EMORY | LAW

Emory Law Journal

Volume 72 | Issue 4

2023

# A Child's Constitutional Right to Family Integrity and Counsel in Dependency Proceedings

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# A CHILD'S CONSTITUTIONAL RIGHT TO FAMILY INTEGRITY AND COUNSEL IN DEPENDENCY PROCEEDINGS


## ABSTRACT

*Since the child welfare system's inception, abuse and neglect laws have conflated poverty-related neglect with active parental violence and willful neglect. The ensuing state surveillance has disproportionately harmed poor children and children of color. Pursuant to the state's expansive parens patriae authority, countless families are investigated, and thousands of children are separated from their caretakers each year—only to be returned within days or weeks after a finding that the reasons for removal were unsubstantiated. Other children risk drifting in foster care limbo until they experience the termination of parental rights—an adjudication so severe that some courts call it the "civil death penalty." Mounting empirical evidence on the racial disparities and trauma caused by the child welfare system has resulted in increasing calls for its abolition.*

*Despite the prominence of family values in American discourse, the Constitution does not speak to the family, and the Supreme Court has shied away from addressing children's rights in the family context—leaving children without a meaningful mechanism to assert their rights in dependency proceedings. Notwithstanding the Court's silence, this Comment argues that Supreme Court jurisprudence implies children have a constitutional right to family relationships free from unwarranted state interference—in other words, a right to family integrity.*

*Recognizing a child's right to family integrity has significant implications for the child welfare system. In the 1960s, the Supreme Court confronted how the juvenile justice system's procedural informality harmed children's liberty interests. As a result, the Court recognized a child's right to counsel in delinquency proceedings. However, the Court has yet to afford children such protection in dependency proceedings despite similar harms inflicted by the child welfare system's procedural informality. This Comment argues that to adequately safeguard a child's right to family integrity, children must be guaranteed the due process right to counsel in dependency proceedings.*

TABLE OF CONTENTS

## INTRODUCTION

One seemingly ordinary night in Brooklyn, Maisha Joefield tucked her five-year-old daughter Deja into her princess bed.[1] Exhausted, Maisha put on headphones and took a bath.[2] After soaking, she exited the bathroom—only to discover a mother's nightmare.[3] Deja was missing.[4] Maisha began "frantically searching."[5] Little did she know, Deja had wandered across the street toward a familiar destination: her great-grandmother's apartment.[6] Deja's short journey was intercepted by a passerby who called the police.[7] Despite Maisha's reasonable explanation and the officer's observation "that Deja appeared well looked after,"[8] Deja was taken into Child Protective Services ("CPS") custody and Maisha was charged with child endangerment.[9]

Over the next four days, five-year-old Deja was surrounded by strangers as she faced periodic interrogations about her home life.[10] Deja's great-grandmother repeatedly requested that CPS transfer Deja to her custody while Maisha's charges were pending.[11] CPS contacted Deja's pediatrician and school administrator, who both reported that Deja was intelligent for her age and well supported at home.[12] Still, CPS kept Deja separated from her family.[13]

Finally, the case was presented to a judge.[14] The judge determined that Deja's "risk of emotional harm" caused by the CPS-facilitated family separation outweighed the risk of possible neglect, and the judge ordered CPS to return

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[1] Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of 'Jane Crow'*, N.Y. TIMES (July 21, 2017), https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html.

[2] *Id.*

[3] *See id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* ("'There's this judgment that these mothers don't have the ability to make decisions about their kids, and in that, society both infantilizes them and holds them to superhuman standards. In another community, your kid's found outside looking for you because you're in the bathtub, it's "Oh, my God"'—a story to tell later, [Scott Hechinger, a lawyer at Brooklyn Defender Services] said. 'In a poor community, it's called endangering the welfare of your child.'").

[9] *Id.* The CPS employees worked for the New York City Administration for Children's Services, but for clarity, this Comment uses the equivalent government agency label, CPS.

[10] *Id.* Deja told the interviewers that she went to school every day and "usually ate pancakes for breakfast." *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

Deja to Maisha's care.[15] The hellish chapter of family separation appeared to close for Deja and Maisha, but the effects were far from over.[16] Although Maisha was never convicted of child endangerment, her name remained on the state registry of child abusers.[17] The registry prevented Maisha, a former daycare worker and single mother, from continuing to work with children.[18] Meanwhile, Deja experienced ongoing harms.[19] Deja's school administrator later reported that Deja was "not doing as well as she used to before she was removed from her home."[20] Years later, Maisha mourned that Deja was never quite the same after her forced displacement—"she was always second-guessing if she did something wrong, if I was mad at her."[21]

When people think about children removed from their homes due to abuse or neglect, they may conjure up headlines of horrifying accounts of harm: children intentionally starved, abandoned, sexually abused, or battered by their parents.[22] These tragedies rightfully rile the public's sensibilities, and the state has a clear interest in protecting children from such harms.[23] However, most children impacted by the "child welfare system"[24] enter the system not because

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[15] *Id.*

[16] *See id.*

[17] *Id. See generally* DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 189 (2022) ("Being a registered child maltreater seriously hobbles a parent's ability to find a job, secure housing, and serve as a caregiver for other children—even children in their own extended family.").

[18] Clifford & Silver-Greenberg, *supra* note 1.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *See, e.g.*, Anders Anglesey, *Abandoned Children Lived with Brother's Corpse for a Year: Police*, NEWSWEEK (Oct. 25, 2021, 4:32 AM), https://www.newsweek.com/abandoned-children-lived-corpse-texas-harris-county-1642081; Andy Newman, Ashley Southall & Chelsia Rose Marcius, *These Children Were Beaten to Death. Could They Have Been Saved?*, N.Y. TIMES (Oct. 26, 2021), https://www.nytimes.com/2021/10/26/nyregion/child-abuse-reports-deaths-nyc.html; Rachel Sharp, *Alexis Avila: Everything We Know About the Teenage Mother Who Threw Her Newborn Baby in a Dumpster*, INDEPENDENT (Jan. 12, 2022, 7:49 PM), https://www.independent.co.uk/news/world/americas/crime/alexis-avila-newborn-baby-dumpster-b1991029.html. *See generally Child Abuse and Neglect: What Parents Need to Know*, HEALTHYCHILDREN.ORG, https://www.healthychildren.org/English/safety-prevention/at-home/Pages/What-to-Know-about-Child-Abuse.aspx (Mar. 16, 2022) (describing various forms of abuse and neglect, including kicking, shaking, and burning).

[23] *See, e.g.*, Jordan *ex rel.* Jordan v. Jackson, 15 F.3d 333, 346 (4th Cir. 1994) ("The Commonwealth as *parens patriae* also has at stake compelling interests—those in the safety and welfare of its children.").

[24] Although this Comment uses the conventional term "child welfare system," it recognizes that this term often does not accurately reflect the lived experience of those who encounter the system. Increasingly, system-impacted families, family defense practitioners, and scholars prefer terms such as the family regulation, family surveillance, or family policing system. *See* Ava Cilia, *The Family Regulation System: Why Those Committed to Racial Justice Must Interrogate It*, HARV. C.R.-C.L. L. REV. (Feb. 17, 2021), https://harvardcrcl.org/the-family-regulation-system-why-those-committed-to-racial-justice-must-interrogate-it/. *See generally* Martin

of newsworthy parental violence, but because of allegations of nebulously-defined neglect.[25] This reality raises critical concerns about the system's design to "err on the side of removal."[26]

When determining whether to remove a child at risk of abuse or neglect, a judge faces a weighty question: "What if I do not issue a removal order and something bad happens?"[27] The consequences for the child could be fatal.[28] Yet, there is a parallel, far less sensationalized concern inherent to every child removal decision: "What if I do issue a removal order and it was unnecessary?"[29] For children like Deja, an unfounded removal is not a neutral incident for the

Guggenheim, Professor, N.Y.U. Sch. of L., Jessica Bryar Memorial Plenary Address at the 2021 National Parent Representation Conference (May 20, 2021), https://www.americanbar.org/groups/public_interest/child_law/national-conferences/2021-national-parent-representation-conference-videos/ (describing data and arguments that the child welfare system is more appropriately described as the family regulation, family separation, or family surveillance system).

[25] *See infra* Section II.A.

[26] David Pimentel, *Fearing the Bogeyman: How the Legal System's Overreaction to Perceived Danger Threatens Families and Children*, 42 PEPP. L. REV. 235, 267, 273 (2015).

[27] *See, e.g.*, *Jordan*, 15 F.3d at 348 (describing "the almost unthinkable consequence of returning the child to parents in whose custody the child's life may be in danger"). For clarity, this Comment refers to the judge as the decision-maker in removal processes. However, judges do not necessarily hold this role; granting removal orders can be delegated to probation officers, magistrates, and other professionals. This process is not without controversy. For example, in 2019, social workers in Kentucky came under public scrutiny for allegedly using "blank removal orders with pre-signed judges' signatures." Jason Riley, *Kentucky Workers Accused of Illegally Removing Children from Homes*, WDRB.COM, https://www.wdrb.com/in-depth/sunday-edition-kentucky-workers-accused-of-illegally-removing-children-from/article_5b42179c-474f-11e9-b44e-5b1688808fe4.html (Mar. 18, 2019). For a discussion about the scope of state laws allowing child removals by law enforcement, other state actors, and even private citizens, see Vivek Sankaran, Christopher Church & Monique Mitchell, *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161, 1171–77 (2019). *See generally* Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413 (2005) (arguing that warrantless searches "in the name of saving children" do more harm than good).

[28] *See, e.g.*, Cynthia Miller, *Child Killings in New Mexico Put Focus on State Agencies*, NEW MEXICAN (Apr. 7, 2018), https://www.santafenewmexican.com/life/family/child-killings-in-new-mexico-put-focus-on-state-agencies/article_504db6de-f427-5521-beac-67c6790eb853.html (discussing a string of children killed by their parents that resulted in new state legislation and calls to "improve the child protection system").

[29] *See* Richard A. Webster, *One Judge's Tough Approach to Foster Care: It's Only for the Really Extreme Cases*, WASH. POST (Nov. 25, 2019, 7:00 AM), https://www.washingtonpost.com/national/one-judges-tough-approach-to-foster-care-its-only-for-the-really-extreme-cases/2019/11/24/bd2dd322-0a4c-11ea-97ac-a7ccc8dd1ebc_story.html (describing how a juvenile court judge's "outlier" approach is driven by the judge's concern that "[t]he greatest threat of harm for most of the children who appear before her . . . is being unnecessarily removed from their families"); ROBERTS, *supra* note 17, at 51–52 ("The majority of jurisdictions *do not* require that courts consider the harm of removal when [weighing the costs and benefits of separating children from their parents]."); Pimentel, *supra* note 26, at 273–74 (discussing how CPS is incentivized to remove children because "[f]rom a publicity standpoint, the downside of thousands of unwarranted removals was far preferable to the blowback that would come from a single death that might have been avoided").

child[30] or the parent.[31] Even brief instances of family separation carry far-reaching consequences.[32] As a former foster child described it, removal and placement in foster care is like chemotherapy: it can be lifesaving, but it is "inherently toxic and should only be used as a last resort."[33]

This Comment argues that children have a constitutional right to family integrity,[34] which is routinely jeopardized under the current child welfare system. Alarmingly, Deja's story is far from an anomaly.[35] To safeguard a child's right to family integrity, this Comment argues that the child has a procedural due process right to counsel in dependency proceedings.[36] Although others have previously argued for a child's right to counsel in dependency proceedings,[37] this Comment uniquely roots the argument in the child's right to family integrity.

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[30] *See, e.g.*, *Jordan*, 15 F.3d at 350 (noting that emergency removals of children from their homes are "in some ways even more emotionally traumatic" than being arrested (citation omitted)). *See generally* Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U REV. L. & SOC. CHANGE 523 (2019) (discussing the emotional and psychological harms of removing children and how the law contributes to the harm); Sankaran, Church & Mitchell, *supra* note 27, at 1165 ("The moment children are removed from the custody of their parents, their lives are forever changed. The placement in foster care separates children from parents, siblings, teachers, friends, communities, and most other things familiar to their lives."); Pamela McAvay, Note, *Families, Child Removal Hearings, and Due Process: A Look at Connecticut's Law*, 19 QLR 125, 156 (2000) ("The removal of the child from the familial home, even when completely proper, will inflict significant psychological distress and will have, perhaps, a lasting effect. Temporary removals are not benign; they do have harmful effects.").

[31] *See supra* note 18 and accompanying text; Collier Meyerson, *For Women of Color, the Child-Welfare System Functions like the Criminal-Justice System*, NATION (May 24, 2018), https://www.thenation.com/article/archive/for-women-of-color-the-child-welfare-system-functions-like-the-criminal-justice-system/ ("[Family] surveillance is not neutral. Once [a parent is] entangled in this web of punitive social systems it can take years to get one's head above water . . . ."); Zach Ahmad & Jenna Lauter, *How the So-Called "Child Welfare System" Hurts Families*, NYCLU (Oct. 29, 2021, 1:30 PM), https://www.nyclu.org/en/news/how-so-called-child-welfare-system-hurts-families (describing how parents are not informed of their rights when child protective services search their homes or interrogate them); *see also, e.g.*, *CLS Files Lawsuit to Challenge Pennsylvania's Childline Registry*, CMTY. LEGAL SERVS. OF PHILA. (Aug. 11, 2022), https://clsphila.org/criminal-records/childline-lawsuit/.

