith-based, government-funded child welfare agencies to refuse to place children with LGBTQ+ people.67 According to the Movement Advancement Project, 11 states now expressly permit state-licensed child welfare agencies to refuse to place children with LGBTQ+ foster parents if doing so would conflict with their sincerely held religious beliefs.68

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60. *Id.* at *4–5* (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)). The Missouri law made it a misdemeanor for a person to have sexual intercourse with another person of the same sex. *Mo. ANN. STAT.* § 566.090 (West 2006) (held unconstitutional by *Johnston*, 2006 WL 6903173). The *Johnston* court held that this was contrary to *Lawrence v. Texas*, which had struck down a similar sodomy law in Texas for being a violation of due process. *Johnston*, 2006 WL 6903173, at *3.*

61. New Hampshire’s adoption statute was amended to remove the prohibition on LGB adoption and foster parenting in 1999. *See supra* notes 54–55 and accompanying text.


63. *See Rudolph, supra* note 32.

64. *See id.*


66. *Adoption and Same-Sex Couples: Overview, supra* note 65.


Furthermore, the administration of President Donald Trump was supportive of a push for greater religious liberty exemptions at the expense of LGBTQ+ people. The U.S. Department of Health and Human Services (HHS) announced in November 2019 that it would stop enforcing a nondiscrimination rule from President Barack Obama’s administration, and proposed a new rule offering recipients of federal grants religious liberty protections under federal law. HHS administers federal programs that provide financial support to states for foster care and adoption services. The Obama administration regulation prohibited discrimination in programs receiving funding from HHS, based on sexual orientation and gender identity as well as other protected categories, and required funding recipients to recognize same-sex marriages.

While HHS contended that these policy changes would allow it to not infringe on religious freedoms in its operations of grants, what they actually do in practice is allow religious agencies to infringe on the rights of LGBTQ+ people and children in foster care. In March 2020, three LGBTQ+ equality organizations sued HHS to challenge its proposed November 2019 rule relating to grant administration and regulation, stating that HHS’s actions ran contrary to the agency’s stated mission of enhancing the health and well-being of all Americans, and put LGBTQ+ youth’s health and


71. 45 C.F.R. § 75.300(c) (“It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the administration of programs supported by HHS awards.”), (d) (“In accordance with the Supreme Court decisions in United States v. Windsor and in Obergefell v. Hodges, all recipients must treat as valid the marriages of same-sex couples. This does not apply to registered domestic partnerships, civil unions or similar formal relationships recognized under state law as something other than a marriage.”).

72. Meyer, supra note 69.
well-being at increased risk. The complaint also alleged that by gutting antidiscrimination laws on the grounds of protecting religious liberty, HHS was “allow[ing] religion to be weaponized to discriminate against” LGBTQ+ people and disregarding “other constitutional constraints on such discrimination.”

The result of these conflicts is a fierce clash, on one side of which are those who argue that exemptions for faith-based agencies are an important aspect of religious liberty. On the other side of this divide, there are those who argue that providing exemptions for agencies that discriminate is a potend violation of both the Equal Protection Clause and the Establishment Clause. As discussed in the next Part of this article, the Fulton case presents the Supreme Court with an opportunity to resolve these disputes.

II. Fulton v. City of Philadelphia

The central issue in Fulton is whether Catholic Social Services (CSS)—a faith-based agency that contracted with the city but has a policy that denies their publicly funded services to married same-sex couples—is entitled to a preliminary injunction on its First Amendment Free Exercise claim. The preliminary injunction application challenged Philadelphia’s

74. Id. ¶ 5.
termination of foster care referrals to the agency in accordance with the City’s nondiscrimination policy. ⁷⁸

A. Fulton’s Facts and Procedural Posture

The investigation that led to Philadelphia’s cessation of foster care referrals to CSS began when a Philadelphia Inquirer reporter called the Department of Human Services (DHS) Commissioner Cynthia Figueroa to state that the newspaper was working on an article about how two publicly funded foster care agencies, CSS and Bethany Christian Services, “would not work with same-sex couples as foster parents.” ⁷⁹ Subsequently, Figueroa contacted both Bethany Christian Services and CSS, along with several other faith-based foster care agencies and one secular agency that contracted with the City, to determine what these agencies’ policies were regarding same-sex couples. ⁸⁰ CSS and Bethany confirmed that they had policies to deny foster care certification to same-sex couples. ⁸¹ None of the other organizations that Figueroa contacted had such policies discriminating against same-sex couples. ⁸²

Figueroa met with CSS to attempt to resolve the dispute, but ultimately, CSS maintained that in accordance with their religious beliefs, they would continue to not certify same-sex married couples. ⁸³ Shortly after the meeting, CSS received notice that DHS would no longer be referring new children to the agency and was instituting an “intake freeze.” ⁸⁴

At the district court level, the case ultimately turned on two questions. The threshold question, whether CSS’s provision of services met the definition of “public accommodations” subject to Philadelphia’s Fair

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⁷⁸ Fulton, 922 F.3d at 146–47.
⁷⁹ Id. at 148.
⁸¹ Fulton, 922 F.3d at 148. CSS also noted that it would not certify or provide home studies to same-sex couples or LGBTQ+ individuals unless they vowed to live single. Fulton, 320 F. Supp. 3d at 672.
⁸² Fulton, 922 F.3d at 148.
⁸³ Id. CSS would not certify any unmarried, cohabiting couples, and does not recognize same-sex marriage. Id.
⁸⁴ Id. at 149. So-called intake freezes had been instituted by the DHS officials when they had concerns that they may have to stop working with an agency. Id.
Practices Ordinance (this was primarily a disagreement about statutory interpretation), was dispensed with quickly.\footnote{Fulton, 320 F. Supp. 3d at 679 (analyzing Philadelphia Fair Practices Ordinance § 9-1102(1) (w), https://www.phila.gov/HumanRelations/PDF/FPO%20Ch9-1100%209-2016_%20nc.pdf).}

\textbf{B. Constitutional Issues}

A second question that the case turned on, and ultimately the question that is pending before the Supreme Court, is whether CSS may nevertheless disregard the nondiscrimination provisions of the Fair Practices Ordinance under a theory that forcing it to comply is a violation of the Free Exercise Clause.\footnote{Id.} Under \textit{Employment Division, Department of Human Resources of Oregon v. Smith},\footnote{494 U.S. 872 (1990).} the Free Exercise Clause is not violated when religious exercise is impacted as an “incidental effect of a generally applicable and otherwise valid” law.\footnote{Id. at 878–80; \textit{see also} \textit{Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah}, 508 U.S. 520, 531 (1993) (“[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.”). One of the questions before the Supreme Court in \textit{Fulton} is whether \textit{Smith} should be “revisited.” Petition for a Writ of Certiorari, \textit{supra} note 77, at i.} However, “[a] law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.”\footnote{Church of the Lukumi Babalu Aye, Inc., 508 U.S. at 531–32.}

In \textit{Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission},\footnote{138 S. Ct. 1719 (2018).} the Supreme Court ruled on narrow grounds against a civil rights agency that required a baker who asserted religious objections to same-sex marriage to bake a cake for a same-sex wedding, without reaching broader Free Exercise and Free Speech claims the bakery raised in opposing Colorado’s enforcement of a nondiscrimination law.\footnote{See id. at 1728–29, 1732.} The Court found that the Colorado Civil Rights Commission displayed clear hostility to the baker’s religious beliefs, unfairly targeting him and failing to provide him with the “neutral and respectful consideration” his claims deserved.\footnote{Id. at 1729–30.} The Commission disparaged the baker’s religious beliefs as “despicable” and “merely rhetorical,” and compared his “invocation of his sincerely held

\begin{footnotes}
\item[86] Id. The Free Exercise Clause of the First Amendment states that “Congress shall make no law . . . prohibiting the free exercise [of religion].” U.S. \textit{Const.} amend. 1. This applies to states through the Fourteenth Amendment Due Process Clause. Fulton, 320 F. Supp. 3d at 680.
\item[87] 494 U.S. 872 (1990).
\item[88] Id. at 878–80; \textit{see also} Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (“[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.”). One of the questions before the Supreme Court in Fulton is whether Smith should be “revisited.” Petition for a Writ of Certiorari, supra note 77, at i.
\item[89] Church of the Lukumi Babalu Aye, Inc., 508 U.S. at 531–32.
\item[90] 138 S. Ct. 1719 (2018).
\item[91] See id. at 1728–29, 1732.
\item[92] Id. at 1729–30.
\end{footnotes}
religious beliefs to defenses of slavery and the Holocaust.”93 The Supreme Court did acknowledge that “the State’s interest could have been weighed against [the baker’s] sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed,” but it found that state officials had failed to do so in this case, noting “[t]he official expressions of hostility to religion in some of the commissioners’ comments.”94

CSS first argued, in an attempt to have the court subject the defendants’ actions to strict scrutiny, that the City and DHS targeted the agency “purely based on its religious beliefs.”95 However, both lower courts found that there was no persuasive evidence in the record that showed that DHS or the City had unfairly targeted CSS.96 In fact, the record showed that DHS officials had actually worked to try and keep their relationship with CSS, and in several instances had placed children with CSS foster families despite the “intake freeze” (for example, if a child’s sibling had previously been placed with CSS).97 Although the record did show that Figueroa used some religiously tinged language in her meeting with CSS, including stating that “it would be great if we could follow the teachings of Pope Francis,”98 CSS’s argument that this is evidence of targeting based on religious belief is unpersuasive. Looked at in context, the language Figueroa used—while no doubt religious—was arguably simply an attempt to find some common ground and a solution to their impasse.99 The Court distinguished Masterpiece Cakeshop, finding that City officials provided “respectful consideration” of CSS’s position and that Figueroa neither disparaged CSS’s religion (that she herself shared) nor acted with hostility towards them based on their religious views.100 Additionally, in rejecting a state-law claim under Pennsylvania’s Religious Freedom Protection Act,101 the Court found that the City’s actions in requiring compliance with

93. Id. at 1729.
94. Id. at 1732.
96. See id. at 687–90; see also Fulton v. City of Phila., 922 F.3d 140, 156–59 (3d Cir. 2019).
97. Fulton, 922 F.3d at 149–51.
98. Id. at 157.
99. Figueroa herself is Catholic, and the court found that her comment about Pope Francis was “best viewed as an effort to reach common ground with [CSS] by appealing to an authority within their shared religious tradition.” Id.
100. Id. at 157–59.
101. 71 PA. STAT. AND CONS. STAT. §§ 2401–07 (West).
a nondiscrimination law were “the least restrictive means of furthering a compelling government interest.”

CSS also claimed as part of its Free Exercise challenge that because Figueroa called mostly faith-based agencies to determine what their policies were on serving same-sex couples, the laws were not applied with neutrality. However, Figueroa had only been tipped off that two agencies—CSS and Bethany—refused to work with same-sex couples, and they did so for religious reasons. The Third Circuit reasoned that it made sense she would then primarily call religious organizations that contracted with the City because she had little reason to think nonreligious agencies would similarly discriminate. Further supporting the City’s argument that it applied its antidiscrimination laws neutrally was the fact that Figueroa had also called a non-faith-based agency to check its policy regarding same-sex couples. Ultimately, the Third Circuit noted that while sincerely held religious belief is always protected, conduct motivated by those religious beliefs is not entitled to “special protections or exemption from general, neutrally applied legal requirements.”

CSS’s second constitutional argument was that its First Amendment Rights under the Establishment Clause were violated by the City’s actions. As evidence of discriminatory treatment because of its Catholic religious values, CSS primarily pointed to Figueroa’s statement concerning the Pope. The Third Circuit did not seem to think much of this argument, noting that the City continued to work with CSS in other contexts, and that Bethany Christian Services opposed same-sex marriage for religious reasons but was able to receive foster care referrals again after it agreed to “cease discriminating against same-sex couples.”

While the Third Circuit’s ruling in the case may appear straightforward, with a conservative Supreme Court that has in recent years been friendly to those who have filed constitutional challenges with the aim of

102. Fulton, 922 F.3d at 163.
103. Id. at 157.
104. Id.
105. Id.
106. Id.
107. Id. at 159.
108. Id. at 159–60.
109. Id.
110. Id. at 149 n.2, 151, 160.
“protecting” religious liberty, it remains to be seen whether this decision will be an affirmation that religious beliefs do not entitle faith-based child welfare organizations to special exemptions or whether it will be a gross misapplication of First Amendment religious liberty protections.

III. Exemptions for Faith-Based Agencies Violate Equal Protection and the Establishment Clause

Under the Equal Protection Clause, laws that distinguish between classes of individuals “must be rationally related to a legitimate governmental purpose.” For LGBTQ+ individuals, this mandate suggests that unless there is a legitimate and plausible governmental objective for differentiating between LGBTQ+ prospective parents and non-LGBTQ+ prospective parents, the state may not treat LGBTQ+ individuals differently in public child welfare services. While the issue may not appear quite so simple when applied to private faith-based agencies that contract with the government and receive public funds, the court in Fulton suggested that

111. In the 2019–20 term, after granting certiorari in Fulton, the Supreme Court ruled in favor of Free Exercise claims raised in other cases. In Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020), the Court found that state officials’ application of a state constitutional “no-aid provision” to bar the use of state-supported private school scholarships at religious schools discriminated based on the “religious character” of the schools and was unconstitutional. Id. at 2255. Espinoza arose as a result of a program the Montana Legislature established that granted tax credits to those who donated to organizations that awarded scholarships for private school tuition. Id. at 2251. In order to reconcile this program with a Montana constitutional provision that barred government aid to schools “controlled in whole or in part by any church, sect, or denomination,” Montana officials issued Rule 1, which barred families from using the scholarships at religious schools. Id. at 2252. The Court applied strict scrutiny and found the restrictions violated the Free Exercise Clause. Id. at 2260–61. Also, the Court expanded the scope of the “ministerial exception,” first outlined in Hosanna-Tabor Evangelical Church v. Equal Opportunity Employment Commission, 565 U.S. 171 (2011). This exception gives religious organizations independence to handle employment disputes free from court interference when the disputes involve “ministers,” considering factors such as the person’s title and the religious functions performed by the person. Id. at 188–92. In Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020), the Supreme Court held that the employment discrimination claims of two elementary school teachers fell under the Hosanna-Tabor exception, noting that although the teachers were not given the title of “minister” and had limited formal religious training, religious education of the students was “the very reason for the existence of most private religious schools.” Id. at 2055. Most recently, in November 2020, the Supreme Court granted preliminary injunctive relief pending appeal in a challenge by religious organizations to New York Governor Andrew Cuomo’s restrictions on religious gatherings during the COVID-19 pandemic. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam). The Court found a likelihood of success on the merits of the organizations’ claims that the restrictions violated the Free Exercise Clause by treating secular activities more favorably than religious ones and severely limiting in-person attendance at religious gatherings. Id. at 66–67.

Philadelphia and DHS had reason to be concerned about the likelihood of such a constitutional challenge from same-sex married couples should the City exempt contracting agencies from complying with the Fair Practices Ordinance.113

One of the initial hurdles of an Equal Protection challenge in this context is establishing that faith-based and publicly funded agencies that contract with the state to provide child welfare services are actually considered “state actors.”114 However, another option LGBTQ+ prospective parents have to sidestep the hurdle of proving that a private party is a state actor is going ahead and suing a state actor or state agency directly.115 Based on the recent Dumont litigation,116 this seems like a potentially successful route.

Once it has been established that there is a sufficient “sovereign” for the purposes of the Equal Protection Clause, the next inquiry is whether or not there is a legitimate and plausible governmental objective for differentiating between LGBTQ+ prospective parents and non-LGBTQ+ prospective parents in child welfare services. As for determining the appropriate standard of review, the level is determined by the nature of

113. The district court in Fulton stated that DHS and Philadelphia have an interest in avoiding possible Equal Protection and Establishment Clause claims that would result if CSS and other faith-based government contractors were allowed exemptions to the public accommodations/antidiscrimination laws in the Fair Practices Ordinance. Fulton v. City of Phila., 320 F. Supp. 3d 661, 704 (E.D. Pa. 2018).

114. The Fourteenth Amendment requires that a “state” not “deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n, 531 U.S. 288, 295 (2001). In some cases, plaintiffs have successfully alleged that private child welfare agencies with government contracts are in fact state actors. See Brent v. Wayne Cty. Dep’t of Hum. Servs., 901 F.3d 656, 677 (6th Cir. 2018) (concluding that “plaintiffs have pleaded sufficiently that Methodist and the Children’s Center are state actors to survive a motion to dismiss”); Hall v. Smith, 497 F. App’x 366, 375 n.13 (5th Cir. 2012) (leaving open whether “a private child placement agency could be considered a state actor with respect to the foster child placement decisions it makes pursuant to a contractual relationship with a state”).

115. See Dumont v. Lyon, 341 F. Supp. 3d 706, 744 (E.D. Mich. 2018). This was the route that Kristy and Dana Dumont utilized when they filed a 42 U.S.C. § 1983 complaint alleging that the Director of the Michigan Department of Health and Human Services and the Executive Director of the Michigan Children’s Services Agency had a practice of permitting state-contracted and publicly funded child placing agencies to use religious criteria to screen prospective foster and adoptive parents for children in the foster care system. Id.; see also Rogers v. U.S. Dep’t of Health & Hum. Servs., 466 F. Supp. 3d 625, 647 (D.S.C. 2020) (denying motion to dismiss Establishment Clause claim where plaintiffs alleged state and federal defendants acted “in an effort to protect a specific [child-placement agency], Miracle Hill, and permit discrimination within South Carolina’s foster care program on the basis of Miracle Hill’s religious criteria”).

116. See supra note 115.
the right at issue or the class of people that the right affects. As sexual orientation and gender identity are not considered “suspect or quasi-suspect class[es],” rational basis review is presumed to be the standard. This level of scrutiny, occupying the lowest level, simply asks if there is a conceivable rational relationship between the challenged action and a legitimate government interest. However, an Equal Protection challenge in this case is not without some teeth. In seminal cases involving LGBTQ+ people, the Supreme Court appears to have utilized a standard that is sometimes referred to as “rational basis with bite,” where the court applies a form of heightened scrutiny without acknowledging this approach. This level of review has most commonly been utilized where the rule of law has no rational relationship to a stated governmental interest and where it discriminates against politically unpopular minority groups.

Whatever the level of scrutiny, the requirement remains that there be a legitimate governmental objective. In this case, it is unclear how allowing faith-based agencies to discriminate against LGBTQ+ people is rationally related to any governmental objective. In child welfare, the framework under which decisions are made is still generally the “best interests of the child.” A variety of factors are taken into account, with the “child’s ultimate safety and well-being the paramount concern.” In 2020, arguing that safety of children is a reason to discriminate against LGBTQ+ parents is a ridiculous and dangerous proposition. Study after study has shown that children of LGBTQ+ parents are just as well-adjusted and healthy as children of heterosexual parents.

119. The rational basis test states that legislation is generally presumed valid and constitutional if the “classification drawn by the statute is rationally related to a legitimate state interest.” City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). Intermediate scrutiny is a more heightened level of scrutiny that is used for gender and “illegitimacy.” Smith, supra note 117, at 2773. Strict scrutiny, which is the highest level of scrutiny, is used when there is a “suspect” class such as race or national origin, or when a fundamental right is involved. Id. at 2771 n.18, 2772–73.
120. Smith, supra note 117, at 2774, 2779–85 (discussing Romer v. Evans, 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2003)).
121. See id.
122. Cleburne Living Ctr., 473 U.S. at 446.
123. Determining the Best Interests of the Child, supra note 45, at 2.
124. Id. (surveying state approaches to “best interests” determinations).
125. See, e.g., Cooper & Cates, supra note 46, at 25–73 (summarizing multiple studies).
parents made friends and formed healthy peer relationships just as well as their peers.\textsuperscript{126} Additionally, for LGBTQ+ children, having a home that is affirming of their identities is actually closely tied with safety and well-being.\textsuperscript{127}

The government also presumably has the objective of wanting to place as many children in homes with loving families as possible. Since studies have found that LGBTQ+ people are more likely to adopt than their straight counterparts, and that not allowing LGBTQ+ individuals to adopt may adversely impact opportunities for children to be adopted from foster care,\textsuperscript{128} this also seems to tilt in favor of there being no legitimate governmental objective advanced through discriminating against LGBTQ+ parents.

In addition to the Equal Protection Clause, providing exemptions to faith-based agencies that discriminate against LGBTQ+ prospective parents is also a violation of the Establishment Clause of the First Amendment. This sort of challenge utilizes the Establishment Clause in a way that is diametrically opposed to how CSS uses the same Clause in \textit{Fulton}.\textsuperscript{129} The Establishment Clause, which protects from the establishment of religion,\textsuperscript{130} prohibits the government “from passing laws that favor one religion over another, or laws that favor religion over non-religion.”\textsuperscript{131} Laws that exempt faith-based private agencies in child welfare from nondiscrimination laws impermissibly accommodate and advance religion to the detriment of LGBTQ+ prospective parents, and foster children. When the government contracts with and funds faith-based private agencies in child welfare that do not serve LGBTQ+ people, it allows these agencies to discriminate based on their specific set of religious beliefs. By advancing these particular beliefs in a way that constricts the availability of child welfare services based on the sexual orientation of the prospective foster or adoptive parent, it irreparably harms LGBTQ+ individuals as well as foster children, and entangles church with state.

\textit{Estate of Thornton v. Caldor, Inc.} is instructive here, as it highlights the grave issue of imposing a certain religious framework onto people who may

\begin{footnotesize}
\textsuperscript{126} Id.
\textsuperscript{128} See Kaye & Kuvalanka, supra note 22.
\textsuperscript{129} See supra notes 108–09 and accompanying text.
\textsuperscript{130} U.S. Const. amend. I; see supra note 24.
\textsuperscript{131} CAHILL ET AL., supra note 76, at 12.
\end{footnotesize}
not share that framework. In this case, the Supreme Court invalidated a Connecticut statute that required that all workers be allowed to refuse to work on the Sabbath, noting that by providing Sabbath observers with this right, they were forcing secular businesses to conform to religious concerns in violation of the Establishment Clause. Just as that Connecticut statute unconstitutionally gave workers the right to summarily refuse to work on the Sabbath, religious exemptions unconstitutionally give faith-based organizations the right to summarily refuse to work with LGBTQ+ people. The whole concept of separation of church and state is essentially a dead letter if religious organizations are not only deeply embedded in the crucial government function of providing child welfare services using government funds but are also using their position of authority to discriminate against and harm an already-marginalized group.

IV. Conclusion

Private faith-based agencies have for many years provided essential child welfare services in conjunction with an often under-resourced and over-burdened public sector. In so doing though, the line between public and private has been blurred. Despite that blurred line, faith-based agencies argue that exemptions to nondiscrimination laws allow them to continue to serve children in need while maintaining their religious values. As the Third Circuit noted in Fulton, while religious belief is certainly protected, conduct motivated by those beliefs is not entitled to special protections or exemptions from “general, neutrally applied legal requirements.” With hundreds of thousands of children in the country in foster care and waiting to be adopted, the misapplication of constitutional protections for faith-based agencies that discriminate is an unaffordable error. Loving and qualified parents willing to foster and adopt are more crucial now than ever, and LGBTQ+ people are the group most likely to do that. Beyond just the child welfare implications of allowing private, faith-based agencies to discriminate, these exemptions for private agencies are a violation of both the Equal Protection Clause and the Establishment Clause. Laws that continue to provide exemptions for faith-based agencies to discriminate against LGBTQ+ people are an egregious abuse of discretion that put an already marginalized community at further risk. Instead of leaving vulnerable communities at risk with no recourse and using taxpayer

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132. 472 U.S. 703 (1985); see CAHILL ET AL., supra note 76, at 12.
money to sanction discrimination, the government should be focused on continuing to expand the pool of prospective foster and adoptive parents, including the thousands of LGBTQ+ parents who are equipped and willing to help the government meet this crucial need.

*Fulton* represents one such instance where the Supreme Court has an opportunity to clarify once and for all that such discrimination is a violation of the Constitution and also limits the pool of available loving and capable parents who are willing to adopt or foster. While the Court could limit a holding favoring Philadelphia to apply only to CSS and Philadelphia’s relationship, the Court should rule more broadly. Even if the Court does not apply *Smith*, the Court should follow the Third Circuit’s holding that Philadelphia has a compelling interest in ensuring that same-sex couples have the same opportunity to foster and adopt as their heterosexual counterparts in accordance with its antidiscrimination provision.136 Importantly, the Court should note that the City’s conduct was not motivated by religious animus and that the City applied its antidiscrimination provision in a general, neutrally applicable manner. Beyond *Fulton*, with the advent of a new administration in the White House, there is both a hope, and also an expectation, that President Joe Biden’s administration will ensure that private agencies contracting with the government are not given waivers to discriminate against LGBTQ+ prospective parents, and that all capable and loving prospective families are supported and protected in the shared goal of bringing crucial child services to all those in need.

135. A limited holding would be similar to the route taken by the Court in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), although the Court in that case ruled against the civil rights agency.

136. *Fulton*, 922 F.3d at 162–65 (ruling for City under Pennsylvania state law that applies strict scrutiny for certain religious freedom claims), *cert. granted on other grounds*, 140 S. Ct. 1104 (2020); see supra notes 101–02 and accompanying text.

137. NBC has called the Biden administration “on track to be [the] most LGBTQ-inclusive in U.S. history.” Dan Avery, *Biden Administration on Track to Be Most LGBTQ-Inclusive in U.S. History*, NBC NEWS (Dec. 4, 2020, 9:23 AM), https://www.nbcnews.com/feature/nbc-out/biden-administration-track-be-most-lgbtq-inclusive-u-s-history-n1250010. Joe Biden’s own campaign website states, “By . . . proposing policies allowing federally funded homeless shelters to turn away transgender people and federally funded adoption agencies to reject same-sex couples . . . the Trump-Pence Administration has led a systematic effort to undo the progress President Obama and Vice President Biden made.” *Out for Biden*, Biden Harris, https://joebiden.com/lgbtq/.
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Introduction to *Family Law Quarterly*,
Volume 54, Number 2

This issue features three articles on recent developments in the ever-evolving field of family law. The topics include the new *Restatement of Children and the Law*, the 2020 U.S. Supreme Court decision on the Hague Child Abduction Convention, and varying state approaches to child support when parents share parenting time.

A working group of the American Law Institute has been, for a few years, creating the *Restatement of Children and the Law*. Professors Clare Huntington and Elizabeth S. Scott summarize the project in their article, *The New Restatement of Children and the Law: Legal Childhood in the Twenty-First Century*. (Professor Scott is the Chief Restatement Reporter and Professor Huntington is one of the Associate Reporters.) They write that the core principle and policy goal of the project has been to endorse policies that promote what they refer to as “child well-being.” Among other things, the authors state that one goal of the project has been to integrate behavioral and biological research on child and adolescent development, as well as empirical research about the effectiveness of various policy interventions pertaining to children. Another overriding goal has been to recognize, and suggest ways to remediate, embedded racial and class biases that have impacted the regulation of children and their families in the United States.

*The Restatement* is organized in four Parts: “Children in Families,” “Children in Schools,” “Children in the Justice System,” and “Children in Society.” Readers of this journal may be particularly interested in Part II of the Huntington-Scott article, in which the authors discuss “The Restatement and Parental Rights.” In this Part, they address the Restatement view of parental rights, which includes a section on corporal punishment and a discussion of the parental right generally to make healthcare choices for a child. The authors also explain why the *Restatement* supports the recognition of rights of de facto parents.

Professor Ann Laquer Estin’s article, *Where Is the Child at Home? Determining Habitual Residence after Monasky*, addresses *Monasky v. Taglieri*, a recent U.S. Supreme Court decision on the Hague Child Abduction Convention. Pursuant to the Convention, if a child is wrongfully removed or retained away from his or her country of “habitual residence,” the child generally is to be returned to the country of habitual residence for any custody determination. In her article, Professor Estin explains that, for decades, the U.S. Supreme Court has provided no guidance about
how U.S. courts should make the determination of a child’s “habitual residence.” As a result, various U.S. circuit courts proposed numerous and somewhat different approaches regarding how to make this determination. Professor Estin notes that the most commonly accepted approach was to determine the last country both parents agreed would be the place they would live indefinitely with their child. While a number of circuits applied this “parental intent” approach, Estin also describes other tests that were proposed.

In 2020, the U.S. Supreme Court finally issued an opinion addressing this issue. This 2020 case involved a couple who married in the United States and then moved to Italy. Eight weeks after their child was born in Italy in 2015, the mother returned to the United States with the child. Shortly thereafter, the father filed a petition in an Ohio district court for the return of his child under the Hague Convention. The mother argued that the child’s habitual residence was not Italy when the child returned to the United States because the parents had no mutual intent to raise the child in Italy. The district court ruled that the child’s habitual residence was Italy when the mother returned to the United States, and the U.S. Supreme Court affirmed.

Professor Estin emphasizes that in this case the Supreme Court opinion expressly rejects the parental intent test as the primary focus for determining habitual residence. Estin notes that the Court was concerned that such a standard could leave many infants without a habitual residence. The Court explained that the determination should be a “fact-driven inquiry” and referred to the appropriate approach as a “totality of the circumstances test.” Estin considers what types of facts might be relevant under this new approach, and she predicts how results in cases might change under this approach.

In the final article in this issue, The Relationship Between Child Support and Parenting Time, Dr. Jane Venohr and I analyze different approaches to child support when parents share parenting time. Child support guidelines were promulgated in the 1980s. At that time, drafting committees assumed that, in most instances, the greater-time parent would be the mother. It was also assumed that the father would have a higher income than the mother and that the father would have access to his children, at most, every other weekend.

During the past 30 years, a number of things have changed that could affect child support policy. More women have lucrative careers. More fathers spend substantial time with their children. Some parents have equal joint physical custody. In other instances, fathers are the greater-time parent.
In our article, we discuss to what extent, if any, child support should be reduced as the level of contact between the obligor parent and the children increases. In some states, the level of obligor contact with the children is merely a deviation factor allowing the court to adjust the amount of child support from the presumptive guideline amount. In contrast, we emphasize that in more than 30 states today, there is some presumptive formula for how the child support should be reduced based on the obligor parent’s level of contact with the child.

We describe a number of these different timesharing adjustment approaches. While by far the most common is some variation of what is called the “cross-credit” approach, there are numerous other approaches. These different approaches are described, and we include numerous graphs and charts that attempt to highlight the differences and similarities of the various approaches at different levels of contact between the obligor parent and the children.

Our article contains a chart comparing how much the child support obligation is reduced under different state timesharing formulas when the obligor parent has a higher income than the other parent and has the child 40% of all overnights. Another chart compares how these different state timesharing formulas would apply when there is equal joint physical custody. One calculation assumes equal parental incomes and the other assumes somewhat different parental incomes.

Our article highlights one important difference among the various approaches. In a small number of states, child support begins to be reduced with a relatively low level of contact between the child and the obligor parent, and then support is gradually reduced as the level of contact increases. In many others, support is not reduced until the level of contact is relatively substantial, and then the support is fairly rapidly reduced as the level of contact exceeds the threshold. Some have opined that this latter approach creates a “cliff effect” when the support amount can significantly change with relatively small levels of change in contact. One potentially undesirable effect of such a cliff effect is that the obligor parent may want to get the level of access to exceed the threshold, while the recipient parent may want the level of access to be below the threshold, and this can cause litigation over contact levels. Because of this concern, some states that have reviewed their guidelines recently have expressed a preference for approaches that do not have a cliff effect.

Finally, our article discusses how child support should be calculated when the greater-time parent has a higher income than the lesser-time parent. On the one hand, the continuity-of-expenditure philosophy would lead to a conclusion that the lesser-time parent should pay some support
to the greater-time parent. We note, however, that some recent cases have affirmed child support awards from the greater-time parent to the lesser-time parent in this situation, particularly if the income of the greater-time parent is much higher than that of the other parent. These cases present very interesting questions about the goals and purposes of child support and child support guidelines.

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The New *Restatement of Children and the Law*: Legal Childhood in the Twenty-First Century

CLARE HUNTINGTON* & ELIZABETH S. SCOTT**

This Essay is based on a previous article: Clare Huntington & Elizabeth Scott, Conceptualizing Legal Childhood in the Twenty-First Century, 118 Mich. L. Rev. 1371 (2020) (offering a comprehensive account of the Child Wellbeing framework).

Introduction

Since the 1960s, the law regulating children has become increasingly complex and uncertain. The relatively simple framework established in the Progressive Era, in which parents had primary authority over children subject to a limited supervisory and protective role of the state, has broken down. Lawmakers have begun to grant children some adult rights and privileges, raising questions about their traditional status as vulnerable, dependent, and legally incompetent beings. In the realm of crime regulation, law and policy have fluctuated between a rehabilitative model of juvenile justice and more punitive reforms, creating instability and uncertainty about the law’s priorities in this domain. Advocates have attacked parental rights, the bulwark of traditional legal regulation, arguing that strong parental authority over children is anachronistic and harms the interests of children. Although parental rights continue to be robust, the rationale for strong parental rights is less clear than it once was.

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In response to this uncertainty, and in an effort to bring clarity and coherence to this area of legal regulation, the American Law Institute (ALI) launched a new project in 2015: the Restatement of Law, Children and the Law1 . . . (hereinafter Restatement of Children and the Law) or Restatement). This project, which is ongoing, offers comprehensive coverage of the legal regulation of children.2 The Restatement is organized in four parts: Children in Families, Children in Schools, Children in the Justice System, and Children in Society.3 In fulfilling its ambitious goals, the Restatement has uncovered an emerging but coherent framework that shapes and integrates doctrine across this broad legal domain. As we explain in this Essay, the Restatement clarifies that regulation of children and families is not incoherent: Lawmakers in the twenty-first century increasingly are guided by a core principle and goal—the promotion of child well-being.4

Three features, all highlighted in the Restatement, distinguish what we call the Child Wellbeing framework from the approach of the earlier Progressive Era, to which it bears superficial similarity. First, modern law is increasingly based on behavioral and biological research on child and adolescent development, together with growing empirical evidence about the effectiveness of policy interventions.5 This body of knowledge, woven into the Restatement, makes it possible to advance child well-being with greater sophistication and effect. Second, lawmakers and the public have begun to recognize that policies promoting child well-being align with social welfare, strengthening and broadening support for contemporary regulation. Again, the Restatement commentary highlights this convergence. And third, modern lawmakers recognize, and have begun tentatively to remediate, the embedded racial and class biases that have

1. See ALI ADVISER, http://www.thealiadviser.org/children-law/ (last visited Nov. 2, 2020) (describing the Restatement and listing the reporters, including author Elizabeth S. Scott, Chief Reporter, and Richard Bonnie, Emily Buss, author Clare Huntington, and Solangel Maldonado, Associate Reporters). This Essay draws in part on the Restatement work of Seton Hall University School of Law Professor Solangel Maldonado, who drafted the sections on children’s contact with third parties, including de facto parents, and medical decision-making, and University of Chicago Law School Professor Emily Buss, who drafted the sections on students’ free speech rights.

Representative sections of the Restatement are in the Appendix to this Essay. The Essay and the Appendix use the section numbering that was in effect at the time the sections were approved. The final version of the Restatement will reflect updated numbering.

2. Id.
3. For sections that have been approved by the ALI membership, see id.
5. Id. at 1401.
long permeated the regulation of children and families. The Restatement commentary acknowledges these deep-seated biases and supports recent legal responses aimed at mitigating the harms they cause.

These dimensions of the Child Wellbeing framework are most evident in the broad reforms of juvenile justice regulation undertaken by twenty-first century courts and legislatures. Across a broad range of issues, lawmakers have embraced the principle that “children are different,” announced by the Supreme Court in recent Eighth Amendment and Fourteenth Amendment opinions prohibiting the harshest sentences for juveniles.6 Many modern lawmakers have rejected the punitive reforms of the 1990s that were motivated in part by racist fears, instead deploying developmental science to formulate doctrines and policies grounded in rehabilitation.7 These legal reforms acknowledge the vulnerabilities of youth in the justice system, as well as their reduced culpability and unique correctional needs as maturing adolescents.8 This developmental approach, which aims to promote the well-being of youths and address racial bias, has gained public and political support, in part because it has produced substantial social welfare benefits, reducing recidivism and promoting the transition of young offenders to productive adulthood.9 The Restatement captures this empirically based trend on issues as wide-ranging as interrogation, competence to stand trial, delinquency dispositions, transfer to criminal court, and conditions of confinement in detention and correctional facilities.10

Identifying the core elements of the Child Wellbeing framework—reliance on science, recognition of social welfare benefits, and acknowledgment of systemic racism—also provides coherence to the allocation of legal authority over children in American law. This allocation was often described by twentieth-century scholars as a zero-sum competition among the parents, the state, and children themselves for

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8. Id.


10. See discussion infra Part I.C.
control over children’s lives. Instead, the Child Wellbeing framework clarifies that legal regulation across doctrinal domains is grounded in the overriding goal of promoting child well-being. In this framework, both the regime of strong parental rights and the opaque pattern of children’s rights can be rationalized and integrated into a unified regime—one that is grounded in developmental research and, for the most part, serves to promote social welfare and mitigate racial bias.

A child-well-being rationale for parental rights is not always intuitive but is a critical justification for the continued vitality of this doctrine. Extensive research indicates that a stable parent-child relationship is essential to healthy child development. Strong parental rights protect this bond. Parental rights also serve a protective function for families of color and poor families, who are subject historically, and still today, to overzealous state intervention. But the modern rationale supporting strong parental rights is also self-limiting. Parents are not free to inflict harm on their child, even on the basis of their religious beliefs.

Beyond parental rights, the Child Wellbeing framework supplies the underlying logic to children’s rights. The framework demonstrates that the goal of promoting child well-being generally explains the pattern in which the law grants some adult rights and privileges to minors but withholds others. It becomes clear that extending some rights and privileges to very young children (such as operating motor vehicles) would threaten their well-being while withholding some adult rights can threaten serious harm to older minors. For example, denying minors the right to make a private decision to obtain substance abuse treatment can harm their well-being; conferring this right mitigates the harm. In deciding to grant or withhold rights and privileges, lawmakers often turn to developmental research to determine whether youth welfare is likely to be promoted or undermined by the right in question.

In this Essay, we explore these themes, explaining how the Restatement of Children and the Law both identifies and reinforces these beneficial trends in the law.

12. See infra notes 86–87 and accompanying text.
13. See infra note 89 and accompanying text; see also Huntington & Scott, supra note 4, at 1388–89.
14. See infra Part II.B.
I. The Restatement and Juvenile Justice

The contemporary regulation of juvenile crime represents the clearest embodiment of the Child Wellbeing framework. As this part explains, law and policy in this area increasingly are grounded in the developmental science of adolescence and are premised on the empirically based recognition that youth involved in the justice system, due to their developmental immaturity, are fundamentally different from adults—different in their culpability for their crimes, in their ability to navigate the justice system, and in their response to correctional settings. This body of knowledge has supported regulation that promotes youth welfare while also reducing the social cost of juvenile crime, contributing to lower recidivism rates and enhancing the prospect that delinquent youth can transition into productive adults. The Child Wellbeing framework is also at work in the growing awareness that systemic racism has long pervaded the justice system.

More specifically, this framework has influenced broad policy reforms under which correctional institutions have been closed and resources shifted to evidence-based community correctional programs. The framework has also shaped doctrinal reforms as courts and legislatures have incorporated developmental knowledge into laws regulating the justice system’s interaction with youth. The Restatement embodies this approach, adopting modern courts’ reliance on developmental science for issues such as interrogation of minors, adjudicative competence, consent to search, waiver of counsel, delinquency dispositions, state duties in juvenile detention and correctional facilities, and transfer to criminal court.

15. For a comprehensive discussion of the developmental model, see ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 223–64 (2008); see also COMM. ON ASSESSING JUV. JUST. REFORM, supra note 7, at 119–37.


17. See RESTATEMENT OF CHILDREN AND THE LAW §§ 14.20–23 (interrogation) (adopted by ALI membership), § 15.30 (adjudicative competence in delinquency proceedings) (adopted by ALI membership), § 12.10 (consent to search) (approved by ALI Council), § 15.21 (waiver of counsel) (approved by ALI Council). Restatement sections on detention, delinquency dispositions, correctional facilities, and transfer to criminal court are in progress. As indicated in note 1, supra, this Essay and the Appendix use the section numbering in effect at the time the sections were approved. The final version of the Restatement will reflect updated numbering.
A. Background: Three Waves of Juvenile Justice Reform

To understand the current period of reform, a bit of historic background is useful. Youth crime regulation has undergone several periods of dramatic legal reform since the juvenile justice system was established in the late nineteenth and early twentieth centuries. The traditional juvenile court, which was supported by Progressive Era reformers, embodied the principle that delinquent youth were very different from adult criminals; the state’s purpose in responding to youth crime was not punishment, but correction and rehabilitation under its *parens patriae* authority.18

This model came under increasing pressure in the second half of the twentieth century, culminating in its near collapse in the 1980s and 1990s. Critics attacked the model’s core premise—that the sole purpose of the juvenile court was to promote the interests of delinquent youth; skeptics pointed to high recidivism rates in young offenders to argue that rehabilitation was a failure.19 Harsh criticism by conservatives and public outrage at violent juvenile crime led to a wave of punitive law reform aimed at protecting the public from young “superpredators,” assumed to be youth of color.20 In what can fairly be termed a moral panic, politicians and the public seemed to reject the premise that young offenders were different from adults.21 Across the country, more juveniles were subject to prosecution and punishment as adults for a broader range of crimes, and youth in the juvenile system were subject to harsher sanctions.22

The twenty-first century has seen another wave of law reform, one that is a powerful repudiation of the punitive law reforms in the 1980s and 1990s.23 The catalysts for this trend are complex.24 Youth crime rates declined, creating a climate that was more benign to young offenders; moreover, observers pointed to the offensive racist underpinnings of the moral panic of the 1990s.25 Also, the 2008 recession highlighted the high cost of incarceration-based policies, which diverted state funds from

20. See id. at 1388.
21. Id.; see also SCOTT & STEINBERG, supra note 15, at 94–98.
22. For a discussion of the trend toward punitive juvenile justice reform, see id. at 91–117; see also PATRICIA TORBET ET AL., NAT’L CTR. FOR JUV. JUST., STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 6 (1996) (describing punitive trend in state legislation).
24. Id.
25. Id. at 539–42.
education and other services. Just as important was growing evidence that punitive policies were ineffective in reducing recidivism, their main goal; youths sent to institutions were far more likely to re-offend than those who remained in the community and participated in effective evidence-based community programs.

Finally, a key catalyst for reform was the Supreme Court. In a series of opinions, beginning in 2005, the Supreme Court underscored the theme that young offenders are different from their adult counterparts and that lawmakers should attend to these differences. These opinions had a far-reaching effect on justice system reforms. Our nation’s highest court announced forcefully that “children are different,” offering a radically different view of teenage offenders from the dominant theme in the 1990s.

At a superficial level, the contemporary reform movement might appear to be a revival of the rehabilitative model of the traditional juvenile court. Like the Progressive Era reformers, lawmakers today recognize that important differences distinguish youth in the justice system from adult counterparts. Further, a core purpose of contemporary regulation is to rehabilitate young offenders and promote their healthy development to adulthood. It is legitimate to ask whether the new wave of reform is a nostalgic revival of the Progressive Era ideal that continues to be widely endorsed but that proved fragile as a governing principle of regulation.

B. The Building Blocks of Contemporary Reform

Close inspection clarifies that several key features distinguish contemporary regulation from its predecessor, providing good reasons to believe that the twenty-first-century regime, grounded in the Child Wellbeing framework, is built on a more stable foundation than the traditional rehabilitative model. First, reforms enacted in the Child Wellbeing framework draw on a large body of scientific research on adolescent development, unavailable in earlier times, that enables regulation more responsive to the capacities, vulnerabilities, and needs of

26. Id. at 542.
27. See infra notes 36, 50–51 and accompanying text.
28. See supra note 6.
31. For additional discussion of Progressive Era reforms, see id. at 1379–85.
32. Id. at 1400–01.
33. Id. at 1375.
34. Id. at 1385–97.
young offenders.\textsuperscript{35} Moreover, this scientifically driven youth justice policy advances social welfare as well as youth welfare. The broad appeal of the recent reforms is due in part to substantial evidence that developmentally based policies protect public safety more effectively than the harsh policies of the 1990s, reducing crime rates at a lower cost.\textsuperscript{36} Finally, reducing racial bias in the system has become an important goal, offering the potential to enhance legitimacy and fairness to youth of color.\textsuperscript{37}

The key role of developmental research in the recent reform movement cannot be overstated. The Supreme Court highlighted research on adolescence in its Eighth Amendment juvenile sentencing opinions in support of its holding that imposing certain harsh sentences on juveniles violates the Eighth Amendment prohibition of cruel and unusual punishment.\textsuperscript{38} Drawing on behavioral and neuroscience studies, the Court held that the challenged sentences violated the principle of proportionality and were unconstitutional because juvenile offenders as adolescents were less culpable than adults.\textsuperscript{39} The Court also explained that juveniles were more likely to reform than adult offenders and that the prohibited sentences foreclosed their opportunity to do so.\textsuperscript{40} Finally, the Court observed that youthful inability to navigate the justice system may have contributed to the harsh sentences.\textsuperscript{41} Following the Court's lead, other courts and lawmakers have relied on research on adolescence in constructing regimes that recognize the role of developmental factors in teenage criminal activity, attend to the vulnerabilities of youth in the justice system, and support their healthy development.\textsuperscript{42}

The substantial body of research on adolescence has influenced law and policy in several ways. First, neuroscience studies have clarified important differences between adolescent and adult brain structure and functioning

\textsuperscript{35} Id. at 1435–36.
\textsuperscript{39} \textit{Miller}, 567 U.S. at 472–74 (discussing Graham and Roper).
\textsuperscript{40} Id. at 471–72.
\textsuperscript{41} Id. at 477–78.
\textsuperscript{42} See \textsc{Elizabeth Scott et al., Juvenile Sentencing Reform in a Constitutional Framework}, 88 \textsc{Temple L. Rev.} 675 (2016) (discussing broad influence of opinions).
that are relevant to engagement in criminal activity. These studies show that aspects of adolescent brain development contribute to sensation-seeking, poor impulse control, heightened sensitivity to peers, and other responses, shedding light on the sources of adolescents’ inclination to engage in risky activities, including criminal activities. Lawmakers have recognized that these developmental influences mitigate the culpability of juveniles. Some states have expanded the Supreme Court’s restrictions on the harsh sentencing of juveniles, directing that when young offenders are prosecuted as adults (as opposed to in the juvenile justice system), they should generally be subject to more lenient approaches to sentencing than their adult counterparts. Further, because much juvenile crime is a product of immaturity driven by developmental factors, most youth can be expected to mature into noncriminal adults unless the justice system undermines their ability to do so.

Another body of research has reinforced the importance of correctional responses that facilitate maturation to productive adulthood. Researchers on adolescent social development have found that maturation is a process of reciprocal interaction between the individual and her social context. A healthy social context provides the conditions for attaining skills and capacities important to successful adult functioning. But, of course, a youth’s social context can also undermine healthy development. For young offenders, correctional facilities and programs may constitute their social context. One key lesson that has driven important reform is that large prisonlike institutions are toxic developmental settings. Courts have


44. See Laurence Steinberg, The Influence of Neuroscience on US Supreme Court Decisions About Adolescents’ Criminal Culpability, 14 NATURE REVIEWS NEUROSCIENCE 513, 515–16 (2013). For a comprehensive review, see Scott et al., supra note 43.

45. See Huntington & Scott, supra note 4, at 1400–01; see also State v. Lyle, 854 N.W.2d 378, 400–03 (Iowa 2014) (prohibiting mandatory minimum sentences of imprisonment for juveniles).