[32] *See, e.g.*, Wallis v. Spencer, 202 F.3d 1126, 1130–31 (9th Cir. 2000) ("In cases of alleged child abuse, governmental failure to abide by constitutional constraints may have deleterious long-term consequences for the child and, indeed, for the entire family. Ill-considered and improper governmental action may create significant injury where no problem of any kind previously existed."). *See generally* Eli Hager, *The Hidden Trauma of "Short Stays" in Foster Care*, MARSHALL PROJECT (Feb. 11, 2020, 6:00 AM), https://www.themarshallproject.org/2020/02/11/the-hidden-trauma-of-short-stays-in-foster-care (describing the trauma of short stay removals).

[33] Sherry Lachman, *I Was in Foster Care. Family Separation Isn't Just a Problem at the Border*, TIME (Aug. 2, 2018, 2:48 PM), https://time.com/5355313/immigration-children-family-separation/.

[34] *See* Troxel v. Granville, 530 U.S. 57, 88–89 (2000) (Stevens, J., dissenting) (citing Michael H. v. Gerald D., 491 U.S. 110, 130 (1989)); *infra* Part I.

[35] *See infra* Part II.

[36] *See infra* Part III.

[37] *See generally, e.g.*, Taylor Needham, *Catch Up CAPTA: Amending CAPTA to Guarantee Children Legal Counsel in Dependency Proceedings*, 58 SAN DIEGO L. REV. 715 (2021) (arguing for a statutory right to counsel

Part I of this Comment establishes a child's constitutional right to family integrity by discussing the evolution of children's rights, tracing Supreme Court jurisprudence defining family integrity, and analyzing circuit court recognitions and applications of a child's right to family integrity. Part II surveys the history and current state of child welfare law and details empirical research on the harm inflicted by child welfare policies in practice. Part III employs the *Mathews v. Eldridge* framework to analyze the child's and government's interests at stake in dependency proceedings and argue that children have a due process right to counsel. Finally, Part IV discusses practical implementation considerations and counterarguments, ultimately highlighting why it is critical to anchor a child's right to counsel in the child's fundamental right to family integrity.

## I. A CHILD'S CONSTITUTIONAL RIGHT TO FAMILY INTEGRITY

Despite the universal experience of childhood, the Supreme Court has long been reluctant to carve out children's constitutional rights.[38] Nonetheless, children, like adults, are impacted by state powers.[39] It is equally critical, if not more so, that children receive the protections the Constitution demands.[40] This Part argues that, despite the Supreme Court's silence, children have a constitutional right to family integrity.[41] Section A provides necessary context on the development and scope of the Supreme Court's acknowledgments of modern children's rights. Section B traces Supreme Court jurisprudence related to the parental right to family integrity and argues the Court's dicta imply that children hold a reciprocal right. Section C highlights how most federal circuit courts have logically extended the parental right to family integrity to children

for children in dependency proceedings); Jennifer K. Pokempner, Riya Saha Shah, Mark F. Houldin, Michael J. Dale & Robert G. Schwartz, *The Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters*, 47 HARV. C.R.-C.L. L. REV. 529 (2012) (arguing that children have a right to counsel in dependency and delinquency proceedings due to their liberty interests at stake and briefly mentioning that the right to family integrity arguably extends to the family unit); LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 FAM. CT. REV. 605 (2009) (arguing that children have a right to counsel in dependency proceedings and mentioning a child's interest in maintaining family integrity without establishing the interest as a constitutional right).

[38] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 231–32 (1972) (declining to consider what might happen when a parent's rights clash with a child's rights); *In re* Gault, 387 U.S. 1, 13 (1967) (declining to consider the impact of "constitutional provisions upon the totality of the relationship between the juvenile and the state").

[39] *See In re Gault*, 387 U.S. at 13 ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."); *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting).

[40] *See* Bellotti v. Baird, 443 U.S. 622, 634 (1979) (discussing the need to protect "the peculiar vulnerability" of children in the context of constitutional rights).

[41] Family integrity is defined as "the right of a family to remain together without . . . [unwarranted] interference of the awesome power of the state." *See* Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977).

in the context of dependency proceedings. Lastly, Section D establishes the practical impact of recognizing a child's right to family integrity.

### *A. The Evolution of Children's Rights*

Though not new, the concept of children's rights is relatively novel and underdeveloped in American law. At common law, children were not viewed as autonomous individuals; instead, they were regarded as property and sources of labor.[42] Parents had the high duty of providing for their children, accompanied by the virtually unchecked authority to dictate how their children were raised; in return, children had the duty of obeying their parents in all circumstances.[43] Such values persisted in law until early twentieth-century Progressive Era reformers brought about a hard-fought paradigm shift: a recognition of society's interest in protecting vulnerable children from harm—resulting in the nation's first juvenile courts and child labor laws.[44] These developments were controversial across social, judicial, and legislative arenas.[45] Some people characterized proponents of children's rights as "unchristian," and the Supreme Court initially struck down Congress's first major child labor law in *Hammer v. Dagenhart* before changing course to uphold the Fair Labor Standards Act twenty-three years later.[46]

The next wave of the children's rights movement gained momentum in the wake of the 1960s civil rights and feminist movements—taking on a more radical tone and raising questions about children's autonomy and ability to make

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[42] *See* Barbara Bennett Woodhouse, *Children's Rights* 4–5 (U. of Penn. L. Sch. Pub. L. Working Paper No. 06, 2000); Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L. REV. 267, 272 (2021) ("In the early 1900s, the notion of 'children's rights' was a laughable concept. Children were considered to be the property of their parents and therefore any rights that could possibly belong to a child really belonged to the parent.").

[43] *See* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 2 (2005) (describing the "laissez-faire mentality" of early American life, where "children could be required to work in unregulated industries for as long as their parents deemed appropriate," and the discretion parents had over whether a child could attend school or work); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *453 ("The *duties* of children to their parents arise from a principle of natural justice and retribution. For to those, who gave us existence, we naturally owe subjection and obedience during our minority, and honour and reverence ever after . . . .").

[44] *See* Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1381 (2020); GUGGENHEIM, *supra* note 43 ("These things are so accepted today, it is even easy to fail to appreciate that it ever could have been otherwise, let alone just how hard won the battles were.").

[45] GUGGENHEIM, *supra* note 43, at 3–4.

[46] *Id.*; *see* Hammer v. Dagenhart, 247 U.S. 251, 275–76 (1918) (holding in a 5-4 decision that the Keating-Owen Child Labor Act was unconstitutional because it exceeded the scope of powers "expressly delegated" to Congress); United States v. Darby, 312 U.S. 100, 116–17, 125–26 (1941) (unanimously overruling *Hammer* and upholding the regulation of child labor passed by the Fair Labor Standards Act).

independent decisions.[47] This so-called modern era of children's rights has been criticized as "a slogan in search of a definition"[48] due to the inconsistent logic underlying the asserted rights.[49] For example, some advocates have rooted their reasoning in capacity-based arguments, emphasizing that children are a vulnerable class requiring special legal protection.[50] In contrast, others have rooted their advocacy in principles of personhood and liberation.[51] These advocates stress that children should have adultlike rights and sometimes, controversially, present children's rights as diametrically opposed to parents' rights.[52]

Similar conflicting patterns emerged in Supreme Court holdings. Some cases afforded children adultlike protection.[53] For example, *In re Gault* held that children were "persons" under the Constitution with Fourteenth Amendment due process rights in juvenile delinquency proceedings.[54] Similarly, *New Jersey v. T.L.O.* held that the Fourth Amendment protects children from unreasonable searches and seizures by public school officials.[55] However, other decisions afforded children special protection based on their "peculiar vulnerabilities."[56]

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[47] GUGGENHEIM, *supra* note 43, at 12; Trivedi, *supra* note 42, at 273. The movement continues to evolve—for example, in 2019, Rutgers University, Roskilde University, and Linköping University created the Childism Institute. *About*, CHILDISM INST., https://www.childism.org/about (last visited Oct. 26, 2022). The Institute defines childism as "like feminism[,] but related to children. It recognizes that young people are often disadvantaged compared to adults[,] [a]nd . . . therefore seeks children's radical equality." CHILDISM INST., CHILDISM: AN INTRODUCTION 2 (2021), https://8edd4583-272f-402d-a88f-f13f889bc034.usrfiles.com/ugd/8edd45_d69ea07ff9674dd180245bd409542504.pdf.

[48] GUGGENHEIM, *supra* note 43, at 12 (citing Hillary Rodham, *Children Under the Law*, 43 HARV. ED. REV. 487, 487 (1973)).

[49] *See id.*

[50] *See id.* at 13.

[51] *See id.*

[52] *Id.* ("The effort has created a struggle within the movement, almost completely invisible to the public, over who is permitted to be called a 'children's advocate.' Within this struggle, the label 'parent's advocate' frequently takes on a pejorative meaning."); *see also, e.g.*, Katherine Hunt Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L.Q. 1315, 1326 (1995) (arguing for children's rights to "enable the powerless to make claims, to command the respect of other powerful beings, and to be treated nonpaternalistically").

[53] *See, e.g.*, *In re* Gault, 387 U.S. 1, 21, 30–31 (1967).

[54] *Id.*

[55] 469 U.S. 325, 333 (1985).

[56] Bellotti v. Baird, 443 U.S. 622, 634 (1979) ("We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."); Gallegos v. Colorado, 370 U.S. 49, 54–55 (1962) ("[A fourteen-year-old] cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. . . . To allow this conviction to stand would, in effect, be to treat [the child] as if he had no constitutional rights.").

For example, various cases have granted children unique rights in the context of sentencing and juvenile confessions.[57]

Beyond these limited acknowledgments of children's rights, the Supreme Court has been largely silent on children's familial rights.[58] This gap in jurisprudence stands in sharp contrast to foreign laws and international treaties recognizing that children have a right to be raised by their families.[59] The United States is the only country that has not ratified the United Nations Convention on the Rights of the Child ("CRC").[60] The CRC states that children have a "right to know and be cared for by [their] parents."[61] The United States' reluctance to ratify the CRC echoes concerns raised by the modern children's rights movement—namely, the concern that recognizing children's rights risks undermining parental rights.[62]

However, concerns about parental rights do not detract from recognizing a child's right to family integrity.[63] When children assert their right to family integrity, there is no clash between the children's rights and their parents' rights.[64] Instead, there is a unique and powerful "commonality of interests."[65]

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[57] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that sentencing minors to the death penalty was unconstitutional); Graham v. Florida, 560 U.S. 48, 82 (2010) (holding sentencing a minor to life in prison without the possibility of parole for a non-homicide offense was unconstitutional); Fare v. Michael C., 442 U.S. 707, 725 (1979) (discussing that a totality of the circumstances analysis includes "evaluation of the juvenile's age, experience, education, background, and intelligence" to determine whether a minor's confession was knowing and voluntary).

[58] James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 848 (2003).

[59] *See, e.g.*, *id.* at 848 n.2 (recognizing that children have "the right to be nurtured in a family" (citing KODEKS ZAKONOV O BRAKE, SEMIE I OPEKE RF [FAMILY CODE OF THE RUSSIAN FEDERATION] arts. 54, 56, 57)). *But see* TRUDE HAUGLI, CHILDREN'S CONSTITUTIONAL RIGHTS IN THE NORDIC COUNTRIES 374 (Trude Haugli et al. eds., 2020) (describing that the Danish Constitution does not provide children a positive right to family life but instead offers limited protection against unwarranted state intervention).

[60] Sarah Mehta, *There's Only One Country that Hasn't Ratified the Convention on Children's Rights: US*, ACLU (Nov. 20, 2015), https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens.

[61] G.A. Res. 44/25, annex, Convention on the Rights of the Child, arts. 7, 8 (Nov. 20, 1989) (stating that children have a "right to know and be cared for by his or her parents" and a right "to preserve his or her . . . family relations as recognized by law").

[62] Howard Davidson, *Children's Rights and American Law: A Response to What's Wrong with Children's Rights*, 20 EMORY INT'L L. REV. 69, 70 (2006); *see also 25th Anniversary of the Convention on the Rights of the Child*, HUM. RTS. WATCH (Nov. 17, 2014, 11:50 AM), https://www.hrw.org/news/2014/11/17/25th-anniversary-convention-rights-child; *see supra* note 52 and accompanying text.

[63] Trivedi, *supra* note 42, at 277 ("Unlike other conceptions of children's rights, where more autonomy for children often comes at the expense of parental rights, when children assert their rights to family integrity, they strengthen parental rights.").

[64] *See* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 108 (2002).

[65] *Id.*

Recognizing a child's right to family integrity powerfully reinforces the well-established parental right to family integrity.[66] It is against this backdrop that this Comment argues that, despite the historical ambiguity around children's rights and the Supreme Court's silence, Supreme Court jurisprudence clearly supports a child's right to family integrity.

### *B. Supreme Court Jurisprudence Defining the Right to Family Integrity*

The Supreme Court has spoken "frequently and forcefully" about parental rights related to family relationships.[67] Collectively, cases establishing the parental right to direct the upbringing of their children free from unwarranted state interference culminate in what the Supreme Court, lower courts, and scholars have labeled the right to "family integrity."[68] This section traces the development of the parental right to family integrity and highlights how Supreme Court precedents contemplate a growing recognition of the child's reciprocal right to family integrity.

Scholars have defined the right to family integrity as "the right of the family as a unit to be free from arbitrary state interference."[69] The right to family integrity is constitutionally protected by the Fourteenth Amendment.[70] Although the text of the Fourteenth Amendment makes no mention of family privacy,[71] the Supreme Court laid the foundation for its connection to family-related rights

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[66] *See* GUGGENHEIM, *supra* note 43, at 16 (describing how the alignment of parental and children's interests in family integrity creates "an edifice of significant barriers to state control and intervention").

[67] Dwyer, *supra* note 58; *see, e.g.*, Clark v. Wade, 544 S.E.2d. 99, 106 (Ga. 2001) ("Parents have a constitutional right under the United States and Georgia Constitution to the care and custody of their children. This right to the custody and control of one's child is 'a fiercely guarded right . . . that should be infringed upon only under the most compelling circumstances.'" (quoting *In re* Suggs, 291 S.E.2d 233 (Ga. 1982))).

[68] *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 651 (1972) (describing the constitutional protection of the "integrity of the family unit"); H.L. v. Matheson, 450 U.S. 398, 410, 411 n.18 (1981) (citing cases establishing the importance of family integrity); Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) (defining the right to family integrity); Cheryl M. Browning & Michael L. Weiner, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 68 GEO. L.J. 213, 213 (1979) (arguing there is a constitutional familial right to family integrity).

[69] *See* Browning & Weiner, *supra* note 68 (citing Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)); *see also* Trivedi, *supra* note 42, at 268 (describing family integrity as "the right of a family to make private decisions about what is best for the family unit, free from unwarranted state intervention").

[70] *See, e.g.*, Wallis v. Spencer, 202 F.3d 1126, 1136 (9th Cir. 2000) (stating that children have a right to live with their family "protected by the Fourteenth Amendment's guarantee that parents and children will not be separated by the state without due process of law except in an emergency" (citations omitted)).

[71] *See* U.S. CONST. amend. XIV.

in two seminal cases in the 1920s: *Meyer v. Nebraska*[72] and *Pierce v. Society of Sisters*.[73]

In *Meyer*, a teacher appealed a conviction for teaching a ten-year-old child literature in German.[74] The Supreme Court held that the underlying statute prohibiting the instruction of foreign languages to children was unconstitutional.[75] Although neither the child nor the child's parent were parties to the case, the Court reasoned that the statute interfered with the parents' freedom to direct their child's education.[76] In dicta, the Court noted that although it had not "define[d] with exactness" the scope of liberty protected under the Fourteenth Amendment,[77] individuals have "certain fundamental rights which must be respected."[78] The Court emphasized that "[w]ithout doubt" such protected liberties included the right to "establish a home and bring up children."[79] Two years later, the Court applied the dicta in *Meyer* to its reasoning in *Pierce* to hold that an Oregon statute requiring parents to send their children to public schools unreasonably interfered with the "liberty of parents and guardians to direct the upbringing and education of children."[80] This holding cemented the Court's conclusion that the Constitution places family-based decisions largely outside of the reach of the state.[81]

In the 1970s, the Court expressly characterized the right to family privacy as the right to family integrity and affirmed it as a fundamental right. First, in 1972, in *Stanley v. Illinois*, the Court reviewed the constitutionality of an Illinois statute that presumed unwed fathers were unfit parents.[82] Peter Stanley had three children with a woman he never married.[83] When the woman passed away, the couple's children were removed from Peter's custody due to his presumed

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[72] 262 U.S. 390 (1923).

[73] 268 U.S. 510 (1925); *see* Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 997 (1992) ("[*Meyer* and *Pierce*] are the foundation cases for an entire constitutional theory of family.").

[74] *Meyer*, 262 U.S. at 396–97.

[75] *Id.* at 403; *see also* Woodhouse, *supra* note 73, at 1004 (discussing background on how the language education law in *Meyer* stemmed partly "from anti-German bias" following World War I).

[76] *Meyer*, 262 U.S. at 399–400.

[77] *Id.* at 399.

[78] *Id.* at 401.

[79] *Id.* at 399.

[80] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).

[81] *See id.* at 535 ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); *see also* Prince v. Massachusetts 321 U.S. 158, 166 (1944) (discussing that the law respects "the private realm of family life which the state cannot enter").

[82] 405 U.S. 645, 646–47 (1972).

[83] *Id.*

parental unfitness.[84] Peter appealed the removal, arguing that the statute deprived him of the equal protection of the law and due process guaranteed under the Fourteenth Amendment since married fathers and unwed mothers could not be separated from their children without a hearing.[85] The Court agreed, holding that all parents in Illinois were entitled to a hearing before their children could be removed.[86] In its reasoning, the Court stated that "[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, . . . the Equal Protection Clause of the Fourteenth Amendment, . . . and the Ninth Amendment."[87] Notably, the Court did not expressly delineate that parents alone have a protected interest in family integrity, but rather seemed to conceptualize the protection as extending to the entire "family unit."[88]

Next, in *Smith v. Organization of Foster Families for Equality and Reform*, the Court considered a group of foster parents' claims that New York's procedures for transferring foster children between foster homes violated the foster parents' Fourteenth Amendment due process rights.[89] The foster parents argued that they had a protected liberty interest in their relationships with the foster children in their care, akin to a biological parent's relationship with his or her child.[90] The Court conceded that "the importance of the familial relationship . . . stems from the emotional attachments that derive from the intimacy of daily association"—attachments which foster parents and foster children could develop over time.[91] However, the Court distinguished the rights of foster parents—whose association with the children was contractual in nature—from the rights of legal family members.[92] The Court reasoned that, "unlike the property interests that are also protected by the Fourteenth Amendment, the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'"[93] In other words, the right

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[84] *Id.*

[85] *Id.* at 646.

[86] *Id.* at 658.

[87] *Id.* at 651 (first citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923); then citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); and then citing Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring)).

[88] *See id*.

[89] 431 U.S. 816, 818–20 (1977).

[90] *See id.* at 839 (asserting that foster families become the "psychological family" of a child, creating a "liberty interest" meriting protection under the Fourteenth Amendment).

[91] *Id.* at 844 (citing Wisconsin v. Yoder, 406 U.S. 205, 231–33 (1972)).

[92] *Id.* at 845.

[93] *Id.* (citations omitted).

to family privacy and integrity is a fundamental right meriting unique protection.[94]

Fundamental rights notwithstanding, the right to family integrity is not unfettered.[95] It is curtailed by the state's parens patriae[96] interest in protecting the welfare of its citizens.[97] In *Prince v. Massachusetts*, the Court upheld a child labor law that penalized the adult petitioner for allowing her nine-year-old ward to advertise and distribute religious pamphlets on a street corner.[98] The petitioner argued that the law violated her religious freedom and right to direct her household.[99] The Court noted that although ordinarily the state cannot enter the "private realm of family life," the family "is not beyond regulation in the public interest," and "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."[100] There was no evidence that the child in *Prince* experienced actual harm from selling pamphlets on the street; instead, *Prince* stands for the proposition that the state's parens patriae authority extends to allow intrusion upon family integrity when there is merely a risk of harm.[101] This framework laid the foundation for the state's authority to remove children from their families.[102]

As a result of the state's ability to regulate the family in the public interest, it is common for the parental right to family integrity and the state's role as parens patriae to clash—especially in dependency proceedings.[103] The Court's dicta implicate the child's right to family integrity in the clash as well. In Justice Stewart's concurrence in *Smith v. Organization of Foster Families for Equality and Reform*, he commented that if a state attempted to separate "a natural family,

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94 *See id.*; *see also* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) ("[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" (citation omitted)).

95 *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

96 Latin for "parent of his or her country." *Parens patriae*, BLACK'S LAW DICTIONARY (11th ed. 2019).

97 *Prince*, 321 U.S. at 166.

98 *Id.* at 159–60, 169–70. In this case, the adult was the aunt and custodian of the child in question. *Id.* at 159.

99 *Id.* at 164.

100 *Id.* at 166–67.

101 *See id.* at 168 (discussing "possible harms").

102 Browning & Weiner, *supra* note 68, at 214; *see, e.g.*, Stanley v. Illinois, 405 U.S. 645, 666 (1972) (Burger, C.J., dissenting) (arguing that the state's parens patriae authority permitted state actors to remove children from unwed fathers based on the generalization that unwed fathers were not "dependable protectors").

103 Trivedi, *supra* note 42, at 287 ("Nowhere else in the law is there such a direct battle between the right of a parent to direct the care, custody, and control of her child and the state's role as *parens patriae*." (citation omitted)); *see, e.g.*, *Stanley*, 405 U.S. at 646–47 (featuring an unwed father challenging statute that assumed unwed fathers were unfit parents, resulting in the state removing the father's three children from his care after the children's mother died).

over the objections of the parents and *their children*, without some showing of unfitness," he would "have little doubt that the State . . . intruded impermissibly on 'the private realm of family life which the state cannot enter.'"[104] The following year, Justice Marshall, writing for a unanimous Court in *Quilloin v. Walcott*, adopted Justice Stewart's dictum, stating that he had "little doubt that the Due Process Clause would be offended" if the State attempted to separate "a natural family, over the objections of the parents and *their children*."[105]

A few years later, in 1982, in *Santosky v. Kramer*, the Court held that the minimum standard of proof required to terminate parental rights was clear and convincing evidence.[106] In its reasoning, the Court again indicated that the right to family integrity extends beyond merely the parent's interest. The Court stated, "the child and his parents *share* a vital interest in preventing erroneous termination of their natural relationship."[107] Finally, most recently, in his dissenting opinion in *Troxel v. Granville* in 2000, Justice Stevens stated:

> While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.[108]

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[104] 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring) (emphasis added) (quoting *Prince*, 321 U.S. at 166).

[105] 434 U.S. 246, 255 (1978) (emphasis added) (quoting Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring)).

[106] 455 U.S. 745, 760, 769 (1982). In *Santosky*, the Court applied the *Eldridge* factors to analyze the procedural due process entitlements of parents in child removal proceedings for a fact-finding of neglect and termination of parental rights. *Id.* at 758–69. The Court found that the "private interest affected" standard weighed heavily against New York's "fair preponderance" of evidence of abuse or neglect standard. *Id.* at 758–59. The Court held that clear and convincing evidence was the minimum standard required termination of parental rights and left it to state legislatures to determine whether they would require an evidentiary burden equal to or greater to that standard. *Id.* at 769–70.

[107] *Santosky*, 455 U.S. at 760 (emphasis added); *see also* Kevin B. Frankel, *The Fourteenth Amendment Due Process Right to Family Integrity Applied to Custody Cases Involving Extended Family Members*, 40 COLUM. J.L. & SOC. PROBS. 301, 319–20 (2007) ("The Court in *Santosky* described the family integrity right as reciprocal, running both from the child to the parent and the parent to the child; this language suggests that either party could invoke the right, not just the parent.").

[108] 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (citations omitted). Justice Stevens noted the Supreme Court had acknowledged that children possessed constitutionally protected rights and liberties in other circumstances—such as Fourteenth Amendment due process rights in juvenile and criminal proceedings and First Amendment rights to political speech in schools. *Id.* at 88 n.8 (first citing Parham v. J.R., 442 U.S. 584, 600 (1979); then citing Planned Parenthood of Central Missouri. v. Danforth, 428 U.S. 52 (1976); then citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506–07 (1969); and then citing *In re* Gault, 387 U.S. 1, 13 (1967)).

Justice Stevens's statement was a direct response to Justice Scalia's plurality opinion in *Michael H. v. Gerald D.*, in which he stated that the Court had "never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship."[109] However, as noted by other scholars, Justice Scalia's comment was about the relationship of a child with a non-legal parental figure.[110] As a result, the Court left open the question of a child's right to family integrity with a legal parent.[111] Indeed, notwithstanding this potentially misleading dictum, the majority of lower federal courts have concluded that a child has a reciprocal right to family integrity, as discussed in the following section.[112]

### *C. Circuit Court Applications of a Child's Right to Family Integrity*

Most circuit courts agree that children have a right to family integrity.[113] No circuit court has rejected that the right exists.[114] This section highlights cases from five circuits to exemplify how the right has been argued and applied. The summaries are intentionally fact-intensive to give weight to the web of family

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[109] 491 U.S. 110, 130 (1989) (plurality opinion).

[110] Trivedi, *supra* note 42, at 281 ("[A] close reading of *Michael H.* demonstrates that the Court was not actually making a decision about the child's relationship with her parent. Since California law presumed that the child's legal father was her mother's husband, Michael was a legal stranger and had no parental claim whatsoever. . . . Here, consistent with the established right to family integrity, the Court felt there was no need to rule on the issue, given that the child already had a father and had no right to maintain a relationship with multiple fathers.").

[111] *See id.*

[112] *See, e.g.*, Jordan *ex rel.* Jordan v. Jackson, 15 F.3d 333, 346 (4th Cir. 1994) (noting that procedural delay in reunification "implicates the child's interest in his family's integrity and in the nurture and companionship of his parents" five years after *Michael H.* was decided).

[113] *See, e.g.*, Suboh v. Dist. Attorney's Off., 298 F.3d 81, 91 (1st Cir. 2002); Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977); *Jordan*, 15 F.3d at 346; Hodorowski v. Ray, 844 F.2d 1210, 1216 (5th Cir. 1988); Berman v. Young, 291 F.3d 976, 983 (7th Cir. 2002); Smith v. City of Fontana, 818 F.2d 1411, 1418 (9th Cir. 1987), *overruled on other grounds by* Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999); J.B. v. Washington County, 127 F.3d 919, 925 (10th Cir. 1997); Franz v. United States, 707 F.2d 582, 595 (D.C. Cir. 1983) ("The constitutional interest in the development of parental and filial bonds free from government interference . . . is manifested in the reciprocal rights of parent and child to one another's 'companionship.'"), *supplemented*, 712 F.2d 1428 (D.C. Cir. 1983). The Third, Sixth, Eighth, and Eleventh Circuits are silent on the issue; however, district courts within the Third, Sixth, and Eleventh Circuits have recognized the right to family integrity for children. *See, e.g.*, Doswell v. City of Pittsburgh, No. 07-0761, 2009 WL 1734199, at *14 (W.D. Pa. June 16, 2009) (holding that a "child has a protectible Fourteenth Amendment familial and associational right in the support, companionship and parenting of his father"); O'Donnell v. Brown, 335 F. Supp. 2d 787, 820 (W.D. Mich. 2004) ("The fundamental constitutional right to family integrity extends to all family members, both parents and children."); Kovacic v. Cuyahoga Cnty. Dep't of Child. & Fam. Servs., 809 F. Supp. 2d 754, 776 (N.D. Ohio 2011) (observing that "[c]ourts have held that [the right to family integrity] extends to both parents *and* their children" and holding that the children in the case "met their burden of demonstrating [their] constitutionally protected interest"), *aff'd and remanded*, 724 F.3d 687 (6th Cir. 2013).