47. Huntington & Scott, supra note 4, at 1403.


49. See Laurence Steinberg et al., Reentry of Young Offenders from the Justice System: A Developmental Perspective, 2 YOUTH VIOLENCE & JUV. JUST. 21, 23–26 (2004).

50. See COMM. ON ASSESSING JUV. JUST. REFORM, supra note 7, at 134.
approved remedial orders to address conditions and disciplinary practices in these institutions—and states have shifted resources to smaller facilities and community programs that are far more effective at accomplishing the justice system’s rehabilitative and crime-reduction goals.51

Finally, research on factors that influence adolescent decision-making has played a key role in doctrinal reforms that enhance procedural protections for youth in the justice system. Researchers have found that youth function less competently than adults in the system because they lack understanding of their rights, are more susceptible to making impulsive choices in stressful situations, and are more compliant with authority figures.52 Consistent with this research, some states require special protections for youth in the contexts of police interrogation.53 Also, the doctrine of adjudicative competence may include developmental incapacities as well as those associated with mental illness and cognitive deficiency.54 Moreover, in some states, lawmakers have recognized youthful incapacity for self-representation by mandating representation of counsel in delinquency proceedings.55

The developmental approach to juvenile justice has been heralded for its focus on the needs and vulnerabilities of youth in the justice system. But the prospect for long-term stability of this regulatory model is enhanced greatly by powerful evidence of its effectiveness. Contemporary reforms have generally enjoyed broad public and political support because they have proved to be more successful at crime reduction than earlier incarceration-based policies and more cost-effective as well.56 A substantial body of research supports that several well-tested community-based programs are as or more effective at reducing recidivism in young


52. See, e.g., Thomas Grisso et al., Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants, 27 L. & HUM. BEHAV. 333 (2003). For a discussion of the Restatement sections addressing this issue, see infra Part I.C.

53. See Huntington & Scott, supra note 4, at 1437, 1437 n.355.


55. See Huntington & Scott, supra note 4, at 1447–48.

56. Id. at 1399, 1404.
offenders than incarceration, at a fraction of the cost. On an historically divisive issue, observers and stakeholders across the political spectrum have endorsed the new wave of juvenile justice reform.

C. The Restatement, the Child Wellbeing Framework, and Juvenile Justice Reform

The new Restatement of Children and the Law follows the trend of courts embracing the Child Wellbeing framework. These courts emphasize the unique status of juveniles and the important differences between youth and adults, a theme that draws on the juvenile court’s historic rehabilitative purposes but that in contemporary law often relies on developmental knowledge. A restatement is based primarily on judicial (common law) rules and is aimed at courts, and thus it does not directly execute sweeping policy changes. But courts indirectly shape youth justice policy. Courts, for example, have enjoined states from practices in detention and correctional facilities that undermine healthy youth development; the Restatement sections on state duties in those facilities follow those courts. Moreover, several Restatement sections provide procedural protections that modern courts have required in response to youthful incapacity and vulnerability. This section will describe several Restatement sections that demonstrate the influence of the Child Wellbeing framework, including sections regulating search, interrogation, adjudicative competence, waiver of counsel, and conditions of detention and confinement.

To begin, the Restatement rules on search and seizure represent the modern trend reflected in the Child Wellbeing framework. When law enforcement officers seek to search a suspect without a warrant, the search is valid under the Fourth Amendment if the suspect gives voluntary consent. For minors, the Restatement rules emphasize the importance of factors associated with age and youthful immaturity in the determination of voluntariness. The Restatement underscores the greater vulnerability of children and adolescents to pressure from adult authority...
figures, a tendency that is particularly pronounced in youth of color.\textsuperscript{62} The \textit{Restatement} also draws on developmental research to generally prohibit suspicion-less strip searches in detention and correctional facilities, as well as schools, following courts and other lawmakers that have recognized the extreme intrusiveness of these searches for adolescents, whose sensitivity to bodily privacy concerns is particularly acute.\textsuperscript{63}

\textit{Restatement} restrictions on the interrogation of minors by law enforcement also follow the modern trend of courts that have recognized the extreme vulnerability of youth in this context, by giving special weight to age in evaluating the validity of confessions. Children and youth have less comprehension of their \textit{Miranda} rights compared to adults.\textsuperscript{64} Teenagers are also more inclined to comply with coercive police tactics; not surprisingly, minors give false confessions at a far higher rate than adults.\textsuperscript{65} Again, youth of color are particularly susceptible.\textsuperscript{66} The \textit{Restatement} emphasizes this vulnerability, both in evaluating whether \textit{Miranda} warnings must be given in an interview setting\textsuperscript{67} and in determining whether the youth’s waiver of rights was intelligent, knowing, and voluntary. Because younger minors are acutely vulnerable, the \textit{Restatement} provides the special protection of requiring consultation with counsel before waiver for youth under 15.\textsuperscript{68}

In the delinquency proceeding itself, two rules offer special protections to youth facing charges. First, consistent with restrictions on juvenile waivers of counsel in some states, the \textit{Restatement} provides that a juvenile does not have a right to waive counsel and undertake self-representation

\begin{footnotesize}
\textsuperscript{62} Id. § 12.10 cmt. b.


\textsuperscript{65} RESTATEMENT OF CHILDREN AND THE LAW § 14.21 Reporters’ Note cmt. h (AM. L. INST., Tentative Draft No. 1, 2018) (discussing research on false confessions by juveniles).

\textsuperscript{66} Id. § 14.20 cmt. b.

\textsuperscript{67} Miranda v. Arizona, 384 U.S. 436, 467–73 (1966). The test for evaluating whether someone is “in custody” under \textit{Miranda} includes the circumstances of the interrogation and whether a reasonable person would believe she was free to leave. The Supreme Court has held the age of a juvenile suspect generally must be part of this determination. J.D.B. v. North Carolina, 564 U.S. 261, 270–71, 277 (2011). Following \textit{J.D.B.}, the \textit{Restatement} incorporates a “reasonable juvenile” standard for making custody determinations, where a police officer knows (or a reasonable officer would know) that the subject of questioning is not an adult. RESTATEMENT OF CHILDREN AND THE LAW § 14.20(b) (AM. L. INST., Tentative Draft No. 1, 2018).

\textsuperscript{68} RESTATEMENT OF CHILDREN AND THE LAW § 14.22 (AM. L. INST., Tentative Draft No. 1, 2018); see also id. Reporters’ Note cmt. b (discussing state laws requiring counsel in order for youth in custody to waive rights).
\end{footnotesize}
in a juvenile delinquency proceeding, a right enjoyed by adult criminal defendants. The Restatement rule recognizes that the well-being of a youth facing a possible deprivation of liberty is almost never advanced by self-representation. Adolescents, due to immaturity, know less about the legal process than adults and are simply less competent than adults at defending themselves. Under the Restatement rule, a court can permit the youth to undertake self-representation in limited circumstances, but the youth has no right to make this choice. The Restatement also recognizes a relatively new basis for adjudicative incompetence in criminal proceedings, based solely on developmental immaturity. Historically, a court’s finding that a defendant is incompetent has been based on cognitive disability or mental illness; the Restatement follows courts that have recognized that a youth may be incompetent to understand the proceedings or assist counsel solely on the basis of developmental immaturity.

Finally, Restatement rules regulating conditions of confinement for youth in juvenile correctional facilities pursuant to delinquency dispositions are solidly grounded in research on adolescent development. The Restatement follows a recent trend in which numerous courts have recognized or approved settlements of constitutional and statutory claims by confined youth, challenging lack of services, harsh discipline, and unsafe conditions. Because of the unique attributes of youth and the juvenile system’s rehabilitative purposes, the state’s duties to youth in confinement exceed the state’s duties to adults. Consistent with emerging doctrine, the Restatement recognizes state duties to provide educational, medical, and mental health services to youth in detention and correctional facilities and to provide a safe, healthy environment. Furthermore, the Restatement prohibits excessive discipline in juvenile correctional facilities and the use of solitary confinement for the purposes of punishment. Courts have cited research describing the particular harm of solitary confinement for adolescents, due to the extreme sensitivity to social context during this

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70. Id. § 15.21 Reporters’ Note cmts. a, b.
71. Id. § 15.21.
73. Id. § 17.20 cmt. c, Reporters’ Note cmt. c.
74. RESTATEMENT OF CHILDREN AND THE LAW §§ 14.20 Reporters’ Note cmts. a, e–h, 14.21 Reporters’ Note cmts. a, d–i (AM. L. INST., Council Draft No. 6, 2020).
75. Id. § 14.20.
76. Id. § 14.21.
developmental stage, and many states have restricted the use of juvenile solitary confinement.77 The large body of research on the critical importance of social context during adolescence supports policies recognizing that the healthy transition to adult life for confined youth depends on whether youth receive adequate educational and mental health services and are guided by constructive, not harsh, discipline. The Restatement rules aim to further both youth well-being and social welfare by providing a social setting that makes this transition more likely. In doing so, it reduces crime and its attendant social costs.

In sum, the Restatement is shaped by the developmental model of juvenile justice that is emerging in the twenty-first century. Policies that are responsive to adolescent capacities, needs, and vulnerabilities have proved far more effective at reducing youth crime than the incarceration-based policies of the 1990s—and at a lower cost. Not surprisingly, this approach enjoys greater support than the rehabilitative model of an earlier time, which failed to protect public safety.78 Finally, modern lawmakers acknowledge the historic racism that defined the juvenile justice system and are working to increase legitimacy and fairness, even as there remains much more work to do on this front.79 The convergence of youth well-being and social welfare, and a consciousness of systemic racism, promises to provide a robust foundation for a regime aimed at advancing youth welfare.

II. The Restatement and Parental Rights

The three elements of the Child Wellbeing framework—reliance on science, recognition of social welfare benefits, and acknowledgment of systemic racism—help explain and justify the continued vitality of parental rights. Modern doctrine reflects an understanding that deference to parental decision-making typically furthers child well-being, serves society’s interests, and provides an important shield against state intervention for low-income families and families of color. This rationale for strong parental rights, which rests on considerable empirical evidence about the importance of stability in the parent-child relationship, reinforces the traditional libertarian justification for parental rights, but it also supplies a self-limiting principle for parental rights that is missing in the libertarian

77. Id. § 14.21 Reporters’ Note cmt. h.
78. See Huntington & Scott, supra note 4, at 1401–06.
79. See id. at 1405–06.
justification: in the Child Wellbeing framework, parental rights do not permit a parent to inflict serious harm on a child or create a substantial risk of such harm.

A. Interpreting Parental Rights in the Child Wellbeing Framework

In recognizing a constitutional right of parents to make decisions for their children, the Supreme Court in the 1920s grounded the doctrine in the rights of individuals in a liberal society to privacy and freedom from undue state interference. These principles continue to support parental rights. Protection of family privacy and of parental freedom to make childrearing choices are as important today as they were a century ago. But these traditional justifications cannot fully explain the continued robustness of these rights, nor do they supply a limit to parental authority.

The Child Wellbeing framework fills this gap. Analysis of modern parental rights doctrine in the framework underscores the importance of child well-being as a reinforcing rationale for the law’s continued deference to parental authority as well as a self-limiting mechanism for these rights.

As a preliminary matter, it is important to remember that children, particularly younger children, are often incapable of making decisions on their own behalf about health care, education, and other critical matters. Thus, a surrogate decision-maker will be required—and that surrogate will be either the child’s parents or a state actor. If parents’ authority is withdrawn or seriously restricted, the state necessarily will have a larger

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81. In Prince v. Massachusetts, the Supreme Court recognized a limit to parental rights based on harm to a child. 321 U.S. 158, 166–67 (1944). The Court did not, however, articulate a principle for drawing this line. Id. at 171.
82. The framework thus elevates a rationale for parental authority that some scholars and lawmakers have endorsed. For an early formulation of the argument that parental rights promote child well-being, see JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (2d ed. 1979). For more recent articulations, see, for example, MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 35–39 (2005); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 16–25 (2002); Emily Buss, Adrift in the Middle: Parental Rights After Troxel v. Granville, 2000 SUP. CT. REV. 279, 285–90; Anne C. Dailey, Developing Citizens, 91 IOWA L. REV. 431 (2006); Elizabeth S. Scott & Robert E. Scott, Parents as Fiduciaries, 81 VA. L. REV. 2401 (1995). These scholars have not, however, integrated parental rights into a larger framework reaching across multiple domains of legal regulation.
83. Huntington & Scott, supra note 4, at 1415.
role regulating families than under current law.\textsuperscript{84} Appreciating that children typically need a surrogate decision-maker, the question facing lawmakers is whether the promotion of child well-being is better served by deferring to parental decision-making or expanding the state’s role.\textsuperscript{85}

The Child Wellbeing framework emphasizes two important reasons why parental rights usually promote child well-being and expanding state authority does not. First, deference to parental authority protects the stability of the parent-child relationship. Based on a large body of research, it is clear that a strong, stable parent-child relationship is critical for healthy child development,\textsuperscript{86} and the disruption and destabilization of this relationship threatens serious harm to the child.\textsuperscript{87} A regime of robust parental rights restricts state intervention in the family and thus reduces the child’s exposure to the accompanying risks, particularly removal of the child from the home.\textsuperscript{88} Protection from state intervention is especially important for children of color, in light of racial disproportionality and disparities in the child welfare system.\textsuperscript{89}

Second, deference to parental decision-making also promotes child well-being because parents are generally better positioned than state actors, such as judges, social workers, or other third parties, to understand their child’s needs and make decisions that will further that child’s interests. This advantage is rooted in the parent’s superior knowledge of and association with the child as compared with outsiders to the family.

In addition to promoting child well-being, robust protection of parental rights also advances society’s interests. In a country in which family-state relations are governed by libertarian principles, parents are burdened with the weighty responsibility of raising the next generation of citizens. Having placed this burden on parents, who receive only limited support from the state, society has an interest in ensuring that parents discharge


\textsuperscript{86} As this research demonstrates, nearly every important aspect of child development turns on a consistent and caring relationship between a parent and child. 1 JOHN BOWLBY, ATTACHMENT AND LOSS: ATTACHMENT (1969); 2 JOHN BOWLBY, ATTACHMENT AND LOSS: SEPARATION (1973); 3 JOHN BOWLBY, ATTACHMENT AND LOSS: LOSS (1980).

\textsuperscript{87} For the foundational work on the importance of attachment and the harms from disruption, see 1 BOWLBY, supra note 86, at 27–30, 209, 326, 330; 2 BOWLBY, supra note 86, at 4–16, 245–57; 3 BOWLBY, supra note 86, at 7–14, 397–411.

\textsuperscript{88} Huntington & Scott, supra note 4, at 1416.

their obligations adequately. Strong protection of parental rights shows respect for and deference to parents for the important job they undertake, reinforcing parental commitment to the duties of parenthood.

Finally, unlike the traditional justification of parental autonomy from the state, the child-well-being rationale for parental rights provides a self-limiting mechanism. With child well-being as the polestar, the framework clarifies that parents are not free to inflict serious harm on their children or to create a substantial risk of such harm. Such actions do not further child well-being and thus are not protected under this rationale for parental authority. When a parent’s action seriously threatens the child’s welfare, state intervention overriding parental authority is justified. This is true even if the parent’s decision is motivated by deeply held values or religious beliefs.

B. Parental Rights Under the Restatement

Three doctrinal examples—all addressed in the Restatement of Children and the Law—illustrate the Child Wellbeing framework. Although lawmakers do not always explicitly invoke a child’s well-being rationale for parental rights, current doctrine is compatible with the framework, providing a normatively appealing contemporary justification.

1. CORPORAL PUNISHMENT

The law has long recognized a parental privilege to use reasonable corporal punishment as a form of discipline, but the justification rested on deference to parental rights, together with the notion that physical punishment benefited the child.90 By contrast, the modern privilege, which applies in both criminal and civil proceedings, does not endorse corporal punishment as beneficial to children and instead is justified as a limit on state power in light of the dangers that accompany state intervention.91 Further, the modern privilege is tailored to the form of state action (criminal or civil/child protective), reflecting the trade-off between protecting children from harm inflicted by parents and protecting children from harm inflicted by state intervention.92 As set forth in the Restatement of Children and the Law, in the criminal context, a parent’s use of corporal punishment

90. See 1 WILLIAM BLACKSTONE, COMMENTARIES *440 (“[A parent] may lawfully correct his child, being underage, in a reasonable manner; for this is for the benefit of his education.” (footnote omitted)).
92. See id.
is not privileged if the punishment inflicts (or creates a substantial risk of inflicting) “serious physical harm or gross degradation” on the child.\textsuperscript{93}

In the child-protection context, a parent’s use of corporal punishment is not privileged if the punishment inflicts (or creates a substantial risk of inflicting) “physical harm beyond minor pain or transient marks.”\textsuperscript{94}

Although it may seem counterintuitive, we contend that the Child Wellbeing framework supports the privilege, primarily because the privilege places a critical constraint on state intervention. Without the privilege, the state could initiate either a criminal prosecution or a child protection petition whenever a parent used physical punishment, bringing the full force of the state to bear on the family and potentially resulting in the incarceration of a parent or the placement of the child in foster care—both serious disruptions to the core parent-child relationship. By maintaining the privilege and tailoring its reach to the form of state action, the privilege promotes the child’s interest in the stability of the parent-child relationship and shields the child from the risks that accompany unnecessary state intervention. By contrast, abolishing the privilege would greatly expand state power, posing a threat to all families but particularly those who are already subject to excessive state intervention.\textsuperscript{95} Finally, the framework’s formulation clarifies that the privilege does not give parents a license to use harsh physical punishment, and it also restricts the state from intervening when parenting may be suboptimal but not seriously harmful. This formulation thus exemplifies the Child Wellbeing framework’s self-limiting constraint on parental rights.\textsuperscript{96}

Maintaining the privilege on child-well-being grounds does not represent an endorsement of corporal punishment. To promote a no-hitting

\textsuperscript{93.} See id. § 3.24(a).

\textsuperscript{94.} See id. § 3.24(b).

\textsuperscript{95.} Parental use of physical discipline is declining, but some parents, particularly in low-income families and families of color, still turn to some forms of corporal punishment to discipline children. See PEW RSCH. CTR., PARENTING IN AMERICA: OUTLOOK, WORRIES, ASPIRATIONS ARE STRONGLY LINKED TO FINANCIAL SITUATION 12, 45–46 (2015), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2015/12/2015-12-17_parenting-in-america_FINAL.pdf (discussing parent survey responses on using spanking). In light of this disproportionate use of corporal punishment, particularly by Black parents, the danger of intervention is particularly acute for families already at greater risk of family disruption through both the criminal justice and child welfare systems.

\textsuperscript{96.} This justification explains why the Child Wellbeing framework supports the parental privilege but condemns corporal punishment in schools. Most states ban corporal punishment in the educational setting. See RESTATEMENT OF CHILDREN AND THE LAW § 8.10 Reporters’ Note cmnt. a (AM. L. INST., Tentative Draft No. 2, 2019) (listing statutes). In the school context, there are no family integrity concerns, and instead the child’s interests in dignity and bodily integrity are paramount and support a complete ban on corporal punishment.
norm, the state can use noncoercive methods such as public education programs and parenting programs that teach parents alternative methods of discipline. But the framework highlights the risks of prohibiting corporal punishment through coercive intervention.

2. THIRD-PARTY CONTACT AND DE FACTO PARENTS

The law governing third-party contact and de facto parents provides another example of the Child Wellbeing framework. At common law, a parent generally had an absolute right to control a child’s associations. Today, two kinds of petitioners may seek a court order requiring a parent to allow contact between the plaintiff and the child: a third party (such as a grandparent or sibling) and a de facto parent (an individual who has functioned as a parent to the child). The law has developed in seemingly divergent ways to address claims by third parties and de facto parents, affording considerable deference to parents against claims by third parties and much less deference against claims by de facto parents. The Child Wellbeing framework clarifies that although lawmakers’ responses appear inconsistent, they are coherent and justified as promoting child well-being.

Beginning with third-party contact, every state grants standing to grandparents to file a petition seeking contact with a grandchild, and some states grant standing to other third parties. Lawmakers increasingly have adopted a standard that is highly deferential to parents, identifying only limited circumstances in which a court is authorized to override a parent’s decision about a child’s contact with a grandparent or other third parties.

97. Private parties can also play a role in promoting this norm. See Robert D. Sege & Benjamin S. Segal, Effective Discipline to Raise Healthy Children, PEDIATRICS, Dec. 2018, at 1, 5, https://pediatrics.aappublications.org/content/pediatrics/142/6/e20183112.full.pdf (advising pediatricians to help parents use noncorporal methods of discipline).


99. See RESTATEMENT OF CHILDREN AND THE LAW § 1.80 Reporters’ Note cmt. i (AM. L. INST., Tentative Draft No. 2, 2019). Although these statutes implicate a parent’s right to make decisions about a child’s upbringing, the U.S. Supreme Court, in reviewing application of a broadly worded visitation statute, has held only that courts must accord “at least some special weight” to the parent’s decision. See Troxel v. Granville, 530 U.S. 57, 70, 73 (2000) (plurality opinion).

100. As of February 2019, at least 21 states required third parties to show harm or a substantial risk of harm to the child should contact be denied. See RESTATEMENT OF CHILDREN AND THE LAW § 1.80(b) Reporters’ Note cmt. g (AM. L. INST., Tentative Draft No. 2, 2019).
The Restatement of Children and the Law adopts a highly deferential standard.101

Analysis in the Child Wellbeing framework demonstrates that the deferential standard promotes a child’s well-being more effectively than the alternative standard applied in some states that allows courts to override the parent’s decision if contact is deemed to be in the child’s best interest.102 First, court-ordered contact with a third party overrides the decision of the adult who bears full child-rearing responsibility, with little reason to believe that the court will make a better decision. A parent is ordinarily better positioned than a judge to assess what third-party contact, if any, is best for the child. Further, allowing ongoing contact over the parent’s objection likely will strain the parent-child relationship, the stability of which is central to healthy child development. Separate from the substantive outcome, the deferential standard protects the child from the predictable stress of a protracted and high-conflict legal dispute. Finally, if the intrusion allows contact with a third party (who lacks any responsibility for the child’s care) over the parent’s objections, the parent may understandably feel resentment, potentially affecting the parent’s enthusiasm for fulfilling those obligations that society has imposed on her. Deference to parents is not absolute, however, and if the child will be seriously harmed by the lack of contact, a court can override the parent’s judgment.

By contrast, when a de facto parent seeks contact with a child, lawmakers increasingly recognize these claims,103 despite the costs imposed on legal parents; and the Restatement follows this approach.104 From the child’s perspective, the adult who has been acting as a parent is a

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101. Under the Restatement, a court can order contact only if it finds by clear and convincing evidence that denying the contact would pose a substantial risk of serious harm to the child. Id. § 1.80(a)(2), (b)(1). A court cannot override a parent’s objection simply because contact with the third party would benefit the child or because the child might experience some distress at the loss of the contact. Id. § 1.80(b) cmt. g.

102. This discussion relies on the work of Emily Buss, who has set forth in detail the reasons favoring the highly deferential standard. See Buss, supra note 85, at 287–98. For detailed discussion of different states’ approaches, see RESTATEMENT OF CHILDREN AND THE LAW § 1.80(b) Reporters’ Note cmt. g (Am. L. Inst., Tentative Draft No. 2, 2019).


104. See RESTATEMENT OF CHILDREN AND THE LAW § 1.82(d) (Am. L. Inst., Tentative Draft No. 2, 2019) (providing that court may grant custody to de facto parent when in the best interest of the child).
parent. Allowing a legal parent to exclude a de facto parent would disrupt one of a child’s central relationships, which would create a risk of serious harm to the child. Moreover, unlike a third party seeking contact with the child over a parent’s objection, the de facto parent has fulfilled parental responsibilities and will do so in the future. Further, the recognition of de facto parents encourages individuals living with partner-parents to assume the significant responsibilities of raising a child, benefiting both children and society. Finally, the recognition of de facto parents is particularly important for children in families that do not fall into the traditional norm of two married parents.