[114] Trivedi, *supra* note 42, at 282.

dynamics, agency decisions, and interests entangled in every investigation of child abuse and neglect. By detailing some of these complexities, this Comment seeks to set the stage for the importance of recognizing a child's procedural right to counsel in dependency proceedings as a path forward to effectively protecting a child's fundamental right to family integrity.

In 1977, in *Duchesne v. Sugarman*, the Second Circuit was the first circuit court to recognize the right to family integrity as a reciprocal right held by both parents and children.[115] In *Duchesne*, a mother brought a section 1983 civil rights lawsuit on behalf of herself and her two minor children against the administrators of the city's child welfare agencies for removing her children without her consent, a hearing, or court order.[116] The mother's two young children were taken into state custody after the mother left them with a friend while she sought "medical attention for emotional problems."[117] When the mother later left the hospital, she made repeated requests for the return of her children; however, her requests were denied because she was "'sweet,' but 'not mother material.'"[118] Despite a psychiatrist's finding that the mother was capable of caring for the children,[119] the mother was separated from her children for months—during which time her daughter had her first and second birthday and was separated from her brother and transferred to a new foster without notice.[120]

When analyzing whether the mother and her children had a protected liberty interest, the Second Circuit stated that "the right of the family to remain together without the coercive interference of the awesome power of the state" was the "most essential" aspect of familial privacy and "encompasse[d] the *reciprocal* rights of both parent and children."[121] The court further emphasized that "there can be no question that the liberty interest in family privacy extends to a mother and her natural offspring."[122] Ultimately, the court held that both the mother and her children "were deprived of their right to live together as a family by the refusal to return the children to the custody of the mother."[123] The court stressed the critical role of counsel in dependency proceedings, highlighting that the state has a greater knowledge of the rights and legal process afforded to individuals

115 566 F.2d at 825.
116 *Id.* at 821.
117 *Id.* at 822.
118 *Id.* at 823.
119 *Id.*
120 *Id.*
121 *Id.* at 825 (emphasis added).
122 *Id.*
123 *Id.*

and "cannot be allowed to take action depriving individuals of a most basic and essential liberty interest which those uneducated and uninformed in legal intricacies may allow to go unchallenged for a long period of time."[124] Until the children's mother obtained legal counsel nearly twenty-seven months after the children were removed, "her rights and *those of her children* to live together as a family were denied with impunity."[125]

The Ninth Circuit has also recognized a child's right to family integrity in cases involving wrongful family separation.[126] In *Wallis v. Spencer*, two children and their parents sued the City of Escondido.[127] When the children were two and five years old, state actors removed them from their parents for nearly three months based on allegations made by a relative who was confined to a mental institution and "had a long history of delusional disorders."[128] The relative alleged that the parents had sexually abused one child and planned to kill the other.[129] Based on the allegation, police arrived at the Wallis's house at midnight and began interviewing the parents.[130] Although "[t]he children appeared well-cared for" and "there was no sign of anything suspicious," the officers required the parents to awaken their five-year-old daughter.[131] They asked the five-year-old if she had been abused, which she denied.[132] Then, claiming to act upon a CPS order that they allegedly did not have, the officers removed the two children at 1:00 a.m. and placed them in a county institution.[133] According to the record, the children "cried for [their parents] constantly" and were not returned for another two and a half months.[134] The children were also subjected to intrusive medical investigations without court authorization or parental consent.[135]

When analyzing the children's and parents' constitutional claims, the court cited multiple Supreme Court cases to conclude that "[p]arents *and children* have a well-elaborated constitutional right to live together without governmental

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124 *Id.* at 828.

125 *Id.* (emphasis added).

126 *See* Wallis v. Spencer, 202 F.3d 1126, 1136 (9th Cir. 2000) ("Parents and children have a well-elaborated constitutional right to live together without governmental interference.").

127 *Id.* at 1131.

128 *Id.*

129 *Id.*

130 *See id.* at 1134, 1139.

131 *Id.* at 1134.

132 *Id.*

133 *Id.* at 1134, 1137.

134 *Id.* at 1134. Part of the reason the children were not immediately returned was due to a medical examination that suggested both children had been sexually abused. *Id.* at 1135. However, the medical report was later admitted as false, and a new review found no evidence of abuse. *Id.*

135 *Id.* at 1135.

interference," protected by the Fourteenth Amendment.[136] In overturning the district court's grant of summary judgment for the city, the Ninth Circuit held that, as with the prosecution of other crimes, the state is constrained by the substantive and procedural due process guarantees of the Constitution—namely the parents' and children's right to family integrity—when conducting child abuse investigations.[137]

While other circuits have also readily recognized the child's right to family integrity, they have grappled with determining to what extent the state is constrained by it. For example, in the Fourth Circuit case *Jordan ex rel. Jordan v. Jackson*, ten-year-old Christopher Jordan routinely spent a few hours at home alone after school while his parents were at work.[138] One Friday afternoon, a CPS worker approached Christopher on his walk home from the school bus.[139] The CPS worker took Christopher into custody prior to any judicial order or review—leaving only a handwritten note for on his parents' front door.[140] Christopher spent the weekend in a foster home with several other children where he had to sleep on a fold-out sofa without a change of clothes or the opportunity to contact his parents.[141] It was a "bewildering and traumatic" experience that made Christopher feel "extremely fearful" and left his parents worrying he had been kidnapped.[142] The following Monday, the CPS worker returned Christopher to his home, apparently pursuing no further investigation of alleged neglect or abuse or judicial review.[143] Christopher and his parents sued, asserting that CPS's ability to make summary removals without prompt judicial review violated Christopher and his parents' right to family integrity.[144]

When analyzing the family's due process claims, the court considered Christopher's right to family integrity, reasoning that "even for a short time," procedural "delay implicates the child's interests in his family's integrity and in

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[136] *Id.* at 1136 (emphasis added) (first citing Santosky v. Kramer, 455 U.S. 745, 753 (1982); then citing Stanley v. Illinois, 405 U.S. 645 (1972); then citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); and then citing Meyer v. Nebraska, 262 U.S. 390 (1923)).

[137] *Id.* at 1130–31; *see also* Coleman, *supra* note 27, at 476 n.181.

[138] Brief for Appellant at 5, Jordan *ex rel.* Jordan v. Jackson, 15 F.3d 333 (4th Cir. 1994) (No. 93-1656). Christopher had attended an afterschool program that taught him how to take care of himself while home alone. *Id.* at 5–6.

[139] *Id.* at 6.

[140] *Id.*

[141] *Id.* at 7.

[142] *Id.*

[143] *Id.*

[144] *Id.* at 9.

the nurture and companionship of his parents."[145] Moreover, the court noted that "the state also shares the interest of the parent *and child* in their family's integrity, because the welfare of the state depends in large part upon the strength of the family."[146] Simultaneously, the court acknowledged that the state had other "compelling interests—those in the safety and welfare of its children."[147] After weighing the risk of error, the administrative burden, and the interests of the state, children, and parents, the court held that a sixty-five-hour weekend delay before the hearing "did not unconstitutionally infringe upon the Jordans' substantial private interests in their family's integrity."[148] However, it was a very close call.[149] The court went so far as to note that if it were a legislator, it might require judicial review sooner.[150] This case exemplifies the difficulty lower courts have drawing lines between children, parental, and state interests, which could be clarified by a Supreme Court pronouncement of a child's right to family integrity.

Another difficulty courts and advocates face due to the Supreme Court's silence is ambiguity about the standard of review for infringements on the right to family integrity. In *J.B. v. Washington County*, the Tenth Circuit cited *Jordan* to recognize that forced family separation impinges upon both parents' and children's rights.[151] In *J.B.*, a mother sued on behalf of herself and her seven-year-old child, alleging that the county violated her and the child's constitutional rights when state actors seized her child for eighteen hours to investigate a report that the child's father had sexually abused her.[152] The mother and child argued the state officials "failed to use the least disruptive procedure to interview the child" in violation of the Fourteenth Amendment.[153] The Supreme Court, however, has never held whether violations of familial rights merit strict scrutiny, heightened scrutiny, or rational basis review.[154] The Tenth Circuit

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145 Jordan *ex rel.* Jordan v. Jackson, 15 F.3d 333, 346 (4th Cir. 1994) (citing Parham v. J.R., 442 U.S. 584, 600 (1979)).

146 *Id.* (emphasis added) (citation omitted).

147 *Id.*

148 *Id.* at 351.

149 *Id.* ("We believe this period is near, if not at, the outer limit of permissible delay between a child's removal from his home and judicial review.").

150 *Id.* at 349.

151 127 F.3d 919, 925, 932 (10th Cir. 1997).

152 *Id.* at 922.

153 *Id.* at 928.

154 Part of the Supreme Court's reluctance to pronounce a clear standard of review for cases related to familial rights in dependency proceedings may stem from its deference to the states on family law matters, especially given that many dependency cases are settled. *See, e.g.*, Emma McMullen, *For the Good of the Group: Using Class Actions and Impact Litigation to Turn Child Welfare Policy into Practice in Illinois*, 37 CHILD.'S LEGAL RTS. J. 236, 240–42 (2017) (describing *B.H. v. Sheldon*, the first dependency-related class action in

ultimately found that although there may have been faster ways to accomplish the state's objective of investigating the sexual abuse report, the officials acted in good faith and thus "did not impermissibly interfere with plaintiffs' right of familial association."[155]

Finally, the Seventh Circuit has discussed a child's right to family integrity in the context of qualified immunity—highlighting a final issue stemming from the Supreme Court's reluctance to recognize children's rights.[156] In *Berman v. Young*, a child named Amanda and her parents sued the Illinois Department of Children and Family Services ("DCFS") and the Calumet City Police Department.[157] Amanda, a three-year-old with cerebral palsy, delayed speech, and delayed motor control, was removed from her parents' custody due to suspected physical abuse.[158] The removal order was based on four bruises on Amanda's body and an allegation by her grandfather.[159] Amanda was subsequently placed in her grandparents' care where the grandparents emotionally manipulated and indoctrinated her against her parents.[160] Upon revelation that Amanda's grandparents were influencing her with false accounts of abuse, Amanda was returned to her parents' custody eight months after her removal.[161] After two years, DCFS dismissed the original abuse report as unfounded.[162]

Amanda and her mother brought claims under section 1983 for violations of their right to family integrity resulting from the insufficient corroboration of Amanda's alleged abuse and investigative delays.[163] The court acknowledged that "[p]arents have a fundamental due process right to care for and raise their children, and children enjoy the corresponding familial right to be raised and nurtured by their parents."[164] However, the court limited its broad declaration of

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Illinois that was settled by a consent decree). Moreover, several federal circuit courts have declined to hear dependency-related class actions on abstention grounds. Pokempner et al., *supra* note 37, at 551 (first citing Foster Child. v. Bush, 329 F.3d 1255 (11th Cir. 2003); and then citing J.B. *ex rel.* Hart v. Valdez, 186 F.3d 1280, 1291 (10th Cir. 1999)).

155 *J.B.*, 127 F.3d at 928.

156 *See, e.g.*, Berman v. Young, 291 F.3d 976, 983 (7th Cir. 2002) ("Parents have a fundamental due process right to care for and raise their children, and children enjoy the corresponding familial right to be raised and nurtured by their parents."), *as amended on denial of reh'g* (June 26, 2002).

157 *Id.* at 978.

158 *Id.* at 978–79.

159 *Id.* at 979.

160 *Id.* at 980–81.

161 *Id.* at 981.

162 *Id.*

163 *Id.* at 983.

164 *Id.*

protection, noting that the "family's due process interests" must be balanced against state interests when the state had a "reasonable suspicion" of abuse.[165]

The court concluded that even if there was a constitutional violation, the state actors involved would be entitled to qualified immunity because "the right to family integrity" was not "so well-developed as to place them on notice that their actions were unlawful."[166] The court based its reasoning on another Seventh Circuit case, *Brokaw v. Mercer County*, which stated that "the balance between a child's liberty interest in familial relations and a state's interest in protecting the child is nebulous at best."[167] Consequently, state actors "will rarely—if ever"—be on notice of violating the child's constitutional interest.[168] Nonetheless, the *Brokaw* court left open the possibility that a child could succeed on a civil rights family integrity claim.[169] It emphasized that qualified immunity should be determined on a "case by case basis" and recognized that in some cases, the state's interest may be so negligible compared to the "well developed" right to family integrity that a qualified immunity claim would fail.[170] Like the standard of review issues raised in *J.B.*,[171] qualified immunity is yet another area where lower courts could benefit from the Supreme Court shining a light on a child's right to family integrity.[172]

### *D. A Critical Reflection: What Difference Does a Child's Right Make?*

The overwhelming weight of federal authority establishes that children have a constitutional right to family integrity.[173] Children have a right to be raised within their family free from unwarranted interference by the government.[174] However, some scholars have expressed skepticism about the value of recognizing the child's right to family integrity.[175] They argue that recognizing a child's right will afford the child no more unique protections than recognizing

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165 *Id.* at 983–84 (first citing Brokaw v. Mercer County, 235 F.3d 1000, 1019 (7th Cir. 2000); and then citing Croft v. Westmoreland Cnty. Child. & Youth Servs., 103 F.3d 1123, 1126 (3d Cir. 1997)).