In short, strong protection of parental rights in the third-party contact context and less deference to legal parents in the de facto parent context both further child well-being. These outcomes are wholly consistent: both rules draw on substantial research demonstrating the harm to children from disrupting core family relationships, and both allow state intervention only when the legal parent’s decision poses a substantial risk of serious harm to the child.

3. DECISIONS ABOUT MEDICAL CARE

The doctrine regulating parental authority to make medical decisions for children is a third example of how child well-being explains and justifies parental rights. At common law, parents had near complete authority to make medical decisions for children, including the right to decline medical treatment. By contrast, contemporary law—reflected in the *Restatement of Children and the Law*—defers to parental authority but limits that authority if the parent’s decision poses serious harm or a substantial risk of serious harm to the child or, in some instances, to public health.

105. *Id.* § 1.82 Reporters’ Note cmt. g. The stringent test for recognizing an individual as a de facto parent ensures that only those individuals who have truly functioned as parents will be placed on a similar plane as legal parents. *See id.* § 1.82(a) (de facto parent recognition requires clear and convincing evidence that “(1) the third party lived with the child for a significant period of time; (2) the third party assumed significant obligations of parenthood without expectation of financial compensation; (3) the third party has been in a parental role for a length of time sufficient to have established a bond and dependent relationship with the child that is parental in nature; and (4) a parent consented to and fostered the formation of the parent–child relationship between the third party and the child”).

106. *See id.* § 1.82 cmts. e, k. A court may require a de facto parent to pay child support. *See id.* § 1.82 cmts. a, k.


108. *See RESTATEMENT OF CHILDREN AND THE LAW* § 2.30 (Parental Authority and Responsibility for Medical Care), § 2.30 Reporters’ Note cmts. c, d (AM. L. INST., Tentative Draft No. 1, 2018); *see also id.* § 3.26 (medical neglect), § 3.26 Reporters’ Note cmt. d.
As with the other examples, the modern rule reflects the Child Wellbeing framework. Restricting the ability of the state to second-guess parents’ medical decisions protects children from the disruption of state intervention and allows parents, with their greater knowledge of their children’s needs, to make these decisions. The deference may enhance role satisfaction as parents undertake the substantial responsibilities of raising a child. And the protection from state intervention is particularly important for low-income families and families of color, who are at a heightened risk for state scrutiny and oversight.

As in other decision-making contexts, parents do not have absolute authority to make decisions. Courts do not defer to parents if the decision to pursue or refuse treatment poses a substantial risk of serious harm to the child. For example, courts will order a blood transfusion over the parent’s objection when the treatment is necessary to prevent serious harm to the child, even when the parent’s decision is based on religious belief.

Similarly, concerns about public health can limit a parent’s medical decision-making authority, particularly the decision whether to vaccinate a child against communicable diseases. Every state has adopted compulsory vaccination laws for school attendance, and the Supreme Court has long upheld state authority in this area. Although nearly every state has enacted a religious exemption to these requirements, and a significant minority have enacted philosophical exemptions, these exemptions may not apply if there is an epidemic and the refusal to vaccinate the child creates a substantial risk of serious harm to the public health. Moreover, in light of recent outbreaks of highly communicable diseases, particularly measles, some states have repealed their religious or philosophical

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110. See supra note 89 and accompanying text.

111. Although the law is solicitous of medical decisions based on parents’ religious beliefs, the state can intervene if the parent’s refusal to provide medical treatment poses a substantial risk of serious harm to the child’s health. See *Restatement of Children and the Law* § 3.26 cmt. I, Reporters’ Note cmt. 1 (Am. L. Inst., Tentative Draft No. 1, 2018).

112. *Id.* § 2.30 cmt. d.


115. See *id.* § 2.30 cmt. d.
exemptions—further evidence of the adoption of the Child Wellbeing framework.116

III. The Restatement and Children’s Rights

In general, American law withholds many rights and privileges from minors that adults enjoy, including the right to marry; the right to consent to most medical treatment, and to execute an enforceable contract and will; the right to vote; and the privilege to purchase alcohol and to operate motor vehicles. But since the 1960s, lawmakers have granted minors a range of adult rights, including the right of free expression in school; the right to make specific medical decisions, including reproductive health decisions; and many procedural rights in delinquency proceedings. Conventionally, these autonomy rights are understood as liberty interests that stand in competition with the authority of the state and the parent over children.117

But analyzed in the Child Wellbeing framework, it becomes clear that the seemingly paternalistic goal of promoting child well-being is important in the conferral of some rights on children and withholding of others. Lawmakers’ decisions about whether rights offer benefits that promote youth welfare increasingly draw on developmental research clarifying the capacities and incapacities of youth. Lawmakers also implicitly attend to social costs and benefits that follow from conferring or withholding rights.118

The framework informs the pattern of conferring rights under the Restatement of Children and the Law. The rights minors enjoy can be understood as promoting their well-being in contexts in which the traditional paternalistic approach would inflict harm on the minor and generate social costs as well.

A. Child Well-Being and Social Welfare

The general policy of withholding legal rights from minors is implicitly, and sometimes explicitly, explained on the basis of child well-being. It


117. See, e.g., Henry H. Foster Jr. & Doris Jonas Freed, A Bill of Rights for Children, 6 FAM. L.Q. 343, 356 (1972); Robert B. Keiter, Privacy, Children, and Their Parents: Reflections on and Beyond the Supreme Court’s Approach, 66 MINN. L. REV. 459, 460 (1982) (“The claimed right of a child to privacy in individual matters inevitably clashes with the longstanding parental right of authority in directing the child’s life.”).

118. See Huntington & Scott, supra note 4, at 1432–38.
seems uncontroversial that children (particularly younger children) are sometimes incapable of self-interested exercise of rights and granting those rights would threaten harm to the child and others. Some level of maturity is necessary to drive a car safely or make a medical decision; thus, the law’s protective stance likely benefits children and society as well. When lawmakers confer rights on children, one of two interwoven rationales seems to be salient—both implicating child well-being. First, some rights directly enhance minors’ well-being. As children mature, the benefits of enjoying adult rights and privileges increase; not surprisingly, most rights and privileges conferred on minors are limited to adolescents, either expressly or implicitly. The well-being of older minors is enhanced by the privilege to operate motor vehicles and by the right of political expression, freedoms that would offer little benefit to younger children. Second, in some contexts, lawmakers recognize that the law’s paternalistic approach of categorically withholding rights from minors itself inflicts harm on children as they mature. For example, in extending procedural rights to youth in delinquency proceedings, the Supreme Court recognized that the absence of due process harmed the youth whose welfare the system aimed to protect.119

The pattern of withholding and granting rights to minors is also driven by social welfare concerns. Certainly, rights are not granted to minors if substantial social costs are anticipated. Withholding privileges that might lead immature minors to engage in risky activities—operating motor vehicles and obtaining alcohol, for example—advances social welfare and offers protection to minors themselves.120 And some rights that are granted to minors clearly promote social welfare as well as the well-being of the minor exercising the right. For example, many statutes authorize minors with substance abuse problems or sexually transmitted diseases to seek treatment independently; lawmakers recognize that serious social, as well as personal, costs are incurred if minors fail to obtain treatment for these conditions.121 Finally, some rights are defined in ways that benefit minors substantially with little social cost. Free speech rights in school benefit students, while also creating the social benefit of encouraging future voters to participate in civil political discourse.122 But granting the right

121. See infra notes 143–44 and accompanying text.
has minimal social costs because speech that threatens the state’s ability to fulfill its educational function is not protected. In general, both child well-being and social welfare often play a key role in defining and limiting children’s rights.

**B. Developmental Research and Children’s Rights**

Because the maturity of minors is an important consideration in granting, withholding, and defining children’s rights, lawmakers recently have turned to developmental research to inform their decisions. Scientific knowledge provides a more sophisticated understanding of minors’ capacities and vulnerabilities than was available in earlier times. Today, our knowledge about maturation in adolescence allows for more informed judgments about when rights can promote minors’ well-being, when paternalistic restrictions inflict harm, and when restrictions actually offer protection to vulnerable minors in a regime that aims to promote their well-being.

Several examples show the growing importance of developmental research in this domain. Research on cognitive development has frequently been invoked to demonstrate that by mid-adolescence, teenagers are competent to make informed medical decisions and thus should be allowed to consent to certain treatments. This research has supported constitutional doctrine authorizing mature minors access to reproductive health treatment. Lawmakers have also turned to research in deciding what rights should be extended to youth in the justice system and when protections and restrictions that limit their rights are justified to protect their interests. Research on the vulnerability of adolescents, particularly youth of color, to adult authority figures has supported providing special protections in the search and interrogation contexts. Developmental research has also shed light on minors’ comprehension of criminal proceedings and capacity to make key decisions in that context, leading

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123. *Id.* at 513. See also Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273–74 (1988) (upholding censorship of material in high school newspaper). Critics argue that this restraint on school speech is too broad, allowing suppression of speech offensive to school authorities. See Huntington & Scott, supra note 4, at 1446.


126. See supra notes 64–68 and accompanying text.
to protections that sometimes restrict the full exercise of rights. Laws reforming the requirements for adjudicative competence for juveniles and limiting rights’ waivers provide examples.

Restrictions on minors’ right to marry provide a good example of a right withheld from minors based on substantial research supporting that this restriction promotes their well-being and furthers social welfare. The fundamental right to marry is withheld from minors under modern law, a trend that has become more, not less, restrictive in the era of children’s rights. The increase in the minimum age of marriage is a trend solidly based on evidence showing that teenagers lack the maturity to establish a stable marriage and that many consequences harmful to both the spouses and their children are associated with these marriages. Teenage spouses have lower educational attainment, reduced employment prospects, and much higher divorce rates than those who marry later. Moreover, their children fare more poorly on health, behavioral, educational, and other measures. Thus, deterring teenage marriage furthers social welfare as well as that of the minors themselves.

C. Children’s Rights Under the Restatement

Consistent with these approaches, the Restatement of Children and the Law extends adult rights to minors that promote their well-being and restricts rights on the same basis. This section touches on free speech rights and rights in the justice system but focuses primarily on minors’ right to make specific healthcare decisions.

We deal briefly with the first two issues. Students in school have broad rights of political expression under the Restatement rules, following the Supreme Court’s recognition of students’ First Amendment speech rights. Free expression provides benefits to students and society,

127. See supra notes 69–73 and accompanying text.

128. See Guggenheim, supra note 84, at 942 (noting that New York’s raising of the age of marriage was touted as a children’s rights victory, even though the change restricted those rights).

129. In some states, the age of marriage was raised in part out of concern about parental coercion or exploitation of minors by adults. See, e.g., N.Y. S. Sponsor Memo, Act of June 20, 2017, ch. 35, https://www.nysenate.gov/legislation/bills/2017/s4407/amendment/b.


131. See id.

preparing youth for political participation and teaching lessons in civil discourse and tolerance. At the same time, restrictions on student speech that interferes with the school’s educational mission, if properly limited, can also further both students’ and society’s interests.133 We discussed earlier the Restatement’s treatment of rights and special protections in the justice system; minors are accorded procedural rights, such as the right to counsel, for their protection, but they are also limited in their freedom to exercise and waive rights.134 The Restatement restricts minors’ exercise of Miranda waivers and the right of self-representation in delinquency proceedings, based on evidence that adult freedoms in these contexts would be harmful to the minor’s interest.135

Under the Restatement, parents have the authority to make most healthcare decisions for minors and are assumed to act in their children’s best interest.136 But the Restatement includes several exceptions to this general rule, following courts and legislatures that have given minors the right to consent to particular kinds of treatment without their parents’ consent or involvement.137 In general, lawmakers confer the right to make treatment decisions on minors in situations in which the requirement of parental consent would create obstacles to beneficial treatment.138 For each exception, the right granted promotes the minor’s well-being and also advances social welfare.

First, the Restatement adopts the common law mature minor rule under which a mature minor has the right to give valid consent to routine, beneficial treatment.139 The treatment must benefit the minor (and not another person) and cannot carry serious health risks; cosmetic procedures are excluded unless they also have an important health benefit.140 This “right” promotes the child’s well-being by increasing the likelihood that beneficial treatment will be provided, in part by protecting the physician from liability for treating a patient without valid consent. The mature minor rule ordinarily does not give the minor a right to refuse beneficial treatment,

133. See Huntington & Scott, supra note 4, at 1391, 1445–46.
134. See discussion supra Part I.C.
135. See supra notes 67–68 and accompanying text.
137. RESTATEMENT OF CHILDREN AND THE LAW §§ 19.01, 19.02 (AM. L. INST., Tentative Draft No. 2, 2019); see id. § 19.01 Statutory Note (discussing state statutes authorizing minors to consent to some types of medical care), § 19.02 Reporters’ Note cmt. a (discussing reproductive health privacy for minors).
138. See id. § 19.01 Statutory Note.
139. Id. § 19.01 Reporters’ Note cmt. a.
140. Id. § 19.01 cmt. d & Reporters’ Note.
although adults have this right, underscoring its purpose of promoting child well-being. Moreover, the rule, limited to mature minors, is supported by contemporary research finding that by mid-adolescence, teenagers are capable of making informed medical decisions.

The Restatement’s mature minor rule also gives minors the right to consent to several treatments that have important public health benefits; these include substance abuse treatment, treatment for sexually transmitted diseases, and outpatient mental health services. Having the right to make these decisions privately and independently encourages minors to seek treatment for conditions that are the consequence of risky activities or involve emotional difficulties that teenagers might not want to discuss with their parents. It follows that the paternalistic requirement of parental consent might deter treatment, threatening harm to the minor’s well-being. These conditions, if untreated, also potentially create social costs. The rule, although heralded by children’s rights advocates as recognition of minors’ liberty interest, is actually driven by the dual goals of promoting child well-being and social welfare.

Finally, the Restatement follows constitutional and legal doctrine in extending to mature minors the right to make certain reproductive health decisions. These include the right to obtain contraceptive and prenatal services and the right to terminate pregnancy. Minors have the right to consent to contraceptive services in almost all states as part of public health initiatives to prevent teenage pregnancy. Although adults’ right of access to contraceptives is grounded in constitutional reproductive privacy, lawmakers extend the right to minors consistent with studies of the substantial personal and social costs that follow from teenagers having unprotected sex. Thus, the right to these services fits comfortably in the Child Wellbeing framework.

141. Id. § 19.01 Reporters’ Note cmt. f.
142. Id. § 19.01 cmt. c & Reporters’ Note.
143. Id. § 19.01 cmt. g & Reporters’ Note. Lawmakers in many states have authorized minors to consent to these treatments by statute. Id. § 19.01 Statutory Note.
144. Huntington & Scott, supra note 4, at 1441–42.
146. Id. § 19.02 cmt. b.
147. Id. § 19.02 Statutory Note.
Similarly, the Restatement follows constitutional doctrine in defining the right of a mature minor to terminate pregnancy. The Child Wellbeing framework enriches our understanding of this right, although it fits less neatly into the framework than other rights of access to medical treatment. The mature minor’s right to make a decision about abortion without parental involvement implicates a liberty interest in reproductive privacy that is analogous to that of a pregnant adult. But the child well-being principle lends weight to the minor’s interest. The obstacle of a parental consent requirement likely would lead some minors to delay abortion, increasing personal and public health costs. Courts also note that pregnancy and childbirth are riskier for teenagers than for adults and, as suggested above, the consequences of having an unwanted child are particularly costly in adolescence. Concern for the minor’s well-being and recognition that requiring parental consent may generate serious harm are imbedded in the constitutional framework. Thus, the minor’s well-being and liberty interests merge in the context of abortion rights.

In withholding rights from minors, the Restatement relies on evidence that youth would be harmed by the exercise of these rights. We have discussed restriction of some procedural rights in delinquent proceedings. In another context, the Restatement will adopt the common law infancy defense in contract law restricting minors’ freedom to execute enforceable contracts in most situations. This limit on freedom of contract is based on evidence that adolescents may be vulnerable to overreaching by adults and to their own impulsive judgments, which may lead them to execute improvident agreements. Its purposes become clear when analyzed in the Child Wellbeing framework.

Not all rights fit within the Child Wellbeing framework. For example, many older minors are as competent to participate in the political process as adults, and withholding the right to vote from this group cannot be justified on the ground that youth welfare is advanced. But analysis in the Child Wellbeing framework clarifies that the conventional narrative that the conferral of children’s rights is granted to advance minors’ liberty interests is at best incomplete. Instead, we have shown that the goal of promoting and protecting youth welfare plays a key role.

149. See supra note 125.
152. Huntington & Scott, supra note 4, at 1449–50.
Conclusion

The Restatement of Children and the Law identifies and reinforces the Child Wellbeing framework across the breadth of the legal regulation of children, demonstrating that the framework is a solid structure for modern regulation. As we have shown, lawmakers draw on a wide body of scientific knowledge about child and adolescent development as well as empirical studies about effective policies. This makes it possible to advance child well-being with greater sophistication, nuance, and confidence than during earlier periods, when lawmakers relied largely on intuition and observation. Further, legal regulation is bolstered by a clear understanding that promoting child well-being generally furthers social welfare. Finally, lawmakers are beginning to appreciate the importance of addressing the multiple ways that racial bias and inequality permeate the legal regulation of children.

This framework is clearest in the early twenty-first century reforms of juvenile justice, but it explains and shapes the regulation of children and families more broadly by elevating a robust contemporary justification for parental rights and providing a logic and consistency to children’s rights doctrine. The framework thus clarifies that not only the role of the state, but also parental rights and children’s rights are defined and shaped by a unifying interest in child well-being. This underlying coherence contrasts with earlier regulatory models that pitted the state, parents, and the child in competition for control over children’s lives. In short, the Restatement both reflects and fortifies the Child Wellbeing framework as the guiding force for the legal regulation of children in the twenty-first century.
Appendix

Restatement of the Law, Children and the Law:
Selected Approved Sections

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The following sections of the new Restatement of Law, Children and the Law (referred to in the above Essay as the “Restatement of Children and the Law” or the “Restatement”) have been approved by the American Law Institute. This Appendix uses the section numbering that was in effect at the time the sections were approved. The final version of the Restatement will reflect updated numbering.

Juvenile Justice
§ 14.20. Rights of a Juvenile in Custody: Definition of Custody

(a) A juvenile in custody has the right to the assistance of counsel and the right to remain silent when questioned about the juvenile’s involvement in criminal activity by a law-enforcement officer.

(b) A juvenile is in custody if, under the circumstances of the questioning:

   (1) a reasonable juvenile of the suspect’s age would feel that his or her freedom of movement was substantially restricted such that the juvenile was not at liberty to terminate the interview and leave, and

   (2) the officer is aware that the individual being questioned is a juvenile or a reasonable officer would have been aware that the individual is not an adult.

§ 14.21. Waiver of Rights in a Custodial Setting

(a) A statement made by a juvenile in custody is admissible in a subsequent delinquency or criminal proceeding only if

   (1) the juvenile has given a knowing, intelligent, and voluntary waiver of the right to remain silent and the right to assistance of legal counsel;

   (2) the statement was made voluntarily; and
(3) the requirements of § 14.22 and § 14.23 are satisfied.

(b) The determination of whether the juvenile has given a knowing, voluntary, and intelligent waiver of rights under subsection (a)(1) and made a voluntary statement under subsection (a)(2) is based on consideration of the totality of the circumstances surrounding the interrogation, in light of the juvenile’s age, education, experience in the justice system, and intelligence. Circumstances surrounding the interrogation include police conduct and conditions of the questioning.

§ 14.22. Consultation with Counsel for Younger Juveniles

Unless otherwise provided by statute, a juvenile age 14 or younger can give a valid waiver of the right to counsel and the right to remain silent only after meaningful consultation with and in the presence of counsel.

§ 15.30. Adjudicative Competence in Delinquency Proceedings

(a) A juvenile is not competent to proceed in a hearing to adjudicate his or her responsibility for a delinquent act unless the juvenile has both a rational and factual understanding of the proceedings, and is able to consult with and assist counsel in preparing a defense. The juvenile may lack the requisite competence due to mental illness, intellectual disability, or developmental immaturity.

(b) A juvenile found incompetent to proceed cannot be subject to adjudication in a delinquency proceeding unless and until the juvenile’s incompetence is remediated and competence is attained. Remediation must occur in a reasonable period of time following the finding of incompetence and through the least restrictive means consistent with the juvenile’s welfare and public safety.

Parental Rights

§ 2.24 Physical Neglect

(a) In a criminal proceeding, physical neglect is defined as a parent, guardian, custodian, or temporary caregiver

(1) purposefully, knowingly, or recklessly
(A) failing to provide a child with adequate food, clothing, shelter, or supervision if such failure causes serious physical harm to the child, or

(B) creating a substantial risk of serious physical harm to the child by failing to provide a child with adequate food, clothing, shelter, or supervision.

(b) In a civil child-protection proceeding, a child is physically neglected when the child suffers serious physical harm or is exposed to a substantial risk of serious physical harm as a result of the failure of a parent, guardian, or custodian to exercise a minimum degree of care in providing for the physical needs of a child. Physical neglect includes, but is not limited to, any of the following:

   (1) failure to provide adequate food, clothing, or shelter, taking into consideration the financial resources of the parent, guardian, or custodian;

   (2) failure to provide adequate supervision, taking into consideration relevant factors, including, but not limited to, the child’s age, maturity, and physical condition, the length of the caregiver’s absence, and the location and potential dangers where the child is left unsupervised; further taking into consideration the financial resources of the parent, guardian, or custodian;

   (3) failure to protect a child from physical abuse by another person if the parent, guardian, or custodian knew or reasonably should have known of the harm or risk of harm to the child and failed to take reasonable precautionary measures to protect the child from harm; and

   (4) failure to protect a child from sexual abuse by another person if the parent, guardian, or custodian knew or reasonably should have known of the harm or risk of harm to the child, including if the serious harm is only mental and not also physical, and failed to take reasonable precautionary measures to protect the child from harm.

§ 3.24 Defenses: Parental Privilege to Use Reasonable Corporal Punishment

(a) In the context of criminal proceedings, the use of corporal punishment by a parent, guardian, or other adult acting as a parent is privileged, provided that such punishment is reasonable,
determined in part by whether the corporal punishment caused, or created a substantial risk of causing, serious physical harm or gross degradation.

(b) In the context of civil child-protection proceedings, the use of corporal punishment by a parent, guardian, or other adult acting as a parent is privileged, provided that such punishment is reasonable, determined in part by whether the corporal punishment caused, or created a substantial risk of causing, physical harm beyond minor pain or transient marks.

Children’s Rights

§ 19.01. Consent to Treatment by Mature Minor

(a) Although a minor ordinarily lacks the authority to consent to medical treatment, a mature minor is authorized to provide legally sufficient consent to routine, beneficial medical treatment. Subject to §19.02, other medical treatment requires the consent of a parent or guardian.

(b) Under this Section, a mature minor is a minor capable of giving informed consent to the proposed medical treatment.

(c) Ordinarily a mature minor lacks the authority to refuse recommended treatment that is expected to be beneficial or life-sustaining, unless:

(1) Such treatment can be postponed until the minor is an adult without substantial risk to the minor’s health; or:

(2) Non-treatment or alternative treatment favored by the minor poses no substantial risk to the minor’s health and is otherwise a reasonable choice.

§ 19.02. Consent by Minor to Reproductive Health Treatment

a) A mature minor is authorized to provide legally sufficient consent to medical treatment affecting reproductive health, including treatment concerning pregnancy, childbirth, and the prevention or termination of pregnancy, without notification of the minor’s parent.

(b) Unless otherwise directed by law, a mature minor is a minor capable of giving informed consent to the proposed medical treatment.
(c) If parental consent or notification is otherwise required by statute to terminate a minor’s pregnancy, the court will determine whether the minor who does not want to involve her parents is a mature minor. 
(d) If the court determines that the minor is not a mature minor, the court will permit the minor to terminate her pregnancy without the consent or notification of the minor’s parent if termination of the pregnancy without such consent or notification is in the minor’s best interest.
Where Is the Child at Home? Determining Habitual Residence After Monasky

ANN LAQUER ESTIN*

Introduction

In Monasky v. Taglieri, the U.S. Supreme Court answered a question that has troubled the federal circuits for almost 20 years: How should a child’s habitual residence be determined for purposes of the Hague Child Abduction Convention? The ruling in Monasky, the Court’s fourth decision regarding the Abduction Convention, affirmed the Sixth Circuit and announced an open-ended “totality of the circumstances” standard for making this determination. Monasky shifts the balance away from the focus on parental intentions that had become the majority rule, and should change the approach to deciding habitual residence disputes in many

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1. 140 S. Ct. 719 (2020).


circuits. Perhaps more significantly, the Court also resolved another circuit split by adopting a deferential clear error standard of review for habitual residence disputes.

I. Mapping the Circuit Split

The Abduction Convention, which is currently in force in more than 100 countries, provides a return remedy when a child has been wrongfully removed or retained away from his or her country of habitual residence. Habitual residence is the threshold question in return proceedings under the Abduction Convention, frequently disputed and often outcome-determinative. It is a common (though not often successful) ground for appeal.

Habitual residence is not defined in the Abduction Convention, whose drafters understood the term to present a purely factual question and used it to avoid the technical complexity of legal concepts such as domicile. Early cases under the Convention in the United States began to describe factors that courts could consider in determining a child’s habitual residence. In 1993, the Sixth Circuit wrote in Friedrich v. Friedrich that “the court must focus on the child, not the parents, and examine past experience, not future intentions.” In 1995, the Third Circuit case of Feder v. Evans-Feder enumerated factors including the child’s circumstances and acclimatization to a place, and also referred to “the parents’ present, shared intentions” regarding their child’s presence in that place.

With Mozes v. Mozes in 2001, the Ninth Circuit put the parental intent factor at the head of the list, defining “shared parental intent” as the touchstone of the inquiry, particularly in cases disputing whether the

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5. Abduction Convention, supra note 2, art. 12.


7. 983 F.2d 1396, 1401 (6th Cir. 1993). The judge in Friedrich wrote that habitual residence cannot be quickly changed, requiring “a change in geography and the passage of time” before the disputed removal or retention. Id. at 1402.

8. 63 F.3d 217, 224 (3d Cir. 1995). On balance, the appellate court placed greater weight on what it saw as the parents’ present, shared intention and reversed the trial court’s conclusion. Id.

9. 239 F.3d 1067 (9th Cir. 2001).
child’s habitual residence had changed. *Mozes* allowed for the possibility that “unequivocal” evidence of a child’s acclimatization to a new place could lead to a finding that the child had acquired a new habitual residence, even with no proof of shared parental intent, but suggested that this should be an unusual result.10 Over time, courts in a majority of the circuits have followed *Mozes*, giving primary emphasis and weight to shared parental intent in a range of different types of cases.11

At the same time, courts in the Sixth Circuit retained the child-centered approach first described in *Friedrich*, and criticized more extreme applications of the *Mozes* test.12 Between these two poles, courts in the Third and Eighth Circuits continued to consider a range of factors, including both intent and acclimatization.13 In circuits that did not fully embrace *Mozes*, parental intentions were given greater weight in cases involving infants or very young children, for whom there was rarely evidence of acclimatization to a particular place.14

Beyond different views of the legal test for habitual residence, the circuit courts have disagreed about the proper standard for appellate review. *Mozes* held that habitual residence determinations should be treated as a question of law, subject to de novo review,15 and several other circuits followed this approach.16 Another group applied more deferential review

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10. *Id.* at 1081. *See also* *Gitter* v. *Gitter*, 396 F.3d 124, 133–34 (2d Cir. 2005) (“[W]e must consider whether, notwithstanding the intent of those entitled to fix the child’s habitual residence, the evidence points unequivocally to the conclusion that the child has become acclimatized to his new surroundings and that his habitual residence has consequently shifted.”).

11. *See* *Nicolson* v. *Pappalardo*, 605 F.3d 100, 103–04 (1st Cir. 2010); *Gitter*, 396 F.3d at 133–34; *Maxwell* v. *Maxwell*, 588 F.3d 245, 251–54 (4th Cir. 2009); *Larbie* v. *Larbie*, 690 F.3d 295, 310–12 (5th Cir. 2012); *Koch* v. *Koch*, 450 F.3d 703, 710–18 (7th Cir. 2006); *Ruiz* v. *Tenorio*, 392 F.3d 1247, 1252–59 (11th Cir. 2004). *Larbie* reversed the trial court for failing to treat the parents’ shared intentions as the “primary focus” in the habitual residence inquiry. *Larbie*, 690 F.3d at 311–12. *Gitter* was remanded so that the court could also consider evidence of the child’s acclimatization under the test described above. *See supra* note 10.

12. *E.g.*, *Robert* v. *Tesson*, 507 F.3d 981, 991 (6th Cir. 2007) (criticizing *Ruiz*, 392 F.3d 1247, which held that children had not acquired a habitual residence in Mexico despite living there almost three years).


14. *E.g.*, *Ahmed* v. *Ahmed*, 867 F.3d 682 (6th Cir. 2017); *Delvoye* v. *Lee*, 329 F.3d 330 (3d Cir. 2003). In each of these cases, the court denied a petition for a return order because the petitioner was not able to establish that the infant had a habitual residence under either test.


16. Cases approving de novo review include the following: *Robert*, 507 F.3d at 993; *Silverman*, 338 F.3d at 897.
under a clear error standard. In the majority of these cases, lower court rulings have been affirmed.

Even as the divide between the circuits seemed to deepen, the Seventh Circuit claimed a middle ground. Redmond v. Redmond reversed a trial court return order based on parental intent, where the court’s “assessment of the observable facts on the ground” showed that the child’s life was “firmly situated in Illinois.” After reviewing the positions taken in different circuits on the significance of “parental intent,” the court said:

Conventional wisdom thus recognizes a split between the circuits that follow Mozes and those that use a more child-centric approach, but we think the differences are not as great as they might seem. Although the Third, Sixth, and Eighth Circuits focus on the child’s perspective, they consider parental intent, too. . . .

The same is true on the other side. Although the Mozes framework focuses on the shared intent of the parents, the child’s “acclimatization” in a country has an important role to play. . . .

In substance, all circuits—ours included—consider both parental intent and the child’s acclimatization, differing only in their emphasis. The crux of disagreement is how much weight to give one or the other, especially where the evidence conflicts.

Considering the case before it, the Redmond court described the parents’ last shared intent as merely “one fact among others” and concluded that “nothing in our caselaw justifies the overwhelming weight the district court gave the parents’ last shared intent at the expense of the undisputed evidence of [the child’s] acclimatization.” More broadly, the court observed that “the concept of ‘last shared parental intent’ is not a fixed

18. Cases that reversed district courts include Feder, 63 F.3d 217, see discussion supra note 8; Larbie v. Larbie, 690 F.3d 295 (5th Cir. 2012), see discussion supra note 11; Redmond v. Redmond, 724 F.3d 729 (7th Cir. 2013), see discussion infra notes 19–23 and accompanying text; and Berezovsky v. Ojeda, 765 F.3d 456, 471–75 (5th Cir. 2014) (finding that the record did not support trial court’s determination that parents had a shared intention regarding the child’s residence).
19. 724 F.3d 729 (7th Cir. 2013). See also Estin, supra note 3, at 247–51.
20. Redmond, 724 F.3d at 743, 744.
21. Id. at 745–46.
22. Id. at 744, 746.
doctrinal requirement, and we think it unwise to set in stone the relative weights of parental intent and the child’s acclimatization.\textsuperscript{23}

\section*{II. Monasky v. Taglieri}

Despite deciding a series of other questions under the Abduction Convention, the Supreme Court declined multiple invitations to resolve the split in habitual residence cases.\textsuperscript{24} Monasky illustrates the intensity with which these disputes are litigated, with a long evidentiary hearing in the trial court and appellate arguments before a panel and the full en banc Sixth Circuit Court of Appeals before reaching the Supreme Court. When the case arrived, it presented a somewhat unusual vehicle for resolving the habitual residence question. Rather than correcting an error, the Supreme Court rejected the appellant’s arguments unanimously and affirmed the outcome of the courts below.

\subsection*{A. Trial and Appeal: Litigating Habitual Residence}

After meeting and marrying in the United States, Domenico Taglieri and Michelle Monasky moved to Italy, where their daughter was born in February 2015. Eight weeks later, Monasky moved home to the United States with the child. In response, Taglieri led an action in Italy to terminate Monasky’s parental rights, and a petition in the Northern District of Ohio seeking a return order under the Abduction Convention.\textsuperscript{25}

In order to prevail, Taglieri had the burden to establish that the child was habitually resident in Italy at the time Monasky moved her to the United States. Monasky argued the child had no habitual residence at that point because the couple’s lives in Italy were unsettled and they

\textsuperscript{23} Id. at 746. In particular, Redmond suggests that shared intent is a less-useful factor when “‘the parents are estranged essentially from the outset,’” and “‘when only one parent has the legal right’” to fix the child’s place of residence. Id. at 746–47 (citation omitted).


had no agreement or shared intent to raise their daughter there. After a four-day evidentiary hearing, the trial judge rejected this argument. The court concluded, “considering the record as a whole,” that Monasky had planned to live in Italy indefinitely at the time the child was born and that parental conflict did not prevent the infant from acquiring a habitual residence there. Based on the facts established at trial, the couple had “established a marital home in Italy, and resided in that place with the child until Monasky departed with her to the United States.”

A divided three-judge panel affirmed the trial court on appeal, with the majority viewing the case as relatively simple, writing: “In cases where the child has resided exclusively in a single country, that country is the child’s habitual residence.” Although a recent precedent in the circuit had held that shared parental intent was a relevant factor in determining an infant’s habitual residence, the majority rejected Monasky’s argument that the trial court should have required proof of shared parental intent in this case.

In a subsequent en banc rehearing, the trial court was affirmed once again by a divided vote. In this second review, the Sixth Circuit Court of Appeals emphasized the factual nature of the habitual residence determination and observed that the evidence on this point was divided. Applying a clear error standard, the majority opinion articulated a strong rule of deference: “[W]e leave this work to the district court unless the findings ‘strike us as wrong with the force of a five-week-old,”

26. Id. at *8–9. This argument relied on several earlier cases involving infants. See id. (citing Delvoye v. Lee, 329 F.3d 330, 331 (3d Cir. 2003); In re A.L.C., 607 F. App’x 658, 662–63 (9th Cir. 2015); and Holmes v. Holmes, 887 F. Supp. 2d 755, 758–59 (E.D. Mich. 2012)); see also supra note 14 and accompanying text.


28. Id. at *10. The court distinguished cases in which the residence of one parent “was of so temporary a nature that the court could not find it to be a habitual residence.” Id. Note that the court also concluded that Taglieri was exercising custody rights at the time of the removal, and that Monasky had not adequately established any of the grounds on which a court may decline to order the child’s return under the Convention. Id. at *11–14.

29. Taglieri v. Monasky, 876 F.3d 868, 876 (6th Cir. 2017), op. vacated, on reh’g en banc, 907 F.3d 404 (6th Cir. 2018), aff’d, 140 S. Ct. 719 (2020). The dissenting judge thought the majority had reached an “erroneous result by adopting a formalistic, rigid, bright-line rule” that distorted the prior precedents in the Circuit. Id. at 882 (Moore, J., dissenting).


31. Taglieri, 876 F.3d at 875–77. The dissenting judge disagreed, taking the position that “[w]here the child is too young to have acclimatized to her community and surroundings, and where the parents do not have a settled mutual intent, I would conclude that the child cannot have a habitual residence.” Id. at 884 (Moore, J., dissenting).

unrefrigerated dead fish.”  As in the earlier ruling, the en banc court expressly rejected Monasky’s argument that establishing an infant’s habitual residence requires proof that the parents had reached a subjective agreement, or “meeting of the minds,” about the child’s future home. 35

The en banc rehearing in Monasky produced one concurring and several dissenting opinions. 36 The judges had different views of how their precedents should be applied to habitual residence disputes involving infants, and different views on the correct standard of review for habitual residence determinations. 37 As the Supreme Court later noted, none of the 18 judges who heard the case on appeal agreed with the argument that establishing the habitual residence of an infant should require proof of an “actual agreement” between the parents. 38

B. Supreme Court: Setting the Legal Standard

The Supreme Court granted review in Monasky to decide two questions: whether a subjective agreement between an infant’s parents is necessary to establish habitual residence for an infant who is too young to acclimate to her surroundings and what standard of review applies to habitual residence

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33. Id. at 408–09 (quoting United States v. Perry, 908 F.2d 56, 58 (6th Cir. 1990)).
34. Id. at 410 (emphasis in original).
35. Id. (“If adopted, Monasky’s approach would create a presumption of no habitual residence for infants, leaving the population most vulnerable to abduction the least protected.”).
36. The concurrence was written by Judge Boggs, who wrote the majority opinion for the panel described above. Id. at 411; see supra notes 29, 31 and accompanying text. Judge Moore, who dissented from the panel decision, also dissented from the en banc decision. Taglieri, 907 F.3d at 415; see supra notes 29, 31. Judge Moore agreed with the legal standard adopted by the en banc majority but thought that the case should have been remanded to the trial court. Taglieri, 907 F.3d at 420–21 (Moore, J., dissenting). Judges Gibbons and Stranch also wrote dissents. Id. at 421 (Gibbons, J., dissenting), 422 (Stranch, J., dissenting).
37. Compare Taglieri, 907 F.3d at 408–10 (applying clear-error review), with id. at 418–19 (Moore, J., dissenting) (concluding that review should be de novo).
38. Monasky v. Taglieri, 140 S. Ct. 719, 725 (2020). Monasky’s argument that proof of an actual agreement or “meeting of the minds” should be required draws from language in a Fifth Circuit decision. See Berezowsky v. Ojeda, 765 F.3d 456, 468–69 (5th Cir. 2014) (discussed supra note 18).
determinations.\textsuperscript{39} On both of these questions, the Court affirmed the Sixth Circuit.\textsuperscript{40}

Justice Ginsburg’s majority opinion emphasized what the federal circuits have in common, describing the split as only “differences in emphasis among the Courts of Appeals,” and stating that the courts “share a ‘common’ understanding: The place where a child is at home, at the time of removal or retention, ranks as the child’s habitual residence.”\textsuperscript{41} Describing this determination as a “fact-driven inquiry, sensitive to the unique circumstances of the case and informed by common sense,”\textsuperscript{42} the Court characterized the legal standard as a “totality of the circumstances” test. In addition, it also concluded that the determination of habitual residence is primarily a task for the fact-finding court, subject to appellate review under a clear error standard.\textsuperscript{43}

Beyond announcing this “totality of circumstances” test, the Court gave only limited guidance in \textit{Monasky} regarding the particular facts to be weighed and balanced.\textsuperscript{44} For older children, the Court suggested that “facts indicating acclimatization will be highly relevant,” with a footnote listing some of the factors that courts had considered in these cases, including:

- a change in geography combined with the passage of an appreciable period of time, age of the child, immigration status of child and parent, academic activities, social engagements, participation in sports programs and excursions, meaningful connections with the people and places in the child’s new country, language proficiency, and location of personal belongings.\textsuperscript{45}

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\textsuperscript{39} Monasky v. Taglieri, 907 F.3d 404 (6th Cir. 2018) (en banc), \textit{cert. granted}, 139 S. Ct. 2691 (June 10, 2019) (No. 18-935), https://www.supremecourt.gov/docket/docketfiles/html/qp/18-00935pp.pdf. The first question was framed as “Whether a district court’s determination of habitual residence under the Hague Convention should be reviewed \textit{de novo}, as seven circuits have held, under a deferential version of \textit{de novo} review, as the First Circuit has held, or under clear-error review, as the Fourth and Sixth Circuits have held.” \textit{Id.}\textsuperscript{40}

\textsuperscript{40} \textit{Monasky}, 140 S. Ct. 719. Two justices concurred: Justice Thomas, \textit{see infra} note 58, and Justice Alito, \textit{see infra} note 56. There were no dissents.

\textsuperscript{41} \textit{Id.} at 725–27 (citing Karkkainen v. Kovalchuk, 445 F.3d 280, 291 (3d Cir. 2006)).

\textsuperscript{42} \textit{Id.} at 727 (citing Redmond v. Redmond, 724 F.3d 729, 744 (7th Cir. 2013)).

\textsuperscript{43} \textit{Id.} at 723, 730.

\textsuperscript{44} \textit{Id.} at 727–28.

\textsuperscript{45} \textit{Id.} at 727 n.3 (quotation marks omitted) (citing JAMES D. GARBOLINO, FED. JUD. CTR., \textit{THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: A GUIDE FOR JUDGES} 67–68 (2d ed. 2015)). Note that Judge Garbolino’s guide is available online at https://www.fjc.gov/content/309626/1980-hague-convention-civil-aspects-international-child-abduction-guide-judges.
\end{flushright}
At the same time, the Court also affirmed that “[b]ecause children, especially those too young or otherwise unable to acclimate, depend on their parents as caregivers, the intentions and circumstances of caregiving parents are also relevant considerations.”

Justice Ginsburg invoked common sense, which “suggests that some cases will be straightforward: Where a child has lived in one place with her family indefinitely, that place is likely to be her habitual residence.”

The Court was emphatic in its rejection of Monasky’s primary argument, writing: “The bottom line: There are no categorical requirements for establishing a child’s habitual residence—least of all an actual-agreement requirement for infants.” Among its reasons for rejecting an “actual agreement” requirement, the Court pointed out that it would leave many infants with no habitual residence, and therefore outside the protections of the Convention.

Justice Ginsburg noted Monasky’s argument about the need to “protect children born into domestic violence.” Though she described domestic violence as an “intractable” problem in cases under the Abduction Convention, she did not agree that an actual-agreement requirement was an appropriate solution. Her opinion for the Court suggested that if “an infant lived in a country only because a caregiving parent had been coerced into remaining there,” those circumstances should “figure in the calculus” of the habitual residence determination. Justice Ginsburg also noted that a court may refrain from ordering return under Article 13(b) of the Convention when there is a “grave risk” that return would “expose the child to physical or psychological harm or otherwise place the child in an intolerable situation,” and that the trial court had considered and rejected Monasky’s Article 13(b) argument.

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46. Monasky, 140 S. Ct. at 727.
47. Id. This was not framed as a bright-line rule, however. Cf. supra note 29.
49. Id. at 728–29; see also Grano v. Martin, 443 F. Supp. 3d 510, 535 ¶ 91 (S.D.N.Y 2020), aff’d, 821 F. App’x 26 (2d Cir. 2020).
50. Monasky, 140 S. Ct. at 724 (describing Monasky’s testimony regarding abuse by Taglieri in Italy).
51. Id. at 729 (“We doubt, however, that imposing a categorical actual-agreement requirement is an appropriate solution, for it would leave many infants without a habitual residence, and therefore outside the Convention’s domain.”).
52. Id. at 727.
53. Id. at 729 (quoting Abduction Convention, supra note 2, art. 13(b) (return of child not required if person opposing return “establishes that . . . there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation”).
On the standard of review question, the Court agreed that habitual residence determinations present a mixed question of law and fact, “albeit barely so.”\(^5^4\) The majority opinion went on to observe: “Once the trial court correctly identifies the governing totality-of-the-circumstances standard, however, what remains for the court to do in applying that standard . . . is to answer a factual question: Was the child at home in the particular country at issue?”\(^5^5\) Viewing this as “a task for factfinding courts, not appellate courts,” the Court concluded that habitual residence determinations “should be judged on appeal by a clear-error review standard deferential to the factfinding court.”\(^5^6\) The opinion points out that this rule also serves the purposes of the Convention because it expedites the appellate process.\(^5^7\)

Following the same approach taken in the Court’s previous cases under the Abduction Convention, the majority opinion in Monasky considered the Convention’s text, the drafting history and Explanatory Report, and the approaches taken to habitual residence in decisions of other treaty countries.\(^5^8\) As in previous Abduction Convention cases, the United States had led an amicus brief describing the views of other contracting states and participated in the arguments before the Court.\(^5^9\) The Court noted that, on both of the issues decided, its ruling conforms to the practice of the U.S. treaty partners.\(^6^0\)

### III. After Monasky: The New Landscape

As a procedural matter, both the fact-based totality of the circumstances test and the clear-error standard of review adopted in Monasky should reduce the numbers of appeals in Abduction Convention cases. As Professor Robert Spector has observed, however, one consequence of a highly fact-based standard is that it will be “rarely possible to decide

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54. Id. at 730.
55. Id.
56. Id. Justice Alito disagreed with this aspect of the ruling, concluding that determination of habitual residence “is not a pure question of fact” and therefore that the appropriate standard of review would be for abuse of discretion. Id. at 735 (Alito, J., concurring in part and concurring in the judgment).
57. Id. at 730 (majority op.).
58. Id. at 732 (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas disagreed with this aspect of the opinion, explaining that he would reach the same result based on a plain meaning approach. Id.
60. Monasky, 140 S. Ct. at 727–28, 730–31 (majority op.).
habitual residence on a motion for summary judgment.” In disputed habitual residence cases, we can confidently predict that long evidentiary hearings before the fact-finding court will continue. The party seeking return will continue to bear the burden of proof as to habitual residence, and trial court rulings will need to reflect the different factors that the court has considered in determining habitual residence.

As a substantive matter, the Court has made clear that parental intentions may be relevant to the determination of habitual residence but should not be dispositive. Parents will certainly continue to dispute and litigate their intentions as to the child’s residence, and fact-finding courts will need to weigh that along with other evidence presented. Family lawyers are already deeply familiar with this kind of open-ended multifactor legal standard, which is typical of many issues that family courts decide. It still remains to be seen, however, to what extent courts will attempt to transplant into the new reality the same kinds of heuristics they relied on before Monasky.

In broad terms, the Court’s opinion aligns most closely with the approach taken by the Seventh Circuit in Redmond, and with cases in the Third and Eighth Circuits that directed courts to examine acclimatization from the child’s perspective as well as parental intent. In the Ninth Circuit, where the Mozes test originated, courts had begun to acknowledge the “international consensus” that courts should look at many factors in determining habitual residence. But Monasky requires the courts that

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63. See, e.g., Grano v. Martin, 443 F. Supp. 3d 510, 538–39 (S.D.N.Y 2020), aff’d, 821 F. App’x 26 (2d Cir. 2020); see also Farr v. Kendrick, 824 F. App’x 480 (9th Cir. 2020); Berenguela-Alvarado v. Castanos, 820 F. App’x 870 (11th Cir. 2020).
64. Including, for example, standards calling for “equitable” division of marital property, or determination of the “best interests” of a child.
65. Redmond v. Redmond, 724 F.3d 729, 743 (7th Cir. 2013); see supra notes 19–23 and accompanying text.
66. See Karkinaien v. Kovalchuk, 445 F.3d 280, 292 (3d Cir. 2006); Silverman v. Silverman, 338 F.3d 886, 898 (8th Cir. 2003); see supra note 13 and accompanying text. This is also the approach advocated in the useful and careful discussion of habitual residence included in RHONA SCHUZ, THE HAGUE CHILD ABDUCTION CONVENTION: A CRITICAL ANALYSIS 220–21 (2013).
67. E.g., Murphy v. Sloan, 764 F.3d 1144, 1150–51 (9th Cir. 2014) (asserting that the Ninth Circuit’s approach was “not inconsistent” with the international decisions). Though the court in Murphy considered the child’s acclimatization, it maintained the high burden of proof adopted in Mozes, requiring that “to infer abandonment of a habitual residence by acclimatization, the objective facts must point unequivocally to [the child’s] ordinary or habitual residence being in [the new country].” Id. at 1152 (quoting Mozes v. Mozes, 239 F.3d 1067, 1081 (9th Cir. 2001); emphasis and alterations in Murphy).
have followed Mozes to go further, and abandon their rule prioritizing parental intentions.