166 *Id.* at 984.

167 235 F.3d 1000, 1023 (7th Cir. 2000).

168 *Id.*

169 *Id.* (quoting Morris v. Dearborne, 181 F.3d 657, 671 (5th Cir. 1999)).

170 *Id.* (quoting *Morris*, 181 F.3d at 671).

171 *See supra* notes 151–55 and accompanying text.

172 *See generally* Nicole Stednitz, Note, *Ending Family Trauma Without Compensation: Drafting § 1983 Complaints for Victims of Wrongful Child Abuse Investigations*, 90 OR. L. REV. 1423 (2012) (discussing section 1983 lawsuits brought against CPS and the impact of qualified immunity).

173 *See supra* note 113 and accompanying text.

174 *See* Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977).

175 *See, e.g.*, John Thomas Halloran, *Families First: Reframing Parental Rights as Familial Rights in Termination of Parental Rights Proceedings*, 18 U.C. DAVIS J. JUV. L. & POL'Y 51, 77–78, 80 (2014).

the well-established parental right.[176] Moreover, they caution that individualizing the child's right will create conflicts with other parental rights and generate convoluted outcomes.[177] This is simply not true; a growing number of scholars have identified critical junctures at which asserting a child's right to family integrity would make a significant difference in case outcomes, including immigration proceedings and sentencing hearings.[178]

Similarly, this Comment argues that recognizing a child's right to family integrity makes a crucial difference in dependency proceedings. Although the Supreme Court has foreclosed the possibility of a parent's due process right to counsel in termination of parental rights proceedings,[179] it has never considered a child's right to counsel. Recall *Duchesne v. Sugarman*.[180] The Second Circuit commented that the mother's and children's rights "were denied with impunity" for twenty-seven months until the mother was finally able to obtain counsel to advocate for their rights.[181] A right to counsel could have dramatically altered the outcome of the case by accelerating a resolution on behalf of the child. The following Part describes how children face unique threats to their right to family integrity throughout dependency proceedings.[182] In these life-altering proceedings, which would not exist but for the child, children must be afforded the procedural due process protection of a guaranteed voice.

## II. THE CONSEQUENCES OF INADEQUATE PROCEDURAL PROTECTIONS FOR CHILDREN IN DEPENDENCY PROCEEDINGS

This Part surveys how a child's fundamental right to family integrity is jeopardized by inadequate procedural protections in dependency proceedings today. Section A provides an overview of the origins of the child welfare system and racial disparities within it. Section B discusses the evolution and shortfalls of federal legislation related to child abuse and neglect. Section C details the

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176 *Id.*

177 *Id.*; *see also* GUGGENHEIM, *supra* note 43, at 12 (discussing Foster & Freed's "Bill of Rights for Children" and noting that "[t]hese unenforceable claims did little to advance children's place in the world").

178 *See generally* Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77 (2011); Caitlin Mitchell, *Family Integrity and Incarcerated Parents: Bridging the Divide*, 24 YALE J.L. & FEMINISM 175 (2012); Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family that Protects Children's Fundamental Human Rights*, 41 COLUM. HUM. RTS. L. REV. 509 (2010); Trivedi, *supra* note 42, at 297–313.

179 *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31 (1981) (holding parents do not have a due process right to counsel in termination of parental rights hearings); *infra* Section III.B.

180 566 F.2d 817 (2d Cir. 1977).

181 *Id.* at 828.

182 *See infra* Section III.C.

unique physical and emotional harms children experience in dependency proceedings. Section D concludes that, due to the undeniable prevalence of such harm, the nation is at a critical inflection point where the right to counsel must be guaranteed to protect a child's right to family integrity.

### *A. The Origins of the Child Welfare System and Modern-Day Disparities*

This section briefly summarizes the origins and evolution of the child welfare system and how it disproportionately punishes poor families and families of color. The first child abuse and neglect laws in the United States originated during the nineteenth century "child savers" movement.[183] Amidst rapid industrialization and increasing immigration, city governments created institutional care facilities and, for the first time, leveraged the state's parens patriae authority to take custody of poor children with living parents.[184] Early child protection laws granted courts unprecedented power to commit children to the care of public agencies—in some cases even until the child turned twenty-one.[185] These child protection laws conflated the underlying causes of children's dependency.[186] By broadly prioritizing the removal of "poor children on the street,"[187] emerging laws failed to distinguish between poverty-related dependency and dependency resulting from parental unfitness.[188] Most concerningly, procedural protections for both children facing charges in delinquency proceedings and children in dependency proceedings were virtually nonexistent because it was widely believed that such protections would only hinder "benevolent caregiving" of the court[189] and impede the "effort for the salvation of all the children."[190]

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183 *See* Merril Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. 745, 748 (2006).

184 *See id.*; YOUTH ON TRIAL 11 (Thomas Grisso & Robert G. Schwartz eds., 2000) ("For the first time, parens patriae—a fifteenth-century concept for orphans—was applied to a poor child whose parents were still alive.").

185 *See* Sobie, *supra* note 183, at 749 (citing Act of May 31, 1884, ch. 438, 1884 N.Y. Laws 511).

186 *See id.* at 748; Marvin Ventrell, *The Practice of Law for Children*, 66 MONT. L. REV. 1, 10 (2005); ELISA MINOFF, ENTANGLED ROOTS: THE ROLE OF RACE IN POLICIES THAT SEPARATE FAMILIES 17 (Oct. 2018), https://cssp.org/resource/entangled-roots.

187 *See* YOUTH ON TRIAL, *supra* note 184, at 11.

188 *See* Sobie, *supra* note 183; Ventrell, *supra* note 186; MINOFF, *supra* note 186.

189 Ventrell, *supra* note 186, at 11, 14.

190 ANTHONY M. PLATT, THE CHILD SAVERS 136 (1969) (citing 15 FIRST BIENNIAL REPORT OF THE BOARD OF STATE COMMISSIONERS OF PUBLIC CHARITIES OF THE STATE OF ILLINOIS 62–72 (1871)). Early agencies further agreed that no distinction should be drawn between "dependent" and "delinquent" for crime prevention purposes—treating children abused or neglected by their parents the same as children who committed delinquent acts. *Id.* at 117.

As a result, children living in poverty became the focus of child welfare efforts and child removal became the default response.[191] Traces of these origins are still evident today.[192] In 2019, over 250,000 children were removed from their families and entered the foster care system.[193] Of these children, 63% were removed due to reasons of neglect in contrast to 13% removed for physical abuse, 5% for abandonment, and 4% for sexual abuse.[194] These statistics align with consistent findings that the vast majority of children are removed from their homes for reasons of poverty-related neglect rather than active parental violence or willful neglect.[195] For example, a study in Boston found that "the best predictor of removal" to foster care after an emergency room visit "was not [the] severity of abuse" the child faced, but the child's Medicaid eligibility.[196] Similarly, leading child welfare researcher Professor Duncan Lindsey found that "inadequacy of income" increased a child's chance of removal "by more than 120 times."[197]

Moreover, over the past half-century, scholars have extensively documented how children of color are disproportionately involved and face worse outcomes during encounters with the child welfare system.[198] In 1972, Andrew Billingsley

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191 *See* Sobie, *supra* note 183.

192 *See* Webster, *supra* note 29 (describing juvenile justice judge's perception that "DCFS investigators mistake poverty for neglect"). *See generally* Kelli L. Dickerson, Jennifer Lavoie & Jodi A. Quas, *Do Laypersons Conflate Poverty and Neglect?,* 44 L. & HUM. BEHAV. 311, 316–17 (2020) (describing empirical findings of people conflating poverty and neglect).

193 CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., THE AFCARS REPORT 2019, at 1 (2020), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf.

194 *Id.* at 2.

195 *See* Clare Huntington, *Flourishing Families*, 50 FAM. CT. REV. 273, 277 (2012) ("In the child abuse context, . . . approximately 50% of cases stem from poverty-related neglect, not active parent violence."); *see also* JANE WALDFOGEL, THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE AND NEGLECT 124–25 (1998) (describing the widespread misconception that the child welfare system intervenes only where there is evidence of "severe" abuse and neglect; noting that only about 10% of cases are considered severe, while approximately 50% of cases are considered "lower-risk" and often related to poverty).

196 Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1724 (2000).

197 *Id.* (citing DUNCAN LINDSEY, THE WELFARE OF CHILDREN 153 (1994)).

198 Karen Aileen Howze, *Child Maltreatment and Domestic Violence: Opportunities for Reform*, 58 FAM. CT. REV. 897, 900 (2020); ROBERTS, *supra* note 64, at 13–14; *see also* Lindsey Brekke, *Native Children in Foster Care Part II*, CTR. FOR ADVANCED STUD. CHILD WELFARE (Nov. 10, 2011), https://cascw.umn.edu/policy/native_children_in_foster_care_1/ (noting that in the 1970s, approximately one in three Native American children were removed from their homes); Hyunil Kim, Christopher Wildeman, Melissa Jonson-Reid & Brett Drake, *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 278 (2017) (finding that 53% of Black children experience a CPS investigation by age eighteen compared to 37.4% of all children); Kathryn Maguire-Jack, Sarah A. Font & Rebecca Dillard, *Child Protective Services Decision-Making: The Role of Children's Race and County Factors*, 90 AM. J. ORTHOPSYCHIATRY 48, 55 (2020) ("Compared with White children, odds of out-of-home placement were 15%

and Jeanne M. Giovannoni published *Children of the Storm: Black Children and American Child Welfare*, first outlining how the child welfare system was failing Black children.[199] In 2002, Dorothy E. Roberts published *Shattered Bonds: The Color of Child Welfare* as "a plea to call the child welfare system what it is: a state-run program that disrupts, restructures, and polices Black families" and to highlight how the racial disparities had only worsened over the previous three decades.[200] Nearly twenty years later, Roberts's work has propelled calls for the abolition of the child welfare system following the 2020 uprisings after the murder of George Floyd.[201]

Some scholars have argued that the apparent racial disparities in the child welfare system are attributed to socioeconomic status rather than racial bias.[202] However, this perspective ignores the historical and structural realities of racism within America's public systems,[203] overlooks how bias is baked into traditional child welfare data inputs and research methods,[204] and is unsupported by other data.[205] For example, an analysis of 180,000 allegations of maltreatment in Texas found that when analyzing family incomes, "race was not a significant predictor" of whether the allegations would be substantiated.[206] However, when the model accounted for the caseworkers' subjective assessment of risk—an

higher for Black children[,] . . . 23% higher for American Indian/Alaskan Native children[,] . . . and 43% higher for multiracial children.").

[199] ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE 3 (1972).

[200] ROBERTS, *supra* note 64, at vi, viii.

[201] *See* Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020, 5:26 AM), https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480; *see also* Lisa Kelly, *Abolition or Reform: Confronting the Symbiotic Relationship Between "Child Welfare" and the Carceral State*, 17 STAN. J. C.R. & C.L. 255, 261 (2021) (citing scholars and advocates calling for abolition). *See generally* Symposium, *Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, 11 COLUM. J. RACE & L. (2021) (exploring the impact of Roberts's work and reinforcing her call to abolish the child welfare system).

[202] Alan J. Dettlaff, Stephanie L. Rivaux, Donald J. Baumann, John D. Fluke, Joan R. Rycraft & Joyce James, *Disentangling Substantiation: The Influence of Race, Income, and Risk on the Substantiation Decision in Child Welfare*, 33 CHILD. & YOUTH SERVS. REV. 1630, 1631 (2011); Clare Huntington, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 263–64, 264 n.203 (2018).

[203] Billingsley & Giovannoni, *supra* note 199, at 7.

[204] ROBERTS, *supra* note 17, at 44–46.

[205] *See* Dettlaff et al., *supra* note 202, at 1631–32 (explaining that race is an essential factor to understanding the disparate effects of the child welfare system); *see also* Cilia, *supra* note 24 (discussing the disproportionate impact of child welfare laws during the War on Drugs). *See generally* ROBERTS, *supra* note 64, at 47–49, 60–61 (describing data from the National Incidence Study of Child Abuse and Neglect about the influence of race on child welfare decision outcomes and the impact of harmful stereotypes of Black women like the "welfare queen" in child welfare decisions); Kristen Weber & Bill Bettencourt, *Different Year, Different Jurisdiction, but the Same Findings: Reforming Isn't Enough*, 12 COLUM J. RACE & L. 688, 695–98 (2022) (discussing results from varied qualitative institutional analyses).

[206] Dettlaff et al., *supra* note 202, at 1632, 1634.

often dispositive factor of whether an allegation of maltreatment is substantiated—race became "a significant predictor."[207] When accounting for this subjective element, all non-white families were more likely to have substantiated findings of maltreatment than white families.[208] The impact of racial bias is also evident in disproportionate case outcomes.[209] In 2019, one foster care agency reviewed hundreds of cases across Atlanta, Philadelphia, Detroit, and Grand Rapids, Michigan, and found that Black children in their programs had the lowest rate of family reunification at 20%.[210] The way these disparities have emerged over time can be explained in part by tracing the development of federal legislation as described in the following section.