Monasky seems likely to have its greatest impact in those circuits that have relied heavily on shared parental intent. The subsidiary rules built on the “shared intent” doctrine must be reconsidered, and some of the growing legal complexity surrounding the doctrine should diminish, if not disappear.\(^{68}\) Courts clearly may no longer apply or impose presumptions, such as a requirement for “unequivocal” evidence of acclimatization when there was no proof of a shared intention to change the child’s habitual residence.\(^{69}\) Given the Supreme Court’s insistence on a totality-of-the-circumstances standard, and its explicit rejection of categorical tests and predetermined formulas, the lower courts also should not attempt to preserve the legal gloss built into their pre-Monasky jurisprudence. Several cases decided in the months after Monasky suggest that courts have had trouble breaking these old habits.\(^{70}\)

On balance, in cases involving children who have lived in a new country for periods of two or three years, it should be somewhat more likely that the new country will be found to be the child’s habitual residence.\(^{71}\) Conversely, it may be less likely that a child’s habitual residence will be deemed to have shifted based on mixed evidence of parental intentions in cases in which the child has lived for only a few months in a new place.\(^{72}\)

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68. For example, there has been substantial litigation of whether or not an agreement to relocate was conditional, and how that should affect a determination of habitual residence. See, e.g., Calixto v. Lesmes, 909 F.3d 1079, 1089–91 (11th Cir. 2018). Another stream of cases addresses whether coercion by one party negates a finding of shared intent. See, e.g., Tsarbopoulos v. Tsarbopoulos, 176 F. Supp. 2d 1045, 1055–56 (E.D. Wash. 2001). On Monasky and coercion, see supra notes 50–52 and accompanying text.


70. See, e.g., Forcelli v. Smith, No. 20-699, 2020 WL 5015838, at *7 (D. Minn. Aug. 25, 2020) (referring to Monasky but also citing Mozes for the proposition that there must be a settled intention to abandon a prior habitual residence before a new one can be acquired); cf. Chambers v. Russell, No. 1:20CV948, 2020 WL 5044036, at *5 (M.D.N.C. Aug. 26, 2020) (“Finally, since Monasky did not overturn the two-prong approach outright, this court will still apply it, cognizant of the Supreme Court’s directive that the inquiry is fact intensive and that the Hague Convention exists ‘to ensure that custody is adjudicated in what is presumptively the most appropriate forum—the country where the child is at home.’”) (quoting Monasky v. Taglieri, 140 S. Ct. 719, 727 (2020)).

71. Cf. Ruiz v. Tenorio, 392 F.3d 1247, 1252–59 (11th Cir. 2004); see supra note 12.

But in many cases, the evidence and analysis will not change significantly as courts embrace the new standard.\footnote{See, e.g., Farr v. Kendrick, 824 F. App’x 480, 482 (9th Cir. 2020); Berenguela-Alvarado v. Castanos, 820 F. App’x 870, 873–74 (11th Cir. 2020).}

One useful example, \textit{Grano v. Martin},\footnote{443 F. Supp. 3d 510 (S.D.N.Y 2020), aff’d, 821 F. App’x 26 (2d Cir. 2020).} emerged from the U.S. District Court for the Southern District of New York two weeks after the Supreme Court ruling in \textit{Monasky}. Faced with a dispute over habitual residence, the trial court noted: “Following \textit{Monasky}, the parties’ last shared intent is still a relevant consideration, although it is not dispositive.”\footnote{Id. at 536.} In its detailed findings of fact and conclusions of law, the court reviewed the evidence from a five-day hearing, and its opinion addressed both the parties’ intentions regarding their child’s residence and other objective facts suggesting that the child “usually or customarily lived” in Spain.\footnote{Id. at 515, 534–39. These other facts included the location of the parents’ money and personal property, their citizenship and residence status, and whether they held return plane tickets. Id. at 537. The ruling was affirmed in a summary order discussing \textit{Monasky}. Grano v. Martin, 821 F. App’x 26 (2d Cir. 2020).}

In \textit{Smith v. Smith},\footnote{976 F.3d 558 (5th Cir. 2020).} the Fifth Circuit Court of Appeals noted the recent \textit{Monasky} decision and stated that “to the extent that our circuit’s prior caselaw . . . has prioritized the parents’ shared intent over other factors, we overrule that emphasis.”\footnote{Id. at 561 n.1.} In the case before it, however, which challenged the district court’s conclusion that the parents had no shared intention that Argentina would become their children’s habitual residence during the two years the family lived there, the appellate court upheld the ruling below.\footnote{Id. at 559–61.} Concluding that the lower court had “determined and considered all the relevant facts,” the appellate court applied \textit{Monasky}’s totality of the circumstances standard to those facts and held that the petitioner had not met the burden of establishing that Argentina was the children’s habitual residence.\footnote{Id. at 563.}

Looking beyond the question of habitual residence, the Court’s embrace of a deferential standard of review has begun to influence other types of appeals under the Abduction Convention. Two weeks after \textit{Monasky} was decided, the First Circuit Court of Appeals relied on the decision to adopt a “clear error” standard of review for other Convention issues based on complex factual determinations, such as the objections to return based on a
child being settled after more than a year in the United States under Article 12 or a grave risk of harm to the child under Article 13(b).81

Conclusion

With Monasky, the Supreme Court has resolved a long-standing disagreement under the Hague Abduction Convention, with the potential to affect hundreds of families each year. Although the federal courts do not keep data on the numbers of return proceedings filed under the Abduction Convention, the Office of Children’s Issues (OCI) in the U.S. State Department receives reports of more than 400 incoming return and access cases each year.82 Based on reports appearing in Westlaw, the federal trial and appellate courts heard and issued decisions in at least 50 separate cases under the Abduction Convention in 2019, with habitual residence among the most frequently disputed questions to be decided.83 The Court’s ruling may not reduce those numbers, but it provides important guidance for judges, lawyers, and parents.

81. da Silva v. de Aredes, 953 F.3d 67, 72–73 (1st Cir. 2020); see Abduction Convention, supra note 2, arts. 12, 13(b).


The Relationship Between Child Support and Parenting Time

J. THOMAS OLDHAM* & JANE VENOHR**

Introduction

When child support guidelines were initially drafted, it was assumed that in most instances, the lesser-time parent would be the father, the father would see the children infrequently, and the father would have a higher income than the mother. Today, more custodial parents are male than before,¹ the wage gap between mothers and fathers has narrowed,² and a substantial number of fathers are more involved in their children’s lives.³

Decades ago, it was rare for an obligor parent to have access to his child more than every other weekend and every other holiday and approximately

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three weeks in the summer (or about 20% of all overnights per year).\textsuperscript{4} Recent studies have found that shared placement has become more common.\textsuperscript{5} Census data find that 58% of noncustodial fathers and 73% of noncustodial mothers had provisions for visitation or joint custody or both in 1991, and that the percentage increased to 81% of noncustodial parents in 2018.\textsuperscript{6} These trends raise questions about how to calculate child support obligations in various situations, particularly when the payor parent has substantial access to the child.

This article will discuss various approaches that have been applied to how child support should be calculated (i) when the lesser-time parent has a higher income than the other parent but has substantial access, (ii) when both parents have equal joint physical custody, and (iii) when the greater-time parent has a higher income than the other parent. We will highlight the advantages and disadvantages of the various policy options.

\section*{I. Background Information}

\textbf{A. The Theoretical Foundation of Child Support Guidelines in the United States}

Most states adopted child support guidelines in the late 1980s to fulfill a federal requirement that each state have advisory child support guidelines by 1987.\textsuperscript{7} The Family Support Act of 1988 expanded the requirement from statewide advisory guidelines to require rebuttable presumptive guidelines.\textsuperscript{8} The requirements were intended to correct several deficiencies: inconsistent order amounts among parties in similarly situated cases, inefficient adjudication of child support amounts due to

\begin{itemize}
\item \textsuperscript{4} For example, one study of divorced fathers in 1981 found that only 8% of all fathers had possession of their child for four or more overnights per month. See Frank F. Furstenberg Jr. & Christine Winquist Nord, \textit{Parenting Apart: Patterns of Childrearing After Marital Disruption}, 47 J. MARRIAGE \& FAM. 893, 895 tbl.1, 896 (Nov. 1985).
\item \textsuperscript{6} See Scoon-Rogers \& Lester, supra note 1, at 6; Grall, supra note 1, at 7.
\end{itemize}
The Relationship Between Child Support and Parenting Time

The lack of uniform standards, and inadequate levels of support when compared to poverty levels and the cost of child-rearing.9

A number of different conceptual models were proposed as a foundation for the creation of child support guidelines. For example, some commentators have argued that guidelines should be crafted so that both parents will have equal living standards until the child becomes an adult.10 However, no state has adopted this as a conceptual framework for guidelines. Instead, most states adopted a “continuity of expenditure” model of child support guidelines.11 The principle of the continuity-of-expenditure model is that the child whose parents are living separately should receive the same level of financial support that the child would have received if the child and parents lived together as an intact family. To this end, the continuity of expenditure model is based on measurements of child-rearing expenditures in intact families. The continuity of expenditure philosophy has been implemented in the United States via the “income shares model” and the “percentage-of-obligor income model,” the two major types of models for the calculation of child support. All but three states use one of these two models. The income shares model, which is used by 41 states,12 presumes that each parent is responsible for his or her prorated share of what an intact family with the same number of children and combined parental income spends on child-rearing. The obligated parent’s prorated share (based on the obligated parent’s share of the total parental income) is the basis of the child support order.13 Under the percentage-of-obligor income model, the presumptive child support amount is calculated based on only the income of the lesser-time parent.14 States utilizing the percentage-of-obligor income model often presume that the custodial parent spends at least an equal percentage of income or dollar amount on the child as the guidelines percentage or amount.

13. See Venohr & Williams, supra note 9, at 12–15.
14. Id. at 10–12.
B. Federal Requirements

Federal law does not require adjustments in state guidelines for when the obligor has substantial access. Recent changes to federal requirements for state guidelines, however, attempt to make sure that states provide adjustments within their guidelines to not impoverish the obligor parent.\(^{15}\) States are now required to provide a self-support reserve or a similar adjustment in their guidelines. Self-support reserves have been established so that significant child support is not required if the obligor parent’s income is below a certain specified amount.\(^{16}\) Most states with both a self-support reserve and an adjustment for timesharing do not allow both adjustments; rather, most take the lower of the two adjustments.

C. Timesharing Adjustment

In the past few decades, there has been a movement toward the adoption of formulas that adjust for parenting time. In 1998, 24 states provided formulas to adjust for parenting time.\(^{17}\) Today, more than two decades later, 38 states have now adopted a parenting-time adjustment formula for child support.\(^{18}\) The formulas and criteria for applying them vary. As set forth in more detail below, many states have adopted rules so that, once the obligor parent has the child for at least a specified number of overnights, the presumptive child support amount is reduced as the level of access increases. In addition, some states have incorporated rules so that, even if the obligor parent has substantial access or equal physical custody, child support should not be reduced if the impact would be to impoverish the recipient parent.\(^{19}\)

To the extent that states provide a timesharing adjustment formula, it is helpful to know what level of parenting time is assumed in the basic

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\(^{17}\) See Venohr & Williams, supra note 9, at 18–19.


\(^{19}\) E.g., Richardson v. Richardson, 545 S.W.3d 895, 897 (Mo. Ct. App. 2018).
formula or table. Most states using the income shares guidelines make no assumption of parenting time in their basic table. This is because most income shares tables, which contain the basic child support obligation owed by both parents for a range of combined parental incomes and number of children for whom support is being determined, are based on economic measurements of child-rearing expenditures among intact families; that is, how much is spent on the children when the parents and the children live together. In other words, there is no timesharing arrangement in the underlying economic data because the parents live together.

As mentioned earlier, the income shares model is one type of continuity of expenditures model, which means the child support obligation relates to how much would have been spent on the child in an intact family. For example, Figure 1, which is an excerpt of the Illinois income shares table, shows that the basic obligation for one child when the parents have a combined income of $7,000 net per month is $1,136 per month. This amount is based on a study of how much an intact family spends for one child on average. The obligated parent’s prorated share of the basic obligation in the table is the basis of the child support order. An adjustment may be layered on top of this for parenting time. Pennsylvania is the only income shares state to incorporate a parenting-time adjustment into its basic table. The Pennsylvania table reflects how much is spent on a child in an intact family less what the obligated parent would need to cover most of the child’s food and entertainment expenses, assuming the child is with the obligated parent 30% of the time.

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Figure 1

Excerpt of Illinois Income Shares Table

<table>
<thead>
<tr>
<th>Combined Adjusted Net Income</th>
<th>One Child</th>
<th>Two Children</th>
<th>Three Children</th>
<th>Four Children</th>
<th>Five Children</th>
<th>Six Children</th>
</tr>
</thead>
<tbody>
<tr>
<td>6525.00 – 6574.99</td>
<td>1078</td>
<td>1621</td>
<td>1929</td>
<td>2155</td>
<td>2371</td>
<td>2577</td>
</tr>
<tr>
<td>6575.00 – 6624.99</td>
<td>1085</td>
<td>1630</td>
<td>1941</td>
<td>2168</td>
<td>2385</td>
<td>2593</td>
</tr>
<tr>
<td>6625.00 – 6674.99</td>
<td>1091</td>
<td>1640</td>
<td>1953</td>
<td>2181</td>
<td>2400</td>
<td>2608</td>
</tr>
<tr>
<td>6675.00 – 6724.99</td>
<td>1097</td>
<td>1650</td>
<td>1965</td>
<td>2195</td>
<td>2414</td>
<td>2624</td>
</tr>
<tr>
<td>6725.00 – 6774.99</td>
<td>1104</td>
<td>1660</td>
<td>1976</td>
<td>2208</td>
<td>2429</td>
<td>2640</td>
</tr>
<tr>
<td>6775.00 – 6824.99</td>
<td>1110</td>
<td>1669</td>
<td>1988</td>
<td>2221</td>
<td>2443</td>
<td>2665</td>
</tr>
<tr>
<td>6825.00 – 6874.99</td>
<td>1117</td>
<td>1679</td>
<td>2000</td>
<td>2234</td>
<td>2457</td>
<td>2671</td>
</tr>
<tr>
<td>6875.00 – 6924.99</td>
<td>1123</td>
<td>1689</td>
<td>2012</td>
<td>2247</td>
<td>2472</td>
<td>2687</td>
</tr>
<tr>
<td>6925.00 – 6974.99</td>
<td>1129</td>
<td>1698</td>
<td>2023</td>
<td>2260</td>
<td>2486</td>
<td>2703</td>
</tr>
<tr>
<td>6975.00 – 7024.99</td>
<td>1136</td>
<td>1708</td>
<td>2035</td>
<td>2273</td>
<td>2501</td>
<td>2718</td>
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<tr>
<td>7025.00 – 7074.99</td>
<td>1142</td>
<td>1718</td>
<td>2047</td>
<td>2286</td>
<td>2515</td>
<td>2734</td>
</tr>
<tr>
<td>7075.00 – 7124.99</td>
<td>1148</td>
<td>1728</td>
<td>2059</td>
<td>2300</td>
<td>2530</td>
<td>2750</td>
</tr>
<tr>
<td>7125.00 – 7174.99</td>
<td>1155</td>
<td>1737</td>
<td>2070</td>
<td>2313</td>
<td>2544</td>
<td>2765</td>
</tr>
<tr>
<td>7175.00 – 7224.99</td>
<td>1161</td>
<td>1747</td>
<td>2083</td>
<td>2326</td>
<td>2559</td>
<td>2782</td>
</tr>
<tr>
<td>7225.00 – 7274.99</td>
<td>1168</td>
<td>1758</td>
<td>2095</td>
<td>2340</td>
<td>2574</td>
<td>2798</td>
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<tr>
<td>7275.00 – 7324.99</td>
<td>1175</td>
<td>1768</td>
<td>2107</td>
<td>2354</td>
<td>2589</td>
<td>2814</td>
</tr>
<tr>
<td>7325.00 – 7374.99</td>
<td>1181</td>
<td>1778</td>
<td>2119</td>
<td>2367</td>
<td>2604</td>
<td>2831</td>
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<tr>
<td>7375.00 – 7424.99</td>
<td>1188</td>
<td>1788</td>
<td>2132</td>
<td>2381</td>
<td>2619</td>
<td>2847</td>
</tr>
<tr>
<td>7425.00 – 7474.99</td>
<td>1195</td>
<td>1798</td>
<td>2144</td>
<td>2395</td>
<td>2634</td>
<td>2863</td>
</tr>
<tr>
<td>7475.00 – 7524.99</td>
<td>1201</td>
<td>1808</td>
<td>2156</td>
<td>2408</td>
<td>2649</td>
<td>2880</td>
</tr>
</tbody>
</table>

Most percentage-of-obligor income guidelines, which is the other type of continuity of expenditures model, also relate to measurements of child-rearing expenditures in intact families. Some states (such as Wisconsin) mentioned that they adjusted the percentages to account for the child’s time with the obligated parent, but did not specify what assumption was made regarding the “normal” level of contact.24 Other percentage-of-obligor income guidelines (such as those of Alaska and Mississippi) do not clearly state that any consideration of timesharing is considered in the basic percentages.25

23. For the complete table, see ILL. DEP’T OF HEALTHCARE & FAM. SERVS., CHILD SUPPORT SERVS., INCOME SHARES SCHEDULE BASED ON NET INCOME, https://www.illinois.gov/hfs/SiteCollectionDocuments/IncomeSharesScheduleBasedonNetIncome.pdf.


The Relationship Between Child Support and Parenting Time

II. Calculating the Child Support Order When the Lesser-Time Parent Has Substantial Access and a Higher Income Than the Other Parent

A. Introduction

Although most states do not contain any parenting-time assumptions in their basic guidelines tables or percentages, most states have adopted a formula pertaining to how the guidelines support amount should be reduced based on the level of access by the obligor. This is premised on the assumption that, as the obligor-parent’s parenting time increases, this increases the child-rearing costs of the obligor parent and reduces the expenses of the other parent. Most states with formulas provide that the formula is to be applied presumptively if the case meets certain criteria (e.g., a shared-custody order that the obligor parent actually exercises). These states, however, disagree about whether the obligor parent should receive some support reduction starting with a relatively low level of contact, or whether such an adjustment should begin only when there is substantial access because the custodial parent’s expenses are not reduced by the child spending only a small number of overnights with the other parent.

Some commentators have argued that child support should not be presumptively reduced if the obligor parent has substantial access. Proponents of this view contend that it is not clear that the recipient parent’s expenses will be reduced as a result of substantial access, so it is not fair to presumptively reduce support when substantial access exists. The consideration of whether the custodial parent’s expenses are reduced is also echoed in a recent New York case that involved a father who had possession of his child overnight three nights per week. He argued that, due to his level of possession, his support amount should be reduced below the normal presumptive amount of child support under the guidelines. The appellate court ruled that, based on the New York law, he did not have the right to have his presumptive support amount reduced due to his substantial parenting time without showing that his expenses had increased as a result or that the other parent’s expenses had decreased. In this particular case, a major consideration was the presentation of evidence that the custodial


27. Jennifer VV v. Lawrence WW., 124 N.Y.3d 474, 478–79 (App. Div. 2020); see also N.Y. FAM. CT. ACT § 413(1)(f)(9) (McKinney 2020) (“unjust or inappropriate” deviation factors may include “(i) extraordinary expenses incurred by the non-custodial parent in exercising visitation, or (ii) expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent’s expenses are substantially reduced as a result thereof”).

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parent’s expenses were not substantially reduced by the obligor parent’s time with the child.\textsuperscript{28}

A small number of states have merely treated the matter as a deviation factor, giving the court the power to reduce the presumptive award due to substantial access. In some of these states, courts have been critical of an absolute rule that an obligor should automatically get a certain reduction in child support as a result of a certain level of access.\textsuperscript{29} Some statutes of this type (such as New Hampshire’s) invite the court to consider, when deciding whether to reduce the support amount, whether the obligor’s level of access reduces the expenses of the recipient parent.\textsuperscript{30}

In contrast with the New Hampshire and New York approaches summarized above, to obtain a parenting-time adjustment under the various formulas in force among most states today, the obligor does not have to establish that his level of access reduces the expenses of the other parent. Nonetheless, some states do give the court some discretion when applying the timesharing adjustment. For example, in the District of Columbia, a timesharing adjustment is not made if the recipient parent can show that such an adjustment would be unjust or inappropriate.\textsuperscript{31} In some other states, before a timesharing adjustment is made, the obligor parent must show that he or she contributed to the expenses of the child, in addition to paying child support.\textsuperscript{32}

\textsuperscript{28} Jennifer VV., 124 N.Y.S.3d at 479.


\textsuperscript{30} See N.H. REV. STAT. ANN. § 458-C:5(1)(b)(2)(B) (2020). The statute also allows the court to consider whether the parent with less income will have adequate resources to support the child in a similar style as the other parent. Id. § 458-C:5(1)(b)(2)(C).

\textsuperscript{31} D.C. CODE ANN. § 16-916.01(q)(3) (2020).

\textsuperscript{32} E.g., WYO. STAT. ANN. § 20-2-304(c) (2020) (adjustment applies “[w]hen each parent keeps the children overnight for more than twenty-five percent (25%) of the year and both parents contribute substantially to the expenses of the children”) (emphasis added). Compare Jensen v. Milatzo-Jensen, 297 P.3d 768, 777–778 (Wyo. 2013) (obligor parent made such a showing), with Fountain v. Mitros, 968 P.2d 934, 938–39 (Wyo. 1998) (obligor parent did not make such a showing). See also N.J. CT. R. app. IX-A § 13(b) (2020), https://njcourts.gov/attorneys/assets/rules/app9a.pdf (“In determining if such an adjustment is appropriate, the court should consider whether the non-custodial parent has incurred variable expenses for the child during PAR Time and if PAR Time has reduced the other parent’s variable expenses for the child.”); S.C. CODE ANN. REGS. 114-4730(A) (2020) (“For the purpose of this section, shared physical custody means that each parent has court-ordered visitation with the children overnight for more than 109 overnights each year (30%) and that both parents contribute to the expenses of the child(ren) in addition to the payment of child support.”).
B. Adjustment Criteria

1. Timesharing Criteria

One common criterion for obtaining a parenting-time adjustment is that the lesser-time parent must have at least a certain number of overnights per year with the child. This is the approach used in many states and some other countries. In some Western European countries, the United Kingdom, and Canada, child support is not reduced until a specified access threshold is reached. For example, in the UK, child support is reduced when the obligor has access 53 nights per year. Greater reductions occur when the obligor has access for 104, 156, and more than 175 nights. In France, child support is reduced when the obligor has the child 25% of the time. Child support is reduced in Canada when the obligor has the child 40% of the time. In Australia, child support begins to be reduced due to obligor access starting with 14% of all overnights (one night per week).

To make a parenting-time adjustment calculation, the country or state must specify how levels of contact are to be measured. While a few U.S. states attempt to measure time spent with each parent (e.g., one-fourth day, one-half day), the most common way to measure levels of access is in terms of how many nights the child spends with the parent. This is done due to the relative simplicity of this method, as well as the fact that, if a child spends the night with a parent, it is likely that the parent will provide dinner and breakfast. (Oregon generally uses overnights, but another method may be used if a parent has frequent contact that does not consist of overnights.) Another related question is whether the child

36. See MINN. STAT. § 518A.36(1)(a) (2020); WYO. STAT. ANN. § 20-2-304(c); IOWA CT. R. 9.9; NORTH CAROLINA CHILD SUPPORT GUIDELINES, Form AOC-CV-628, at 5 (Mar. 1, 2020), https://www.nccourts.gov/assets/documents/forms/a162_1.pdf?xjkrR4e2imYNRbMDxXJT1ppuFWJUaUWF; FLA. STAT. ANN. § 61.30(11)(a)(10), (b) (West 2020); 750 ILL. COMP. STAT. ANN. 5/505(a)(3.8) (West 2020); IND. CT. CHILD SUPPORT RULES & GUIDELINES, GUIDELINE 6, https://www.in.gov/judiciary/rules/child_support/#g6.
support should be calculated based on the parenting time set forth in the decree or the parenting time actually occurring or both.38

As mentioned earlier, of those states that have adopted a formula for the reduction of child support based on access levels, they do not agree regarding when the child support amount should begin to be reduced. Some states require nearly equal timesharing before the adjustment is applied. In other states, the child support amount is reduced by a small amount even with a very low level of access.39 In the states that reduce support beginning with low levels of access, the child support reduction gradually increases as the number of overnights increases.40 These parenting-time reduction schedules were created to attempt to give the obligor parent credit for the additional expenses that are incurred as parenting time increases.

Further, when the child support reduction starts at few overnights, there is not a precipitous drop in the guidelines support amount at any level of access. Such a precipitous drop in the child support amount with a small change in access is referred to as a “cliff effect.” For example, if a substantial number of overnights are required before a parenting-time adjustment can be made, and the guidelines-calculated amount is significantly reduced with additional access, then cliff effects are created. The cliff effect becomes larger as the minimum threshold is increased.

This is shown by comparing in Figure 2 the amount of support that would be due under the Illinois child support guidelines schedule using the Illinois timesharing reduction formula, which uses a 146-overnight threshold for applying the Illinois shared physical care adjustment,41 to how the support amount would change if the Colorado threshold of more than 92 overnights would be applied to the Illinois child support guidelines schedule.42 (Both Illinois and Colorado use the same general timesharing adjustment


40. See id.


42. See COLO. REV. STAT. § 14-10-115(3)(b) (2020).
The comparisons consider a scenario where the father’s net income is $4,000 per month, the mother’s net income is $3,000 per month, there is one child, and there are no other adjustments. It is assumed in Figure 2 that the father is the lesser-time parent. The figure shows the changes in the monthly order amount as the lesser-time parent has more time with the child. The figure starts at zero timesharing, skips to 16% timesharing, and then tracks with one percent increases in the percent of overnights until equal physical custody of 50%. (Including one percent increments from 0–16% in the figure would make the graph unwieldy to read.) The cliff effect that results from the Illinois approach is much more dramatic than the cliff effect arising from the Colorado timesharing threshold.

Figure 2
Illustration of the Impact of Lower and Higher Timesharing Thresholds:
(Case Scenario: Income shares calculation using the Illinois income shares Schedule for one child where the lesser-time parent’s net income = $4,000 per month and the greater-time parent’s net income = $3,000 per month.)

2. Timesharing Adjustments and Low-Income Recipients

One question presented by parenting-time child support reductions is whether they should be granted if they would significantly harm the financial condition of the household of the recipient parent. A few courts have not granted parenting-time reductions due to the low income of the recipient parent. The parenting-time adjustment rules in Missouri, Virginia, and New Jersey provide that generally no support adjustment should presumptively occur if the recipient-parent’s income is below a certain specified level.

C. Formulas for Adjusting for Timesharing

With the exception of the “cross-credit formula” (which is also called the “offset formula” in some states), no other timesharing formula is used by more than two states. The cross-credit formula is used by 23 states.

1. Cross-Credit Formula

The cross-credit formula essentially calculates a theoretical order for each parent weighed by the percentage of time with the other parent. The parent with the larger theoretical order is the obligor parent and owes the difference between the two theoretical orders. Colorado was the first state to adopt this method and promulgated it in 1986.

The first step in calculating the child support amount under an income shares approach in most states using the cross-credit formula is to

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45. The Missouri guideline sets forth a level of “adjusted monthly income” of the recipient parent below which a parenting-time adjustment generally should not occur. This income level changes with the number of children in the household. See Directions, Comments for Use and Examples for Completion of Form No. 14, at 8, Child Support Forms, Mo. COURTS (updated Mar. 13, 2019), https://www.courts.mo.gov/file.jsp?id=114614 [hereinafter Directions, Mo. Child Support Forms]. In Virginia, the adjustment is not presumptively to be made if either parent’s gross income is less than or equal to 150% of the federal poverty level. See VA. CODE ANN. § 20-108.2(G)(3)(d) (2020). In New Jersey, the adjustment is not presumptively made if the net income of the recipient parent is less than two times the poverty level for the recipient’s household size. See N.J. CT. R. app. IX-A § 13(b)(3) (2020), https://njcourts.gov/attorneys/assets/rules/app9a.pdf.

46. See Venohr, Parenting-Time Expense Adjustment, supra note 18, at 10, which counted 21 states in 2015. Since then, Illinois, Nevada, and North Dakota have also adopted the cross-credit formula, while Minnesota no longer uses it. See 750 ILL. COMP. STAT. ANN. 5/505(a) (3.8) (West 2020); NEV. ADMIN. CODE § 425.115(3); N.D. ADMIN. CODE 75-02-04.1-08.1 (2020); MINN. STAT. § 518A.36 (2020).

47. See COLO. REV. STAT. § 14-10-115(8)(b) (2020).
increase the basic obligation owed by both parents by 50%\textsuperscript{48} to account for some child-rearing expenses being duplicated when both parents have substantial access (i.e., the cost of housing and some transportation expenses). In other words, the cross-credit formula with such a multiplier assumes it costs more to raise a child in two households when both parents have substantial access than it does in one household. (A few states do not utilize a multiplier or use a multiplier other than 1.5.)\textsuperscript{49}

As shown in Figure 3, each parent’s share of that larger theoretical support amount is determined (under an income shares approach) based on each parent’s share of combined parental income. Once each parent’s shared-care enhanced child support obligation is calculated, that amount is multiplied by the percentage of overnights the child spends with the other parent. The smaller number is then subtracted from the larger number to arrive at the child support amount. The parent with the larger amount would pay the other parent the difference between the two amounts.\textsuperscript{50}

**Figure 3**

*Illustration of the Cross-Credit Adjustment*

<table>
<thead>
<tr>
<th>Line</th>
<th>Description</th>
<th>Parent A</th>
<th>Parent B</th>
<th>Combined</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Monthly net income</td>
<td>$4,000</td>
<td>$3,000</td>
<td>$7,000</td>
</tr>
<tr>
<td>2</td>
<td>Percentage share of income</td>
<td>57%</td>
<td>43%</td>
<td>100%</td>
</tr>
<tr>
<td>3</td>
<td>Basic obligation for 1 child (from Illinois Schedule)</td>
<td>$1,136</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Shared-care enhanced child support obligation (Line 3 multiplied by 150%)</td>
<td></td>
<td>$1,704</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Each parent’s share (Line 2 × Line 4)</td>
<td>$971</td>
<td>$733</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Overnights with each parent (must total 365)</td>
<td>146</td>
<td>219</td>
<td>365</td>
</tr>
<tr>
<td>7</td>
<td>Percentage time with each parent (Line 6 divided by 365)</td>
<td>40%</td>
<td>60%</td>
<td>100%</td>
</tr>
<tr>
<td>8</td>
<td>Each parent’s obligation (for Parent A, Parent A’s line 5 × Parent’s B Line 7; For Parent B, Parent B’s line 5 × Parent’s A Line 7)</td>
<td>$583</td>
<td>$293</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>Shared custody obligation (subtract smaller from larger on Line 8)</td>
<td></td>
<td>$290</td>
<td></td>
</tr>
</tbody>
</table>


\textsuperscript{50} For example, see Valdes v. Valdes, 154 So. 3d 1165, 1166–67 (Fla. Dist. Ct. App. 2015).
(An alternate way to make this calculation is to multiply each parent’s enhanced shared-care child support amount by that parent’s percentage of overnights, and then to subtract that amount from the enhanced shared-care child support amount to arrive at the amount each parent owes the other parent. Then the lower amount would be subtracted from the higher amount to arrive at the child support obligation.) Under this approach, if the shared-care child support amount is greater than the amount that would have resulted from a sole custody award, the parent normally pays the smaller amount.51

All states using a cross-credit approach set a certain timesharing threshold for its use. States do not agree regarding the appropriate threshold. Alaska and Vermont have chosen 30% of overnights, the District of Columbia has chosen 35%, and Illinois utilizes 40%.52 The cross-credit approach is commonly used with an income shares approach, although a few states with percentage-of-obligor income guidelines (such as Alaska and Wisconsin) also use it.53

There are some strengths and weaknesses to the cross-credit with multiplier approach. The major strengths of a cross-credit formula are that it has been used for decades by many states and is easily explainable. The first weakness is that the child support is not reduced until the parenting-time level reaches the threshold. Once the parenting time reaches the threshold, child support frequently goes down substantially as parenting-time levels increase above the threshold. This creates a cliff effect. (This is evident in Figure 2.) Small variations in parenting time can result in substantial changes in child support. When there is a cliff effect, particularly a large cliff effect, there is a concern that the child support recipient may oppose the obligor’s parenting time meeting the amount of timesharing required for the adjustment, while the obligor might want to meet that threshold. The result can be more litigation over parenting time.54 Some commentators have questioned whether this is a significant

51. E.g., COLO. REV. STAT. § 14-10-115(8)(b).
52. See ALASKA R. CIV. P. 90.3(b), (f)(1), https://public.courts.alaska.gov/web/rules/docs/civ.pdf?page=124; D.C. CODE § 16-916.01(q)(1); VT. STAT. ANN. tit. 15, § 657(a) (2020); 750 ILL. COMP. STAT. ANN. 5/505(a)(3.8) (West 2020).
54. In 2016, the committee reviewing the Minnesota approach stated that one primary goal was to adopt a new approach that did not have a significant cliff effect. See MINN. DEP’T OF HUM. SERV. CHILD SUPPORT DIV., CHILD SUPPORT WORK GROUP FINAL REPORT 3, 10–11 (2016), https://mn.gov/dhs/assets/child_support_work_group_2016_tcm1053-166182.pdf.
problem; also, some parents may not be familiar with the law or may misunderstand it.

The second perceived weakness of this cross-credit approach is that it can result in the greater-time parent paying child support to the lesser-time parent if the lesser-time parent’s income is substantially less than that of the other parent. While such a result is controversial in some states, it is perceived to be a desirable outcome in some other states.

2. MATHEMATICAL VARIATIONS TO THE CROSS-CREDIT FORMULA

There are at least two mathematical variations of the cross-credit formula. One variation is used by Michigan and Minnesota. The other variation is used by Oregon. The mathematical structure of these two formulas is rooted in the cross-credit formula, but they do not require a timesharing threshold for their application. These approaches have also been called “advanced math” or “non-linear” formulas because they are complicated mathematical formulas with exponential functions. The use of an exponential function allows the dollar reduction of the child support order for more overnights to increase gradually, rather than have a cliff effect. Figure 4 shows the formulas of these three states. Figure 5 compares the order amounts for the same case scenario shown in Figure 2 (the father is the lesser-time obligor parent with a net monthly income of $4,000 and the mother’s net monthly income is $3,000). That is, the Michigan, Minnesota, and Oregon formulas (and a cross-credit formula with a threshold of 92 overnights) are applied on top of the Illinois child support guidelines schedule for comparison purposes to illustrate the impact of the timesharing formula, rather than the guideline support amount differences among states.


### Figure 4

**Formulas of States That Have Modified the Cross-Credit Approach**

<table>
<thead>
<tr>
<th>Formula</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Michigan</strong>&lt;sup&gt;58&lt;/sup&gt;</td>
<td>$[(A_0)^{2.5} \times (B_0) - (B_0)^{2.5} \times (A_0)]/[(A_0)^{2.5} + (B_0)^{2.5}]$</td>
</tr>
<tr>
<td>$A_0$</td>
<td>Approximate percentage of overnights the children will likely spend with parent A annually</td>
</tr>
<tr>
<td>$B_0$</td>
<td>Approximate percentage of overnights the children will likely spend with parent B annually</td>
</tr>
<tr>
<td>$A_s$</td>
<td>Parent A’s base support obligation</td>
</tr>
<tr>
<td>$B_s$</td>
<td>Parent B’s base support obligation</td>
</tr>
<tr>
<td><strong>Minnesota</strong>&lt;sup&gt;59&lt;/sup&gt;</td>
<td>$[(A_0)^3 \times (B_0) - (B_0)^3 \times (A_0)]/[(A_0)^3 + (B_0)^3]$</td>
</tr>
<tr>
<td></td>
<td>Same key as Michigan</td>
</tr>
<tr>
<td><strong>Oregon</strong>&lt;sup&gt;60&lt;/sup&gt;</td>
<td>Credit percentage = $1/(1 + e^{(-7.14 \times ((overnights/365) – 0.5))} – 2.74% + (2 \times 2.74% \times (overnights/365))$</td>
</tr>
</tbody>
</table>

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58. See 2017 MICHIGAN CHILD SUPPORT FORMULA MANUAL, supra note 56, § 3.03(A)(2).
59. MINN. STAT. § 518A.36(2)(b).
60. OR. ADMIN. R. § 137-050-0730(6).
As shown in Figure 4, the elements of the Michigan and Minnesota formulas are similar to the cross-credit formula in that both consider each parent’s share of the basic obligation and weight it by the percentage of time the child is with the other parent. The difference is neither the Michigan timesharing adjustment nor the Minnesota timesharing adjustment applies a multiplier to the basic obligation. Instead, both states make an exponential function of the percentage of time: Michigan takes it to the 2.5 power and Minnesota takes it to the third power, which essentially cubes it. This causes the timesharing formula to start off with small adjustments when the lesser-time parent has few overnights and increases the adjustment as the parents move toward almost equal custody.

Figure 5 shows significant differences in support amounts in the four timesharing formulas when the lesser-time parent has few overnights, but the differences in the order amounts produced by the different timesharing formulas narrow as the lesser-time parent’s time with the child approaches almost equal physical custody. When the lesser-time parent has the child for 40% of the time, the order amount would be $292 per month under the cross-credit formula with a 150% multiplier, $347 per month under...
the Michigan timesharing formula, $389 per month under the Minnesota timesharing formula, and $282 per month under the Oregon timesharing formula. (The reader should keep in mind that the timesharing formulas are applied to the Illinois schedule to not confound differences among the timesharing formulas with differences with state child support schedules.) Figure 5 also shows that the Michigan timesharing adjustment produces a larger reduction than the Minnesota timesharing adjustment. In other words, the higher the exponential power used in the formula, the smaller the reduction.

The Oregon formula produces the greatest adjustment at low levels of timesharing. The Oregon formula was developed by a mathematics professor to yield gradual changes when the lesser-time parent had little time with the child and larger changes when the lesser-time parent has almost equal custody, and it was also designed to track what a cross-credit formula with a 1.5 multiplier would yield at almost equal custody.\textsuperscript{61} For ease of use, Oregon has developed a lookup table of overnights and percentage adjustments from its formula as well as an automated calculator.\textsuperscript{62} An excerpt of the Oregon lookup table is shown in Table 1.

### Table 1

Excerpt of the Oregon Lookup Table\textsuperscript{63}

<table>
<thead>
<tr>
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The Relationship Between Child Support and Parenting Time

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The major advantages to the mathematical variations of the cross-credit formulas are that they produce gradual reductions to the child support order as overnights increase (no cliff effect), they recognize that the rate of reduction should be less when there is little timesharing and more when there is greater timesharing, and they do not require a timesharing threshold. The disadvantages are that the formulas are not easily explainable, they cannot be calculated manually, and they can produce an adjustment at a very low number of overnights. The adjustment for a low number of overnights is a concern to policymakers who believe that the parent with more overnights does not incur a reduction in child-rearing expenditures until the child spends a substantial number of overnights with the other parent.

Published in Family Law Quarterly, Volume 54, Numbers 1 & 2, 2020. © 2021 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
3. VARIABLE EXPENSES AND FIXED, DUPLICATED, AND NONDUPLICATED EXPENSES

A few states (e.g., Arizona, Indiana, Missouri, and New Jersey) premise their parenting-time adjustments on expenses of children grouped into three categories: variable expenses (which travel with the child, such as food), duplicated fixed expenses incurred by both parents (such as the cost of housing), and nonduplicated fixed expenses (such as clothing). Although this is the premise underlying the parenting-time formulas in these states, the premise is not always evident because each of these states (except New Jersey) has converted the formula to a sliding-scale lookup table. Nonetheless, Indiana, Missouri, and New Jersey specifically discuss the foundation of this adjustment in their guidelines.

Indiana, Missouri, and New Jersey have not changed their underlying assumptions. Indiana assumes 35% of child-rearing costs are variable, Missouri assumes 38% are variable, and New Jersey assumes 37% are variable. Another difference between the timesharing adjustments in these states is that all require a different minimum amount of overnights for an adjustment: Arizona requires at least four parenting-time days per year, Indiana generally requires at least 52 overnights per year, Missouri requires at least 36 overnights per year, and New Jersey generally does not specify a number of overnights for its adjustment for overnights not exceeding two or more per week.

At low levels of obligor parenting time, such timesharing adjustments try to give the obligor credit for variable expenses only. At higher levels of parenting time, the obligor is also given credit for duplicated fixed expenses. For example, New Jersey begins to include adjustments for

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64. VENOHR, PARENTING-TIME EXPENSE ADJUSTMENT, supra note 18, at 10–11. Arizona has changed its shared-parenting adjustment over the years such that it no longer obviously links to the concept of variable, duplicated fixed, unduplicated, and fixed child-rearing expenses.


68. For a more lengthy discussion of these schedules, see VENOHR, PARENTING-TIME EXPENSE ADJUSTMENT, supra note 18, at 10–11.
duplicated fixed expenses when the lesser-time parent has at least two overnights per week (28% timesharing).69

There is a dearth of research confirming whether a particular expense is variable, duplicated fixed, or nonduplicated fixed. However, most states assume housing expenses, which is the largest expenditure category, are a duplicated fixed expense. States are mixed on their treatment of transportation expenses, which are the second-largest category of expenses. Depending on the state, some or all transportation expenses are considered variable expenses.70 Food is normally considered a variable expense. Other categories of expenses, such as clothing, entertainment, and personal items, are less clear in their categorization. Yet these expenses comprise smaller shares of total child-rearing expenditures. A 2000 survey of parental expenditures regarding the living expenses of college students explored the classification of variable/duplicated fixed/nonduplicated fixed expenses and found conflicts with state assumptions.71 For example, many of the college students recalled that their nonresidential father purchased clothing for them,72 while clothing is typically deemed a nonduplicated fixed expense (hence, only incurred by one parent) in the states using this classification.

Figure 6 compares the parenting-time formulas for Arizona, Indiana, Missouri, and New Jersey using the same case scenario considered in Figures 2 and 5 (the father is the lesser-time obligor parent with a net monthly income of $4,000 and the mother’s net monthly income is $3,000) and applying each of the state’s timesharing formulas to the Illinois income shares child support schedule. When the lesser-time parent has 40% timesharing, the order amount would be $300 per month under the Arizona timesharing formula, $272 per month under the Indiana timesharing formula, $342 per month under the Missouri timesharing formula, and $333 per month under the New Jersey timesharing formula.

69. See N.J. Ct. R. app. IX-A § 13(a), 14(c)(2).
70. For example, New Jersey considers the cost of the child’s transportation to be a variable expense, while Indiana considers only some of the transportation expenses. Compare N.J. Ct. R. app. IX-A § 13(a)(2), with Ind. Ct. Guideline 6 cmt., supra note 65.
72. Id. at 327.
The Arizona parenting-time formula, which is shown in Table 2,\(^{73}\) consists of 13 intervals. The wide range of overnights within an interval (e.g., a 16.1% adjustment for 88 to 115 overnights) causes the downward staircase effect (i.e., notches) of the Arizona timesharing formula as the lesser-time parent has more time with the child. As observed in Figure 6, the Missouri parenting-time formula also has a downward staircase effect, but because it considers more and narrower timesharing intervals (18 intervals instead of 13 intervals like Arizona does),\(^{74}\) the notches under the Missouri parenting-time formula are not as dramatic as those under the Arizona parenting-time formula.

The strengths of the variable/duplicated fixed/nonduplicated fixed timesharing premise are that it has a theoretical basis, can adjust for low levels of timesharing, and can be structured not to have a cliff effect. The weaknesses include the lack of empirical evidence on whether families actually organize their child-rearing expenditures this way and what the levels for each category of expense are, as well as the lack of clarity regarding at what timesharing threshold parents should move from sharing of variable expenses only to sharing of variable expenses and duplicated fixed expenses.

\(^{73}\) This is Parenting Time Table A from the Arizona Child Support Guidelines. The Guidelines also provide a Parenting Time Table B to be used when some child-rearing expenses are not substantially or equally shared in each household. **ARIZ. CHILD SUPPORT GUIDELINES** § 11 (Apr. 1, 2018), http://www.azcourts.gov/Portals/34/Forms/FamilyLaw/AOCDRS10H2018.pdf (depicting Parenting Time Tables A and B). Parenting Time Table B is rarely used, and there is a suggestion to eliminate it.

\(^{74}\) See Directions, **Mo. Child Support Forms**, supra note 45, at 8, Line 11 Direction.
Figure 6

Comparison of Variable, Duplicated Fixed, and Nonduplicated Fixed Formulas

(Case Scenario: Income shares calculation using the Illinois income shares schedule for one child where the lesser-time parent’s net income = $4,000 per month and the greater-time parent’s net income = $3,000 per month.)
Table 2

Arizona’s Parenting Time Table A

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4. OTHER FORMULAS

Some states have established a sliding scale for the reduction of child support once the level of access reaches a certain level. For example, the Iowa guidelines provide that an obligor’s obligation is to be reduced by 15% for 128 to 147 nights, 20% for 148 to 166 nights, and 25% for more than 167 nights (but less than equal physical custody). Iowa also provides that a cross-credit formula with a 150% multiplier should be applied when there is equal physical custody. Other states with sliding scales are Delaware and Kansas. The lowest adjustment percentage is 10% and the highest is 30% in these sliding-scale formulas. Pennsylvania and North Dakota essentially provide a formulaic version of the sliding scale that allows the percentage reduction to vary from 10–20% in Pennsylvania and 9–16% in North Dakota. Ohio simply provides an adjustment of

75. ARIZ. CHILD SUPPORT GUIDELINES § 11, supra note 73.
76. See IOWA CT. R. 9.9 (2020).
77. See id. R. 9.14(3).
The Relationship Between Child Support and Parenting Time

10% for 90 or more overnights per year. These percentage adjustments may be loosely linked to the concept such as variable/duplicated fixed/nonduplicated fixed child-rearing expenses, but this is not clearly stated in the guidelines.

Utah reduces its basic guidelines calculation by a factor of 0.27% for every overnight over 110 but not greater than 131 overnights. For overnights exceeding 131, Utah provides a deduction factor of 0.84% for each overnight. The 0.27% is the ratio of 100% divided by 365 overnights; hence, it is a per diem approach. It is not clear what the basis of the 0.84% is or why Utah set the threshold at 110 overnights. The Tennessee timesharing adjustment is also essentially a per diem adjustment. The Tennessee adjustment has a timesharing threshold of 92 overnights and is designed to result in an award of no support at 182.5 overnights when the parents have equal incomes.

To that end, the Tennessee adjustment factor for 92 overnights or more is the number of overnights multiplied by .0109589 (which is 2/182.5: that is, 92 overnights is a quarter of the year and 182.5 is half the year, so the timesharing formula contains percentages needed to result in a zero order at 50%/50% timesharing).

Figure 7 illustrates the impact of these different approaches by comparing the order amounts under the Iowa, Pennsylvania, Tennessee, and Utah timesharing formulas applied to the same case scenario considered in earlier figures (the father is the lesser-time obligor parent with a net monthly income of $4,000 and the mother’s net monthly income is $3,000), using the Illinois income shares child support schedule. When the lesser-time parent has the child 40% of the time, the order amount would be $479 per month under the Iowa timesharing formula, $536 under the Pennsylvania timesharing formula, $357 per month under the Tennessee timesharing formula, and $432 per month under the Utah timesharing formula. Figure 7 shows that a sliding-scale percentage such as the Iowa timesharing formula and Pennsylvania’s timesharing formula produces cliff effects at each timesharing interval (128, 148, and 167 overnights in Iowa) or when the timesharing threshold is met (40% timesharing in Pennsylvania). In contrast, the per diem approaches used by Tennessee and Utah produce more gradual changes in the order amount as the child’s time with the lesser-time parent increases.