### *B. The "Swinging Pendulum" of Child Abuse and Neglect Legislation*

This section provides an overview of the federal legislation guiding state policies related to dependency proceedings. Federal policy related to child abuse and neglect has been described as a "pendulum"—the focus of child protection has vacillated from family preservation to family separation.[211] The following paragraphs detail the historical shifts.

The Child Abuse Prevention and Treatment Act ("CAPTA") of 1974 was the first federal legislation to define child abuse and neglect.[212] It provided federal funding to states that established reporting procedures and systems "for the

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[207] *Id.* at 1634–35.

[208] *Id.*

[209] ANNIE E. CASEY FOUND., DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE: ANALYSIS OF THE RESEARCH 43 (2011), http://www.aecf.org/m/resourcedoc/AECFDisparitiesAndDisproportionalityInCh-2011.pdf (discussing a meta-analysis of correlations between race and dependency proceedings outcomes and concluding that "[c]hildren of color generally have longer lengths of stay and are slower to exit the system than white children").

[210] BETHANY CHRISTIAN SERVICES, WHAT THE PANDEMIC TAUGHT US: INNOVATIVE PRACTICE REPORT 23 (2021), https://bethany.org/media/resources/blogs/innovative-practice-report-2021.pdf (highlighting 2019 data showing that the reunification rates for white and multiracial children were 32% and 37%, respectively, compared to 20% for Black children). A former foster child who later became a foster and adoptive mother in Atlanta reflected: "You see the difference in the courts—two kids coming in for the same type of neglect . . . . The judge looks at them differently, the social workers deal with them differently. There's more sympathy for the white parents, unfortunately." David Crary, *Many Say Now is the Time to Fight Racial Bias in Foster Care*, AP NEWS (Apr. 14, 2021), https://apnews.com/article/race-and-ethnicity-foster-care-coronavirus-pandemic-child-welfare-adoption-99afad8c4e512f14c8f9fec5ac0c66af.

[211] ROBERTS, *supra* note 64, at 104. *But see* ROBERTS, *supra* note 17, at 120 ("[C]hild welfare policy has never swung decisively toward preserving families. Even the most supportive federal legislation still centers on threatening parents with taking their children and devotes the bulk of funding to maintaining children away from home. For Black families, the pendulum of child welfare services has stayed firmly on the side of child removal and foster care.").

[212] Pub. L. No. 93-247, 88 Stat. 4.

prevention, identification, and treatment of child abuse and neglect."[213] The law did not distinguish between abuse and neglect,[214] and states split over their interpretation of what constituted sufficient grounds for terminating parental rights.[215] CAPTA also required states to develop their own mandatory reporting laws, which have been criticized for their disproportionate impact on Black families—resulting in parents sometimes declining necessary social services due to fear of unfounded reports and deteriorating community trust.[216] Collectively, the effect of CAPTA was an increase in surveillance, an expansion of foster care programs, and a surge in the number of children removed from their homes—particularly children of color.[217]

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[213] *Id.* § 2(b)(2).

[214] *See id.* § 3 ("For purposes of this Act the term 'child abuse and neglect' means the physical or mental injury, sexual abuse, negligent treatment, or maltreatment of a child . . . under circumstances which indicate that the child's health or welfare is harmed or threatened thereby . . . .").

[215] *Compare* Charisa Smith, *The Conundrum of Family Reunification: A Theoretical, Legal, and Practical Approach to Reunification Services for Parents with Mental Disabilities*, 26 STAN. L. & POL'Y REV. 307, 317 (2015) ("As of 2011, thirty-five states allowed for TPR because of neglect alone. In most states, statutory distinctions are not made about the difference between situational poverty and neglectful parenting."), *with* Douglas J. Besharov, *Child Abuse Realities: Over-Reporting and Poverty*, 8 VA. J. SOC. POL'Y & L. 165, 202–03 (2000) (noting that the District of Columbia "expressly excludes from the definition of child neglect 'deprivation . . . due to the lack of financial means'" and New York laws "prohibit a finding of abuse or neglect unless the parents are 'financially able' to care for their children or were 'offered financial or other reasonable means to do so'" (citations omitted)).

[216] *See* CHILD.'S RTS., FIGHTING INSTITUTIONAL RACISM AT THE FRONT END OF CHILD WELFARE SYSTEMS 13–14 (2021) (discussing studies on the disproportionate treatment of Black children under mandatory reporting practices among educational and medical fields); Frank Edwards, Sara Wakefield, Kieran Healy & Christopher Wildeman, *Contact with Child Protective Services is Pervasive but Unequally Distributed by Race and Ethnicity in Large US Counties*, 118 PNAS, no. 30, 2021, at 1 ("In 11 out of the 20 counties, Black children [faced] risks of [CPS] investigation that exceeded 50%."); Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers' Institutional Engagement*, 97 SOC. FORCES 1785, 1793–94 (2018) (describing how one in six SNAP-eligible mothers proactively declined available services due to concerns about CPS reporting and surveillance); Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 COLUM. J. RACE & L. 639, 671 (2021) ("Requiring professionals like teachers, domestic violence providers, and health care providers to report families to CPS 'has undermined a greater sense of community responsibility' by encouraging people to rely on an impersonal third party 'rather than take an active, integrated role in the well-being of other community members.'"); ROBERTS, *supra* note 17, at 170–71 ("Mandated reporting thwarts the potential for schools, health care clinics, and social programs to be caring hubs of community engagement that noncoercively help families meet their material needs.").

[217] KASIA O'NEILL MURRAY & SARAH GESIRIECH, A BRIEF LEGISLATIVE HISTORY OF THE CHILD WELFARE SYSTEM 3 (2004), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster_care_reform/legislativehistory2004pdf.pdf; *see* Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 616, 620–22 (2020) (discussing findings that mandatory reporters invoke reporting laws as a tool to enforce their subjective, moral judgments, disproportionately impacting poor families and families of color).

The late 1970s brought waves of growing concerns that too many children were being removed from their homes.[218] In response, Congress passed the Adoption Assistance and Child Welfare Act of 1980 ("AACWA").[219] AACWA introduced requirements for state agencies to make "reasonable efforts" to allow children to remain with their families and for agencies to make "reasonable efforts" to reunify families after child removal.[220] On paper, these policies favored family preservation, but in reality, the volume of children in foster care skyrocketed from 280,000 in 1986 to 500,000 in 1990.[221] Policymakers began to highlight concerns that children were spending years in foster care limbo as they waited indefinitely for their parents to resolve the reasons for their removal.[222] Some scholars, such as Elizabeth Bartholet, began arguing for policies that prioritized permanency—including increased pathways for adoption.[223]

In response, in 1997, Congress passed the Adoption and Safe Families Act ("ASFA"), the most substantial legislative overhaul of child abuse and neglect policies to date.[224] ASFA has faced much criticism for its dramatic shift away from family preservation in favor of removal and adoption.[225] The shift was threefold. First, ASFA introduced funding incentives for adoption which further

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[218] MURRAY & GESIRIECH, *supra* note 217; *see also* ROBERTS, *supra* note 64, at 105 (citing scholars and describing that part of the issue was that, under CAPTA, the federal government funded out-of-home placements but not services for families whose children were returned home).

[219] Pub. L. No. 96-272, 94 Stat. 500; MURRAY & GESIRIECH, *supra* note 217.

[220] ROBERTS, *supra* note 64, at 105; *see also* CHILD.'S RTS., *supra* note 216, at 9 ("The 'reasonable efforts' provision has remained largely illusory as a protection from unjustified removal, especially for Black families."); Vivek Sankaran, *The Power of Asking Why*, IMPRINT (Nov. 1, 2021, 6:30 AM), https://imprintnews.org/opinion/the-power-of-asking-why/59995 (describing how the "reasonable efforts" requirement can function as little more than an administrative checkbox as judges accept unquestioningly caseworkers' statements).

[221] MURRAY & GESIRIECH, *supra* note 217, at 4.

[222] *See* ROBERTS, *supra* note 64, at 159 ("By 1999, 15 percent [of children] had been in foster care for three to four years and 18 percent for more than five years. And the number of children waiting for adoptive homes doubled during this period, reaching 117,000 children.").

[223] Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C. J.L. & SOC. JUST. 63, 73–74 (2012). *See generally* ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE (1999) (arguing that the child welfare system does not account for the best interest of the child).

[224] Pub. L. No. 105-89, 111 Stat. 2115; ROBERTS, *supra* note 64, at 105.

[225] *See, e.g.*, Shanta Trivedi, *Adoption and Safe Families Act is the 'Crime Bill' of Child Welfare*, IMPRINT (Jan. 28, 2021, 6:44 PM), https://imprintnews.org/adoption/adoption-safe-families-act-crime-bill-child-welfare/51283. A full critique of ASFA is beyond the scope of this comment. For an argument about how ASFA violates the substantive due process rights of parents, see Amy Wilkinson-Hagen, *The Adoption and Safe Families Act of 1997: A Collision of* Parens Patriae *and Parents' Constitutional Rights*, 11 GEO. J. POVERTY L. & POL'Y 137 (2004). Organizations such as the National Associate of Black Social Workers have been calling for the repeal of ASFA since as early as 2003. ROBERTS, *supra* note 17, at 122.

intensified the already dramatic imbalance between federal funding dedicated to reunification services and funding dedicated to foster care and adoption.[226] Second, ASFA implemented nationwide limits on how long a child could remain in foster care before the child's parents' rights were involuntarily terminated.[227] These unforgiving timelines dealt a particularly harsh blow to parents recovering from substance abuse or facing incarceration.[228] The accelerated timetables also came at a time when federal spending on food stamps and welfare benefits decreased dramatically, stripping parents of much-needed material support to regain custody of their children.[229] Finally, ASFA muddied AACWA's already murky "reasonable efforts" mandate[230] by eliminating it in cases involving "aggravated circumstances"[231] and requiring concurrent permanency planning in all remaining cases.[232] Concurrent permanency planning directs caseworkers to simultaneously plan for reunification and adoption—inevitably giving rise to conflicting priorities and often skewing decision-makers' judgments in favor of adoption.[233]

During this era, Congress also passed the Multiethnic Placement Act and its amendments in 1994 and 1996 (collectively known as "MEPA-IEP") to increase

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[226] *See* ROBERTS, *supra* note 64, at 105, 109–10; ROBERTS, *supra* note 17, at 143 (explaining Title IV-B and Title IV-E of the Social Security Act and how only four percent of federal funding goes to reunification services while about fifty percent goes to adoption and foster care).

[227] ROBERTS, *supra* note 17, at 121.

[228] ROBERTS, *supra* note 64, at 154–55. Roberts highlights how "the 12-month permanency clock" creates "an irreconcilable clash" for parents who are in treatment for addiction, which is "at best" a twenty-four-month timeline. *Id.* This is significant when, in 2019, 34% of children were removed from their families due to substance abuse by the parent(s). CHILD.'S BUREAU, *supra* note 193, at 2. For a discussion on how the ASFA's timetables present issues for children with incarcerated parents, see Jean C. Lawrence, *ASFA in the Age of Mass Incarceration: Go to Prison—Lose Your Child?*, 40 WM. MITCHELL L. REV. 990 (2014).

[229] ROBERTS, *supra* note 17, at 121–22; *id.* at 184–85 (describing how "cookie cutter" family "service plans" imposed upon parents to regain custody of their children often created onerous and conflicting obligations that were a "far cry from material things [the parents] said they needed, such as cash, affordable housing, furniture, food, clothing, education, and child care"); *see also id.* at 145–46 (discussing declines in Medicaid and TANF funding under the Trump administration and a study linking restrictive TANF policies to increased foster placements); Frank Edwards, *Saving Children, Controlling Families: Punishment, Redistribution, and Child Protection*, 81 AM. SOCIO. REV. 575, 586 (2016).

[230] *See supra* note 220 and accompanying text.

[231] Kathleen S. Bean, *Aggravated Circumstances, Reasonable Efforts, and ASFA*, 29 B.C. THIRD WORLD L.J. 223, 226–27 (2009).

[232] ROBERTS, *supra* note 64, at 111–12 ("Giving agencies the conflicting missions of reuniting foster children with their families while preparing them for adoption is likely to dilute agencies' efforts at family preservation.").

[233] *Id.*; *see also id.* at 113 (quoting a family court judge: "[o]ne wonders if any natural parents of children in foster care could pass muster if the superior capabilities of the foster parents are the measure of 'best interests'"). Pre-adoptive foster families may also potentially improperly influence the decision maker's perception of the child's best interests. *Id.* at 112.

adoption rates.[234] Prior to the enactment of MEPA-IEP, most states had formal or informal policies promoting same-race adoptions as a result of the National Association of Black Social Workers' advocacy efforts that discouraged transracial adoption of Black children by white parents in the 1960s and 70s.[235] By the 1990s, advocates grew concerned that large numbers of children in foster care were not being adopted because the majority of adoptive parents were white and, overwhelmingly, the children in foster care were not.[236] MEPA-IEP was passed to eliminate race-matching policies, prohibit considerations of race in placement decisions, and increase adoptions.[237]

Lastly, the most recent federal legislation, the Family First Prevention Services Act of 2018 ("FFPSA"),[238] purports to shift back toward family preservation.[239] In a bipartisan effort to reimagine child welfare policy as preventative rather than reactive,[240] FFPSA claims to redirect federal funding "from foster care homes to parents."[241] Eligible families with children at risk of entering foster care may receive reimbursements for trauma-informed mental health services, substance abuse treatment, and in-home parenting skills programs for a maximum period of twelve months.[242] Some scholars have criticized the legislation for its focus on "in-home" services and corresponding

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234 Pub. L. No. 104-188, 110 Stat. 1755, 1904 (codified as amended at 42 U.S.C. § 1996(b)(1)(A)).

235 Yablon-Zug, *supra* note 222, at 76 ("The NABSW described such adoptions as 'a form of race and cultural genocide.'" (citation omitted)).

236 *Id.* at 77.

237 *Id.*

238 *Family First Prevention Services Act*, NAT'L CONF. STATE LEGISLATURES (Apr. 26, 2022), https://www.ncsl.org/research/human-services/family-first-prevention-services-act-ffpsa.aspx.

239 In recent decades various other pieces of legislation have been passed related to child welfare outside the scope of this Comment. *See* Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (establishing more stringent requirements for removing Native American children from their families and providing jurisdictional alternatives); Foster Care Independence Act of 1999, Pub. L. No. 106-169, 113 Stat. 1822 (providing funds to and assistance to support current and former foster care youths); Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (increasing kinship placements and assistance to foster youth and providing funding to Tribal organizations). Medicaid and Temporary Assistance for Needy Families ("TANF") policies also have a significant impact on child welfare. *See, e.g.*, Mark E. Courtney, Amy Dworsky, Irving Piliavin, & Andrew Zinn, *Involvement of TANF Applicant Families with Child Welfare Services*, 79 SOC. SERV. REV. 119 (2005) (discussing correlations of CPS involvement after TANF applications).

240 Fabiola Villalpando, *Family First Prevention Services Act: An Overhaul of National Child Welfare Policies*, 39 CHILD.'S LEGAL RTS. J. 283, 283 (2019).

241 Caitlyn Garcia, *Replacing Foster Care with Family Care: The Family First Prevention Services Act of 2018*, 53 FAM. L.Q. 27, 28 (2019); Villalpando, *supra* note 240, at 284 (describing that the preventative services are available for no more than twelve months for families with children at risk of entering foster care).

242 CHILD.'S DEF. FUND, THE FAMILY FIRST PREVENTION SERVICES ACT: HISTORIC REFORMS TO THE CHILD WELFARE SYSTEM WILL IMPROVE OUTCOMES FOR VULNERABLE CHILDREN 1–2 (2018), https://www.childrensdefense.org/wp-content/uploads/2018/08/family-first-detailed-summary.pdf.

exclusion of families facing housing insecurity, incarceration, and domestic violence.[243] Moreover, the preventive "services" increase state surveillance of families without necessarily meeting underlying material needs.[244]

Whether federal policy continues to vacillate with the enactment of FFPSA remains to be seen. Although the law became mandatory for states in October 2021,[245] families in some states will not see the full financial benefits from the law until 2027.[246] In the interim, over 400,000 children remain in foster care, experiencing the day-to-day realities of these policies.[247] Some experience the trauma and uncertainty of CPS investigations stemming from CAPTA's expansive mandatory reporting requirements.[248] Some await the fruit of the state's "reasonable efforts" to reunify them with their family under the AACWA or place them with an adoptive family.[249] Others face the ticking countdown of ASFA timetables until their parents' rights are involuntarily terminated and they become legal orphans.[250] The following section explores the often harmful impact of these policies on children's everyday lives and rights—giving rise to the urgent need for the procedural protection of guaranteed counsel in dependency proceedings.

### *C. The Harm Children Face Throughout Dependency Proceedings*

Despite the child welfare system's purported mandate of child protection, a child's safety may be jeopardized at each stage of dependency proceedings.[251]

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[243] Garcia, *supra* note 241, at 44–46. For additional criticism about how the law expands regulatory control over families, see Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 COLUM. J. RACE & L. 767, 791–94, 797–801 (2021).

[244] ROBERTS, *supra* note 17, at 144–45; *cf.* Fong, *supra* note 217, at 628 ("[M]erged supportive and coercive capacities yield an expansive, stratified, and distressing surveillance, with everyday system interactions—a doctor's visit, a child going to school—opening families up to the state.").

[245] Veronnica Thompson, *Implementing the Family First Prevention Services Act: What to Watch in 2021*, NAT'L ACAD. FOR STATE HEALTH POL'Y (Jan. 22, 2021), https://www.nashp.org/implementing-the-family-first-prevention-services-act-what-to-watch-in-2021/.

[246] Garcia, *supra* note 241, at 36.

[247] CHILD.'S BUREAU, *supra* note 193.

[248] *See supra* note 216 and accompanying text; *see, e.g.*, Darcey H. Merritt, *How Do Families Experience and Interact with CPS?*, 692 ANNALS AM. ACAD. POL. & SOC. SCI. 203, 209 (2020) ("Living under conditions where one experiences a diminished locus of control and lack of power . . . can also transfer distress intergenerationally to children, even affecting children's coping mechanisms. Children may feel uncertain about the primary role of their parents when other authority figures seem to be guiding the family system.").

[249] *See supra* notes 220, 232 and accompanying text.

[250] *See supra* notes 227–28 and accompanying text.

[251] *See, e.g.*, State v. Julie G., 500 S.E.2d 877, 881 n.7 (W. Va. 1997) (commending the lower court for "handl[ing] this case with the type of priority that child abuse and neglect cases deserve, but of which they are all too often deprived"). For a detailed overview of the stages of dependency proceedings in Florida, see

First, family surveillance harms children. Surveillance may affect the mental health of parents and children,[252] drive parents to make difficult decisions affecting the child's well-being,[253] and financially destabilize families.[254] Moreover, the lack of oversight and broad discretion during the initial investigation phase may subject children to invasive searches and traumatizing interview tactics.[255]

Second, removal harms children. Pursuant to the state's broad parens patriae authority, officials have high levels of discretion to remove children, "even with scant evidence."[256] When children are removed from their families, they often face anxiety, attachment disorders, trauma, and other negative health experiences due to the ambiguous loss of their caretakers and the stress of placements in new environments with unclear roles or norms.[257] One study found that twenty-five percent of foster care alumni experienced post-traumatic

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Thomasina F. Moore & Sara E. Goldfarb, *Proceedings from Petition to Adjudicatory Hearing in Dependency Cases*, *in* FLORIDA JUVENILE LAW AND PRACTICE ch. 13 (16th ed. 2020). For a general overview of dependency proceedings, see Suparna Malempati, *The Illusion of Due Process for Children in Dependency Proceedings*, 44 CUMB. L. REV. 181, 187–91 (2014).

[252] Kristine A. Campbell, Lawrence J. Cook, Bonnie J. La Fleur & Heather T. Keenan, *Household, Family, and Child Risk Factors After an Investigation for Suspected Child Maltreatment*, 164 ARCHIVES PEDIATRICS & ADOLESCENT MED. 943, 947 (2010); Stephen A. Kapp & Jennifer Propp, *Client Satisfaction Methods: Input from Parents with Children in Foster Care*, 19 CHILD & ADOLESCENT SOC. WORK J. 227, 236–37 (2002); *see supra* note 248 and accompanying text; Mack, *supra* note 243, at 799 ("Implicit in the family regulation system intervention is the government's signal to children that their parent is no longer their protector.").

[253] *See, e.g.*, Sarah C.M. Roberts & Cheri Pies, *Complex Calculations: How Drug Use During Pregnancy Becomes a Barrier to Prenatal Care*, 15 MATERNAL CHILD HEALTH J. 333, 338 (2011); *supra* note 216 and accompanying text.

[254] Mical Raz, *Calling Child Protective Services is a Form of Community Policing that Should Be Used Appropriately: Time to Engage Mandatory Reporters as to the Harmful Effects of Unnecessary Reports*, 110 CHILD. & YOUTH SERVS. REV. 1, 2 (2020). A mother who was investigated by CPS describes the impact to her job and daughter's well-being as follows:

> I followed all their instructions. I didn't go to work once a week for months in order to take my daughter to a psychologist who was an hour away by public transportation. I left my job early every two weeks to receive CPS investigators at my home. My daughter, who was only 3, was so nervous being interrogated by strangers so many times that she started behaving irregularly. And, as the investigation dragged on, I was so nervous at work that I couldn't concentrate. Plus, my boss was losing patience with my increasing absences. Eventually, I lost my job.

Rachel Blustain & Nora McCarthy, *The Harmful Effects of New York City's Over-Surveillance*, IMPRINT (Oct. 21, 2019, 5:15 AM), https://imprintnews.org/child-welfare-2/the-harmful-effects-of-over-surveillance/38441.

[255] *See, e.g.*, Pimentel, *supra* note 26, at 264 (describing frightening interview tactics); Wallis v. Spencer 202 F.3d 1126, 1134, 1139 (9th Cir. 2000) (describing a child interview in the middle of the night).

[256] Clifford & Silver-Greenberg, *supra* note 1; *see* Coleman, *supra* note 27, at 417; *Wallis*, 202 F.3d at 1131.

[257] *See* Trivedi, *supra* note 30, at 528–32; Sankaran, Church & Mitchell, *supra* note at 27, 1166–69 (describing how trauma from removal may cause "body dysregulation, difficulty managing emotions, dissociation, poor self-regulation and self-concept, cognitive impairment, and multiple long-time health consequences").

stress disorder.[258] Even brief removals can inflict lasting harm.[259] The act of removal is a moment that children often "relive over and over again in their minds"—associating the act with guilt and fear.[260] Additionally, removals frequently happen in the middle of the night with little explanation to the child.[261] A twelve-year-old described the experience as feeling "like you're being kidnapped and nobody wants to tell you [anything]."[262]

While some removals are necessary to prevent real and imminent harm, data show that many are unnecessary.[263] For example, a study in New Mexico found that "45% of children removed . . . spent less than three days in foster care"—revealing that nearly half of the children entering New Mexico's foster care system were separated from their families for unsubstantiated reasons.[264] At minimum, the harm of removal raises doubts about the child welfare system's entrenched history of "erring on the side of removal,"[265] especially in cases of poverty-related neglect, when alternative responses allowing a child to remain home could preserve the child's right to family integrity. As Dr. Charles Nelson, professor of Pediatrics at Harvard Medical School, described: "There's so much research on [the harm of family separation] that if people paid attention at all to the science, they would never do this."[266]

Children also face risks of harm while residing in foster care. First, there is the broad disruption of life and community resulting from the child's physical displacement.[267] Children face potential trauma and harm from being separated

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[258] Sankaran, Church & Mitchell, *supra* note at 27, at 1169 (noting that this rate is nearly double the rate of U.S. war veterans with documented post-traumatic stress disorder). Other studies have found this number to be as high as 80%. *See* Trivedi, *supra* note 30, at 549 (citing studies).

[259] Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 210–13 (2016); Hager, *supra* note 32.

[260] *See* Trivedi, *supra* note 30, at 531; Clifford & Silver-Greenberg, *supra* note 1; Mark D. Simms, Howard Dubowitz & Moira A. Szilagyi, *Health Care Needs of Children in the Foster Care System*, 106 PEDIATRICS 909, 912 (2000).

[261] Trivedi, *supra* note 30, at 531; *see, e.g.*, *Wallis*, 202 F.3d at 1134, 1139 (describing police arriving at midnight and awakening children).

[262] Trivedi, *supra* note 30, at 532 (alteration in original).

[263] *See* Samantha Bei-wen Lee, *The Equal Right to Parent: Protecting the Rights of Gay and Lesbian, Poor, and Unmarried Parents*, 41 N.Y.U. REV. L. & SOC. CHANGE 631, 652 (2017) (citing U.S. Department of Health and Human Services data that over 100,000 children removed in 2001 were found to not have been maltreated).

[264] *See* Sankaran, Church & Mitchell, *supra* note at 27, at 1188–89.

[265] Trivedi, *supra* note 30, at 526.

[266] Sankaran, Church & Mitchell, *supra* note at 27, at 1167.

[267] Michael S. Wald, *Thinking About Public Policy Toward Abuse and Neglect of Children: A Review of Before the Best Interests of the Child*, 78 MICH. L. REV. 645, 662 (1980) ("Even when placed in good environments, . . . [children] suffer anxiety and depression from being separated from their parents, they are forced to deal with new caretakers, playmates, school teachers, etc. As a result, they often suffer emotional damage and their development is delayed.").

not only from their parents, but also sometimes from siblings, pets, relatives, and other sources of familiarity.[268] Removal is disruptive to the child's community fabric and sense of agency.[269] As Dorothy Roberts describes, the system's racial disparities inflict group-based harm that "reinforces long-held stereotypes about Black mothers' and fathers' irresponsibility and corrupting influence on their children" and messages that Black people "need white supervision"—ultimately perpetuating a "degrading view of Black citizenship."[270]

Second, there is potential harm stemming from the treatment a child receives while in foster care. Children in foster care experience disproportionate risks of physical and sexual abuse,[271] they face further trauma and disruption from placement instability due to changes in the foster parents' circumstances, behavioral challenges, or agency needs—which all risk harming a child's psyche and sense of belonging.[272] Such displacement puts children at higher risk for trafficking, exploitation, and criminalization.[273] Children in foster care are also

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[268] Trivedi, *supra* note 30, at 533; *see also id.* at 541 (describing harm of cultural alienation and disruption of sense of belonging); Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & C.R. L. REV. 663, 677 (2006).

[269] ROBERTS, *supra* note 64, at 237, 240, 243 ("Excessive state interference in Black family life damages Black people's sense of personal and community identity. Family and community disintegration weakens [Black people's] collective ability to overcome institutionalized discrimination and to work toward greater political and economic strength.").

[270] *Id.* at 244–45; *see also* Huntington, *supra* note 202, at 269 n.232 (citing a 1965 Department of Labor report about Black families' need for "assistance from the white world").