80. OHIO REV. CODE ANN. § 3119.051(a) (LexisNexis 2020).
81. UTAH CODE ANN. § 78B-12-208(3)(a) (LexisNexis 2020).
82. Id. § 78B-12-208(3)(b).
83. TENN. COMP. R. & REGS. § 1240-02-04-.04(7)(b)(2), (4)(i).
The strength of the sliding scale and per diem timesharing adjustments is that they are simple. The weaknesses are that the adjustment thresholds can still result in cliff effects and the percentage adjustments can appear arbitrary.

5. SUMMARY OF TIMESHARING ADJUSTMENTS FOR WHEN LESSER-TIME PARENT HAS MORE INCOME

Many states have adopted formulas for reducing child support based on the obligor’s parenting time. In these states, the criteria for applying the adjustment, the adjustment formulas, and formula parameters vary widely. Only the cross-credit with a 150 multiplier is used by more than two states. Due to these large variations, state timesharing formulas produce very different order amounts even when the same child support schedule is used. This is illustrated by Figure 8, which compares the 12 different timesharing formulas graphed earlier using the same case scenario (the monthly income of the lesser-time parent is $4,000 and the monthly income of the other parent is $3,000) and the Illinois income shares child support guidelines schedule, and assumes that the lesser-time parent cares...
The Relationship Between Child Support and Parenting Time

for the child 40% of the time. It shows the monthly order ranges from $272 per month using the Indiana timesharing formula to $536 per month using the Pennsylvania timesharing formula. In contrast, the sole custody order for this case in Illinois is $649 per month.

**Figure 8**

*Comparison of the 12 Formulas When Lesser-Time Parent Has Child 40% of Time*

(Case Scenario: Income shares calculation using the Illinois schedule for one child where the lesser-time parent’s net income = $4,000 per month and the greater-time parent’s net income = $3,000 per month.)

The information presented in Figure 8 should not be used to rank which state timesharing formulas produce more or less support orders. As is seen in the next section, the rankings vary with the circumstances of the case scenario being considered.

**III. Calculating the Child Support Order When Both Parents Have Equal Physical Custody**

Most formulas used for the scenario where the lesser-time parent has more income and substantial access apply when both parents have equal physical custody. However, a few states with parenting-time adjustment formulas for substantial access have decided to use a different approach when parents have equal physical custody. Most states with a different
formula rely on the sliding-scale formula or the variable/duplicated fixed/nonduplicated fixed formula. These states also need to clarify what constitutes “equal physical custody.” For example, would an arrangement of 45%/55% parenting time constitute equal physical custody?84

Some have argued that there should not be a child support obligation if there is equal physical custody. For example, in Western Europe, some countries abate child support when there is equal physical custody.85 This approach is generally not accepted in the United States, at least when the parents have different incomes.

In most states, including all states using the cross-credit formula at lower levels of timesharing, the parenting-time adjustment approach to substantial access also applies to equal physical custody. Pursuant to the cross-credit approach discussed above, when there is equal physical custody, the higher-income parent would pay some child support to the other.86 However, if both parents have equal incomes, no child support would be due.87 The modifications to the cross-credit adopted in Oregon, Michigan, and Minnesota also result in no child support when there are equal physical custody and equal incomes.88

Not all states agree that when there are equal joint physical custody and equal income, no child support should be due. For example, in some of the states that reduce child support using the concept of variable/duplicated fixed/nonduplicated fixed expenses, such as Indiana and New Jersey, there is an assumption that, even with equal physical custody and equal incomes, one parent may be paying the nonduplicated fixed expenses relating to the child, so some child support should be due.89 Some states with a sliding-scale percentage or a percentage formula, such as Pennsylvania, also do not produce a zero order when there are equal physical custody and equal income. Also, in some of these states, such as Iowa90 and North Dakota,91 there is a different formula for equal physical custody.

Figure 9 compares the results of the 12 parenting-time adjustment formulas applied to an equal physical custody situation and the Illinois

84. E.g., Bluestein v. Bluestein, 345 P.3d 1044 (Nev. 2015) (joint physical custody exists where both parents have physical custody of the child at least 40% of the time).
86. See VENOHR, PARENTING-TIME EXPENSE ADJUSTMENT, supra note 18, at 17.
87. Id. at 15.
88. Id.
89. Id. at 10–12.
90. See IOWA CT. R. 9.14(3).
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income shares child support schedule. It considers two scenarios. The first scenario is the same scenario that has been considered in previous figures: There is one child, the father has a net income of $4,000 per month, and the mother has a net income of $3,000 per month. The first scenario reveals a wide variation in the results of the parenting-time formulas with the exceptions of the mathematical modifications of the cross-credit formula used by Michigan, Minnesota, and Oregon. Each of these mathematical formulas yields an order of $81 per month because of the similarities in their mathematical calculation. The parenting-time formulas of the other states all yield greater amounts. The states using the variable/duplicated fixed/nonduplicated fixed concept (with the exception of Arizona) and the percentage adjustment at equal physical custody (e.g., Pennsylvania) and Tennessee’s per diem approach yield considerably higher amounts.

In the second scenario, there is still one child, but the parents have equal incomes: Each parent has a net income of $4,000 per month. Figure 9 shows 7 of the 12 timesharing formulas considered produce a zero order when there are equal physical custody and equal income. This includes the cross-credit formula with 150% multiplier, the mathematical modifications of the cross-credit approach (the Michigan, Minnesota, and Oregon parenting-time formulas), the Arizona formula (which has modified its variable/duplicated fixed/nonduplicated fixed premise to produce a zero order when there are equal physical custody and equal incomes), the Tennessee parenting-time formula (which is a per diem approach), and the Iowa parenting-time formula (which provides for a cross-credit with 150% multiplier at equal physical custody). While the Utah timesharing formula comes close to zero for the equal physical custody and equal income with a three-dollar-per-month order, the state parenting-time formulas using the pure variable/duplicated fixed/nonduplicated fixed concept do not because there is always one parent who incurs some nonduplicated fixed expenses. New Jersey assumes that the parent incurring the fixed expenses in equal physical custody is the parent with whom the child resides mostly when attending school.

The comparisons in Figure 9 should not be used to draw the conclusion that there are substantial orders for all cases involving equal physical custody and equal incomes. It is not uncommon for parties with almost equal physical custody and almost equal incomes to agree upon a zero order.
IV. Calculating the Child Support Order When the Lesser-Time Parent Has a Lower Income Than the Other Parent

A. Formulas

It is normally assumed that the lesser-time parent will pay support to the greater-time parent. One reason for this is that it was assumed that the income of the lesser-time parent would be greater than that of the other parent. Should this rule extend to situations where the income of the lesser-time parent is less than that of the other parent? The underlying premise of the income shares model is that both parents should contribute financially toward the cost of raising their child in proportion to their share of the parents’ combined income. For example, in a Colorado case,

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the lesser-time parent with a monthly income of $2,000 was ordered to pay child support to the greater-time parent, who had a monthly income of $19,500.\textsuperscript{93} In many such cases, the standard of living of the lower-income parent would be lower than that of the other parent, even before the income transfer required by a child support obligation.\textsuperscript{94} Still, creating a special rule for a situation when the lesser-time parent has a lower income than the other parent would be inconsistent with the cross-credit formula, which essentially calculates a theoretical order for each parent, weights each parent’s theoretical order by the child’s time with the other parent, and provides that the parent with the larger amount owes the other parent the difference.\textsuperscript{95} In other words, the cross-credit formula is just a mathematical calculation indifferent to which parent pays support in these circumstances. It is just where the numbers land.

Figure 10 compares some parenting-time formulas shown earlier for a scenario where the father is the lesser-time parent with a net income of $4,000 per month and the mother’s net income is $5,000 per month. There is one child and the Illinois child support schedule is applied to each state’s timesharing formula. Figure 10 shows that four of the six timesharing formulas result in the mother owing the father child support for this case scenario, even when the father is the lesser-time parent with substantial access. The obligated parent flips from the father to the mother at 45% timesharing under the cross-credit formula with the 150% multiplier, 46% timesharing under the Tennessee timesharing formula, 47% timesharing under the Oregon timesharing formula, and 50% timesharing under the Indiana timesharing formula. Although not shown, it would also flip for the Michigan and Minnesota timesharing formulas. In other words, it will flip using the cross-credit formula and mathematical modifications to the cross-credit formula. Tennessee uses a per diem formula, which will generally flip depending on the parameters. Sliding-scale percentages and formulas, such as what Pennsylvania uses, will not flip. Whether the variable/duplicated fixed/nonduplicated fixed formulas flip depends on the parameters. As shown in Figure 10, the Indiana timesharing formula, which is based on the variable/duplicated fixed/non-duplicated fixed concept, flipped, while Missouri’s version of the concept did not for this particular scenario.

\textsuperscript{93} See Marriage of Antuna, 8 P.3d 589, 596–97 (Colo. App. 2000).
\textsuperscript{95} See supra text accompanying notes 46–53.
At 50% timesharing for this scenario, the cross-credit formula with a 150% multiplier would result in the mother owing the father $113 per month, the Oregon timesharing formula would result in the mother owing the father $75 per month, the Tennessee timesharing formula would result in the mother owing the father $150 per month, the Indiana timesharing formula would result in the mother owing the father $2 per month, the Pennsylvania timesharing formula would result in the father owing the mother $331 per month, and the Missouri timesharing formula would result in the father owing the mother $141 per month. Missouri, however, does indicate a guidelines deviation could be granted for this circumstance.

The reader should note that although Figure 10 shows four of the six state timesharing formulas flip which parent is obligated to pay support, the outcome will differ depending on the circumstances of the case. The flipping could occur at a lower level of timesharing if the lesser-time parent has significantly lower income relative to the other parent. Further, a guidelines deviation may be granted for this circumstance.
A few states have adopted an absolute rule or have case law that if a greater-time parent has the child for more than a specified number of overnights, that parent cannot be ordered to pay child support. Other states have adopted a presumption that the obligated parent should have a reduction in child support once the number of overnights exceed a certain number.

**B. Case Law**

Because courts may deviate from the guidelines when appropriate or just or in the best interest of the child, case law often informs the treatment of shared-parenting situations. Perhaps the most challenging cases of this type involve situations where the greater-time parent has a high income and the other parent has substantial access and a low income. For example, in a recent Illinois case, the father’s net monthly income was almost $21,000 and the mother’s net monthly income was $929. The mother had substantial access, but less than 50% of all overnights. Over the father’s objection, the appellate court affirmed the trial court’s order that the father had to pay monthly child support of $3,990.

In a similar case, a New York court ruled that New York law did not give a New York court the power to order the custodial parent to pay child support, even when the greater-time parent was wealthy and the other parent had limited resources and substantial access. In contrast, the Pennsylvania Supreme Court reversed the denial of a child support award against a greater-time parent when the greater-time parent had a substantially higher income than the other parent and the other parent had contact for about 27% of the year. The Illinois Supreme Court has also affirmed an order finding the court had authority to require the greater-time parent to pay child support to the other parent, who had “nearly equal” time with one of the children but less-frequent contact with the other child, when the lesser-time parent’s income was much lower than that of the other parent.

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99. Id. at 833.
100. Id. at 835–39.
102. See Colonna v. Colonna, 855 A.2d 648, 651–52 (Pa. 2004). The case was remanded for further proceedings. Id.
greater-time parent. In both of these cases, the Pennsylvania and Illinois supreme courts were generally supportive of requiring the greater-time parent to pay child support when the greater-time parent’s income was significantly higher than that of the other parent.

A recent Texas case presented a similar issue. Texas relies on a percentage-of-obligor income guideline formula. While the statute is not totally clear, it has been assumed by lawyers and judges that the guideline is to be applied to the income of the lesser-time parent. (Of course, the court can deviate from this presumptive amount if there is a reason to deviate.) In this particular case, the parents were granted joint legal custody. The father (who had a significantly higher income than the mother) was granted more than 70% of all overnights. To calculate the presumptive child support award, the trial court calculated the presumptive child support award that the mother would have owed under the guidelines and subtracted it from the presumptive award that the father would have had to pay based on his income. (Texas has no specific formula for reducing child support due to parenting time.) The trial court concluded that the father therefore should pay the mother monthly child support based on the difference between the two presumptive obligations because it was “in the child’s best interest to have an adequate amount of resources available in each home to support the child.” The appellate court affirmed.

The authors believe that the cases summarized above in this section create a great deal of uncertainty regarding how a child support award should be calculated if the greater-time parent has a significantly higher income than the other parent. One of the goals of child support guidelines was to create more predictability in child support awards. There seems to be some disagreement as to how guidelines should be applied when the

103. See In re Marriage of Turk, 12 N.E.3d 40, 43–51 (Ill. 2014). When this article was about to be published, the Court of Special Appeals of Maryland issued an opinion affirming an award of child support from the greater-time parent to the lesser-time parent. In this case, the greater-time parent had an annual salary of approximately $1.3 million, while the other parent had an annual salary of $50,000. Kaplan v. Kaplan, No. 3387, 2020 WL 6789989, at *2–3, 11–13 (Md. Ct. Spec. App. Nov. 18, 2020).


105. See id. § 154.123.


107. Id. at *8.

108. Id. at *2, *3.

109. Id. at *2.

110. Id. at *4, *9–10.
The Relationship Between Child Support and Parenting Time

greater-time parent has a higher income than the other parent, and this uncertainty will encourage litigation.

The Georgia Supreme Court considered a case very similar to the Texas In re A.R.W. case discussed above. At the time this case was decided, Georgia, like Texas, relied on a percentage-of-obligor income guideline formula and had no specific formula for reducing child support due to parenting time. In a custody modification action, the court awarded the father 60% of the parenting time and the mother 40%. The father had a higher income than the mother. To calculate the child support obligation, the Georgia trial court, like the court in In re A.R.W., subtracted the amount that the mother would be ordered to pay under the guidelines from the presumptive amount the father would have to pay if the guideline would be applied to his income and ordered the father to pay the mother the difference, which was $1,087 per month. The Georgia Supreme Court ruled that the trial court had misapplied the guidelines. To calculate the presumptive award, the Georgia Supreme Court clarified that the guidelines should be applied to the income of the lesser-time parent. The Georgia Supreme Court explained that the trial court can, of course, then deviate from the presumptive amount for good cause. The Georgia Supreme Court stated that it could be possible to order the greater-time parent to pay child support if adequate grounds for deviation could be established to do so. However, because the trial court had misapplied the guidelines, the Georgia Supreme Court reversed the child support order of the trial court and remanded the case for the trial court to recalculate child support.

Perhaps some objective standard could be established to govern the award of child support when the income of the greater-time parent exceeds that of the other parent, particularly in those states that have not adopted a parenting-time adjustment formula. For example, one type of objective standard would be to specify that, if the lesser-time parent’s income is less than a certain specified percentage of the income of the other parent, and the lesser-time parent has the child for at least a certain specified number of overnights, the greater-time parent can be ordered to pay child support.

112. Id. at 682.
113. Id. at 680.
114. Id. at 682–83.
115. Id.
116. Id.
A disadvantage of such a system is that it could create a substantial cliff effect at the threshold. As was mentioned above, a number of parenting-time adjustment approaches clarify when the greater-time parent should pay child support and the presumptive amount of the support payment.

V. Other Concerns

One concern regarding parenting-time adjustments for child support is that, over time, parenting time will decrease. This would require the greater-time parent to go to court to modify support to reduce or eliminate the child support parenting-time reduction. One study found that, compared to the level of contact at divorce, for parents with a shared-care arrangement, there was some reduction in the level of contact for some fathers (19% of fathers with young children reduced contact, while 30% of fathers with older children reduced contact).118

Another concern is that timesharing will not occur as specified in the order. A Florida statute provides that, if an obligor parent does not regularly exercise the timesharing schedule set forth in the parenting plan, this is a substantial change in circumstances that can justify a modification in child support retroactive to the date the parent first failed to exercise the specified access rights.119 A few other states have similar provisions. Some states provide a simplified procedure for an order modification if the amount of parenting time used to calculate the support amount does not actually occur on a regular basis. None of these states clarify how large the difference between the amount of timesharing that occurred and what was considered in the order is required to be eligible for a modification.

Still another concern is if a “typical” level of timesharing is assumed in the standard basic child support schedule, what should be done if the timesharing is actually less? Tennessee and Pennsylvania are the only states with guidelines that explicitly state what a standard amount of timesharing is under the guidelines. The Tennessee guideline provides what the adjustment should be if actual timesharing is more or less than the standard amount. Pennsylvania, which incorporates an adjustment for 30% timesharing of the lesser-time parent in its basic child support schedule, does not specify a formula for when actual timesharing is less than 30%. Tennessee assumes a standard amount of timesharing of 80 overnights (every other weekend, two weeks in the summer, and two weeks during holidays through the year), and also uses a per diem approach to adjust

118. See Melli & Brown, supra note 5, at 256.
the basic formula amount upward if the lesser-time parent has the child 68 overnights or less per year. Some courts have endorsed increasing child support above the presumptive guideline amount if the obligor has little or no contact with the child.

VI. Summary and Policy Choices

This Article identifies several approaches to parenting-time adjustments in state guidelines. Some state guidelines provide for timesharing as a guideline deviation factor, while most states provide a parenting-time adjustment formula. The criteria for applying the parenting-time formula vary, but often a state-determined level of timesharing must be met before an adjustment is made.

By far the most common formula is a cross-credit formula with a specified minimum threshold of timesharing before an adjustment occurs. Three states have taken the basic concept of the cross-credit formula and mathematically modified it to result in a more gradual change in the order amount as the lesser-time parent’s time with the child increases. In addition to the states that have adopted some variation of a cross-credit formula, other states use a wide variety of parenting-time formulas. None of these other formulas are identical. A few states base their timesharing adjustment on the principle that child-rearing expenses can be classified as variable, duplicated fixed, and nonduplicated fixed. Under these formulas, the lesser-time parent receives credit for variable expenses at low levels of timesharing and additional credit for variable and duplicated fixed expenses at almost equal levels of timesharing. In addition, there are states that use a sliding-scale percentage adjustment or formula and still other states that use a per diem approach for timesharing above a state-determined threshold.

The graphs in this Article reveal certain differences among the various approaches. For example, the rate of decrease due to more overnights with the child generally is more gradual under the modified cross-credit formulas as well as under Indiana’s version of the variable/duplicated fixed/nonduplicated fixed timesharing formula. This occurs because a parenting-time adjustment begins at a relatively low level of access by the payor. In contrast, the cross-credit formula and sliding-scale percentages and formulas do not provide an adjustment until the specified timesharing

120. T enn. C omp. R. & R eg. 1240-02-04-.04 (7)(a), (i) (2020).
threshold is met. The cross-credit formula can have a significant cliff
effect at the timesharing threshold required for applying the adjustment.
When the recipient has no income, the child support amount under the
cross-credit with multiplier is greater than the amounts calculated using
the mathematically modified cross-credit formulas. When both parents
have equal incomes, many of the formulas go toward no child support with
equal joint physical custody, while most parenting-time formulas based on
the variable/duplicated fixed/nonduplicated fixed expense concept and the
sliding-scale percentage or formula do not. When the lesser-time parent’s
income is significantly less than that of the greater-time parent, under
the cross-credit and the modified cross-credit formulas and the per diem
approach, the greater-time parent begins to pay support once the lesser-
time parent’s percentage of overnights gets close to equal timesharing,
but not under most versions of the variable/duplicated fixed/nonduplicated
fixed expenses model or the sliding-scale percentage or formula.

A number of the differences in results mentioned above reveal policy
choices states make when adopting a parenting-time adjustment approach.
First, should the adjustment be applied when the recipient’s household
income is below a certain level? If so, what should that level be?

The parenting-time support reduction adjustments described above
presumptively apply once the obligor parent establishes that he or she
meets the specified threshold for a parenting-time adjustment. Should there
be any ground for not applying the parenting-time adjustment, other than
the relative poverty of the recipient parent, as mentioned in the previous
paragraph? If so, what other reasons should there be for not applying the
adjustment?

Second, should child support be reduced if there is a relatively low level
of obligor contact or should a more substantial threshold be specified before
support is reduced? Note that approaches with a threshold by definition do
not reduce support until the threshold level of access is reached, and then
reduce support more substantially as parenting time exceeds the threshold.
The cliff effect resulting from the threshold conceivably could increase
litigation, which could be a concern. However, it could be argued that it
is fair not to reduce child support until a certain threshold of contact is
met because the recipient’s expenses are not significantly reduced until the
obligor’s access is substantial.

Third, what should be the magnitude of the parenting-time child support
reduction at various levels of contact? (Note the large variation in award
amounts in Figure 8 for support when the obligor parent has possession
of the child 40% of all overnights and in Figure 9 when the parties have
equal physical custody.)
Fourth, should the greater-time parent ever have to pay child support to the other parent if the greater-time parent’s income is significantly higher? Should it be possible for the greater-time parent to be ordered to pay a substantial amount in support if the parents’ incomes are very different? Should the same formula be used when there is substantial access by the obligor, as when there is equal joint physical custody? If a different formula is to be used, what constitutes equal joint physical custody, when a different formula would apply? Further, if two different formulas are to be used, how can the transition from one formula to the second formula be made without a cliff effect?

Finally, should the parenting-time adjustment be made based on the level of access set forth in the court order, or should the adjustment be based on the actual number of overnights, if that differs from what is set forth in the order (or if there is no order)?

VII. Conclusion

States are required to review their child support guidelines at least once every four years. Most states review their guidelines through a commission or committee that typically consists of a wide range of stakeholders, such as attorneys, judges, representatives of the state child support agency, parents, children’s advocates, economists or accountants, and academicians. Adopting parenting-time formulas or expanding parenting-time formulas are often issues discussed in these reviews. Committees and commissions in states without parenting-time formulas generally are interested in adopting formulas to create greater consistency in shared-parenting situations and to respond to an increased number of cases with shared parenting. Many committees and commissions in states with parenting-time formulas, particularly those that require timesharing thresholds be met before an adjustment occurs, generally seek to alleviate the cliff effect.

Committees and commissions considering parenting-time adjustment formulas share two common objectives. The first objective is to keep the adjustment simple. The common beliefs are that a simple formula is easier to explain and easier to calculate and can be calculated manually. (This is a particular concern in states without automated calculators or where judges and decision-makers with authority to issue child support orders

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122. 45 C.F.R. § 302.56(e) (2020).
lack computers.) However, states often find a trade-off between keeping it simple and creating cliff effects. The second objective is to minimize parental strife regarding parenting time. The concern is that too large of an adjustment for substantial access will fuel more litigation over the obligor-parent’s time with the child.

Most recently, commissions have officially and unofficially favored the Oregon formula because of its gradual support decrease as the obligated parent’s time with the child increases. In addition, they are encouraged by Oregon’s reports that its formula does not increase litigation because each additional overnight creates a minuscule decrease in the order amount.\textsuperscript{124} However, final approval of any guidelines changes typically rests with the legislature or the state’s supreme court, depending upon whether the state sets its guidelines via legislation, court rule, or administrative rule.\textsuperscript{125} Legislatures and supreme courts appear to be less receptive to dramatic changes in parenting-time formulas and generally do not favor timesharing formulas (like the Oregon formula) that begin to reduce support after relatively few overnights.

The Oregon formula may seem particularly extreme in states that currently have no timesharing adjustment formula or have adopted a formula that requires a parent to have a large number of overnights before the adjustment is applied. For these states, it may be more attractive to adopt a cross-credit formula with a multiplier and a relatively low threshold, or if they have already adopted a cross-credit formula, the state could consider lowering the threshold. The effect of the change can be evaluated as a part of the next review of the state’s child support guidelines to determine whether the timesharing adjustment better serves children and families.


\textsuperscript{125} Most states with guidelines set in administrative rule also require legislative approval for substantive guidelines changes such as those that change the state timesharing formula.