[271] Trivedi, *supra* note 30, at 542–43 (citing studies finding rates of physical and sexual abuse among foster children three to four times higher than that of the general population and partially attributing the results to the possibility that foster families more readily abuse foster children due to the non-permanent and non-biological nature of their relationship). Foster children may face increased barriers to reporting abuse. *See, e.g.*, M.D. *ex rel.* Stukenberg v. Abbott, 907 F.3d 237, 259–60 (5th Cir. 2018) (describing a child who tried to report that she was being sexually abused at her foster placement to no avail; due to high turnover, the child had ten different caseworkers over the course of seven years in foster care).

[272] Trivedi, *supra* note 30, at 544–45; *see, e.g.*, Complaint at 11–12, M.B. v. Howard, 555 F. Supp. 3d 1047 (D. Kan. 2021) (No. 18-2617) (describing a plaintiff who was moved placements over 130 times while and foster care and suffered ongoing mental health and educational disruptions). The plaintiffs prevailed in a landmark settlement. *See* M.B. v. Howard, 555 F. Supp. 3d 1047, 1059 (D. Kan. 2021).

[273] Ellen Wulfhorst, *Without Family, U.S. Children in Foster Care Easy Prey for Human Traffickers*, REUTERS (May 3, 2018, 4:04 AM), https://www.reuters.com/article/us-usa-trafficking-fostercare/without-family-u-s-children-in-foster-care-easy-prey-for-human-traffickers-idUSKBN1I40OM; ROBERTS, *supra* note 17, at 260–62 (explaining the how foster care is a "direct pathway to delinquency"); ROBERTS, *supra* note 17, at 266 ("The child welfare system also treats sexually exploited children badly. Girls who are brought back into foster care after running away tend to be pathologized as having an 'oppositional defiant disorder' and are subjected to draconian constraints . . . .").

more likely to be educationally disenfranchised,[274] overmedicated,[275] receive inadequate dental care, and engage in risky sexual behavior and drug use.[276] The detrimental impacts are far-reaching, as highlighted by MIT economist Joseph Doyle's research.[277] Doyle conducted a statistical study on "marginal" cases: cases where caseworkers disagreed about whether the child needed to be placed in foster care.[278] The study found that the children who were placed in foster care had higher delinquency rates, higher teen pregnancy rates, and worse employment outcomes.[279] Put otherwise, children placed in foster care experienced more long-term harm than similarly situated children who remained with their families.[280]

Finally, children face potential harm when parental rights are terminated. Termination of parental rights is such a severe final adjudication that some courts refer to it as the "civil death penalty."[281] Under ASFA timetables, thousands of "legal orphans" are created each year by way of termination of parental rights proceedings—a status change that is accompanied by enduring consequences.[282] As the Supreme Court noted, "[t]he child loses the right of support and maintenance, for which he may thereafter be dependent upon society; the right to inherit; and all other rights inherent in the legal parent-child relationship . . . forever."[283] More profoundly, the child, whose brain and

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[274] ROBERTS, *supra* note 17, at 229, 258–60 (citing a study about how more foster children go to prison than college); Madison Hunt & Michael Fitzgerald, *New York City Foster Youth Graduation Rates Found Far Lower Than Previously Known*, IMPRINT (June 22, 2022, 12:24 PM), https://imprintnews.org/education/new-york-city-foster-youth-graduation-rates/65944#:~:text=Just%20one%20in%20four%20foster,high%20school%2C%20new%20study%20finds.&text=Advocates%20and%20public%20officials%2C%20including,program%20to%20support%20foster%20youth.

[275] *See, e.g.*, Bryan C. v. Lambrew, 340 F.R.D. 501, 517–21 (D. Me. 2021) (allowing foster children plaintiffs to proceed with their claims that the state violated their constitutional rights through the unnecessary administration of psychotropic medication). For an overview of the rampant harm of psychotropics in foster care, see *Psychotropics*, CHILD.'S RTS., https://www.childrensrights.org/our-campaigns/psychotropics/ (last visited Feb. 6, 2022).

[276] Trivedi, *supra* note 30, at 547–48; Simms et al., *supra* note 260, at 914.

[277] Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1599 (2007).

[278] *Id.* at 1584.

[279] *Id.* at 1599–602.

[280] *See id.*

[281] Drury v. Lang, 776 P.2d 843, 845 (Nev. 1989) ("[T]ermination of a parent's rights to her child is tantamount to imposition of a civil death penalty."); *see also* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 39 (1981) (Blackmun, J., dissenting) ("In this case, the State's aim is not simply to influence the parent-child relationship but to *extinguish* it. A termination of parental rights is both total and irrevocable.").

[282] *See supra* note 227 and accompanying text.

[283] Santosky v. Kramer, 455 U.S. 745, 760 n.11 (1982) (quoting *In re* K.S., 515 P.2d 130, 133 (Colo. App. 1973)).

understanding of the world and relationships is still developing, loses the opportunity to have a lifelong, permanent connection with his or her living parents.[284] For a developing adolescent, the consequences are dismal: non-death relational loss, known as "ambiguous loss," generates a unique combination of grief, stress, and anxiety that is more damaging to a child's mental health than knowledge that a relative was murdered.[285]

### *D. An Inflection Point: Reckoning with the Realities of the Child Welfare System*

The child welfare system is at a critical inflection point.[286] Historically, the law did not consider children's interests or rights because it was presumed that fit parents acted in their children's best interests.[287] Accordingly, so long as the interests of parents and children coincided, parental rights served as a sufficient proxy for safeguarding their children's rights. However, that presumption is overcome when parents do not act in their children's best interests—thus warranting the state's intervention pursuant to its parens patriae power to protect the child's welfare.[288] When the state assumes custody of the child, the state supersedes the parental authority and becomes the new proxy for safeguarding the children's interests.[289] It is then presumed that the state, rather than the parent, acts in the child's best interests.[290] Like other areas where the state exercises its parens patriae authority, procedural protections have historically been viewed as unnecessary or even barriers to the state's ability to care for and protect the child.[291]

Over time, the Supreme Court has reckoned with the reality that discarding procedural formality to facilitate the court's "care and solicitude" causes more

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[284] Vivek Sankaran, *The Value of Leaving the Door Open for Families*, IMPRINT (Jan. 14, 2021, 11:43 PM), https://imprintnews.org/opinion/value-leaving-door-open-families/50885.

[285] Carolyn Knight & Alex Gitterman, *Ambiguous Loss and Its Disenfranchisement: The Need for Social Work Intervention*, 100 FAMS. SOC. J. CONTEMP. SOC. SERVS. 164, 165, 166 (2019).

[286] Kelly, *supra* note 201, at 292.

[287] *See* Parham v. J.R., 442 U.S. 584, 604 (1979) (discussing "the traditional presumption that the parents act in the best interests of their child").

[288] *See supra* note 102 and accompanying text; Pitchal, *supra* note 268, at 679–80.

[289] *See, e.g.*, *In re* K.I., 735 A.2d 448, 454 (D.C. 1999) ("Given the lack of appropriate attention and care by [the child's parent], the trial court assumed its role as *parens patriae* 'to promote [the child's] best interest.'").

[290] *See id.*

[291] *See In re* Gault, 387 U.S. 1, 14 (1967) ("From the inception of the juvenile court system, wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles."); *id.* at 16 ("These results were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as *parens patriae*."); Ventrell, *supra* note 186, at 11; *supra* notes 190–91 and accompanying text.

harm than good.[292] When the Court first recognized a child's right to counsel in juvenile court proceedings, it cited empirical research about how the juvenile court's procedural informality had failed to achieve its purported goals of rehabilitation, care, and individualized treatment.[293] The Court stated that "it is important, we think, that the claimed benefits of the juvenile process should be candidly appraised. Neither sentiment nor folklore should cause us to shut our eyes . . . to [empirical data]."[294] Similarly, there is mounting evidence that the child welfare system, as it exists today, does not serve its purported purposes of protecting children.[295] Children face potential harm at every adjudicatory step of dependency proceedings: during unsubstantiated, intrusive removals; during extended stays in foster care when states fail to make reasonable efforts to reunify; and during termination of parental rights proceedings based on arbitrary timelines, which permanently sever a child's ties to their family.[296]

In short, the state has failed to protect children's constitutional right to family integrity. In its role as parens patriae, it has not safeguarded the rights of children in foster care. Absent fit parents and the state's ability to adequately promote children's interests in foster care, it is critical that children be guaranteed strong procedural protection in dependency proceedings to ensure that their fundamental right to family integrity is protected.

## III. CHILDREN MUST BE GUARANTEED COUNSEL IN DEPENDENCY PROCEEDINGS: A DUE PROCESS ANALYSIS

When the Supreme Court held that children had a right to counsel in delinquency proceedings, it declined to consider whether such a right extended to dependency proceedings.[297] In *Lassiter v. Department of Social Services*, the Court held that parents do not have a right to counsel in termination of parental rights hearings, but it did not hold anything about a child's right to counsel.[298]

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[292] *See In re Gault*, 387 U.S. at 15.

[293] *Id.* at 18, 22.

[294] *Id.* at 21–22.

[295] *See supra* Section II.C.

[296] *See supra* Section II.C.

[297] *In re Gault*, 387 U.S. at 13; Ventrell, *supra* note 186, at 14.

[298] 452 U.S. 18, 31–32 (1981) (5-4 decision). The Court applied the *Mathews v. Eldridge* framework, noting that the parent's interest at stake was "extremely important." *Id.* at 31. However, over the dissent's objection, the Court stated there was a presumption against a "right to appointed counsel in the absence of at least a potential deprivation of physical liberty." *Id.*; *see id.* at 40 (Blackmun, J., dissenting). The Court mentioned that although presumption might be overcome in extreme termination of parental rights ("TPR") cases, "due process is not so rigid" as to always require the sacrifice of the government's interest in informality. *Id.* at 31 (majority opinion) (citation omitted) (internal quotation marks omitted). Nonetheless, the Court stated that wise public policy might require higher standards than the Constitution. *Id.* at 33. For an in-depth discussion of state statutory schemes

Circuit courts are silent, but two district courts have addressed the issue with opposite outcomes.[299]

In the groundbreaking decision *Kenny A. v. Perdue*, the United States District Court for the Northern District of Georgia held that children have a constitutional due process right to counsel in dependency proceedings after considering the child's right to family integrity and applying the *Mathews v. Eldridge* due process framework.[300] If narrowly construed, the holding could be read to only apply to circumstances where children risk placement in institutional settings.[301] This Part argues the right is not so limited. In 2021, in *G.K. v. Sununu*, the United States District Court of New Hampshire held that a categorical right to counsel was unnecessary under New Hampshire's CAPTA representation model.[302] Despite the First Circuit's recognition of a child's right to family integrity, the *G.K.* court did not address it.[303] This Part argues that, contrary to the *G.K.* decision, CAPTA-based representation models are inadequate, and the Constitution cannot tolerate disparate due process protections of a child's constitutional rights across state lines. Due to the nature of the child's fundamental rights at stake, children have a constitutional right to counsel in dependency proceedings.

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that provide parents a right to counsel in TPR proceedings, see Vivek S. Sankaran, *Moving Beyond* Lassiter*: The Need for a Federal Statutory Right to Counsel for Parents in Child Welfare Cases*, 44 J. LEGIS. 1 (2017).

[299] *Compare* Kenny A. *ex rel.* Winn v. Perdue, 356 F. Supp. 2d 1353, 1359, 1361 (N.D. Ga. 2005) (holding children have a right to counsel), *with* G.K. *ex rel*. Cooper v. Sununu, No. 21-cv-4-PB, 2021 WL 4122517, at *7 (D.N.H. Sept. 9, 2021) (holding children do not have a right to counsel).

[300] *Kenny A.*, 356 F. Supp. 2d at 1360. The plaintiffs argued their due process rights under the Georgia Constitution, but the court acknowledged the children's due process rights were protected under both the Georgia and U.S. Constitutions. *Id.* at 1355, 1359. For a thorough analysis of the *Kenny A.* decision and its implications, see Pitchal, *supra* note 268.

[301] *See Kenny A.*, 356 F. Supp. 2d at 1360–61; Pitchal, *supra* note 268, at 681.

[302] *See* 2021 WL 4122517, at *7. New Hampshire has adopted a layperson CASA/GAL model that requires the appointment of an attorney-GAL when a volunteer is unavailable. *Id.* at *2 (citing N.H. REV. STAT. ANN. § 169-C:10 (2013)). Attorney-GALs are required to advocate the child's best interests and advise the court if the child's express interests conflict with the attorney-GAL's recommendations—in which case the court has discretion to appoint an attorney for the child's express interests. *Id.* The court acknowledged the *Kenny A.* decision but noted that *Kenny A.* "did not address *Lassiter* or otherwise explain why a case-by-case assessment of the need for counsel was inadequate to safeguard the children's due process rights" and thus had "limited" persuasive value. *Id.* at *6 n.4.

[303] *See* Suboh v. Dist. Attorney's Off., 298 F.3d 81, 90–91 (1st Cir. 2002); *see also G.K.*, 2021 WL 4122517, at *1–12. When analyzing the children's private interests at stake, the court merely stated, "[a]pplying the *Eldridge* factors here, there is no question that Class Plaintiffs have protected liberty interests, considering they have been, or are at risk of being, placed in congregate care facilities where their physical liberty is restricted." *G.K.*, 2021 WL 4122517, at *6.

To evaluate what procedures due process requires, courts apply the three-prong balancing test set forth in *Mathews v. Eldridge*.[304] The test includes weighing (1) the private interest at stake; (2) "the risk of erroneous deprivation of such interest" through existing procedure and the "probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[305] When balancing the factors, the Supreme Court has emphasized the importance of determining what procedures "are necessary to guarantee . . . fundamental fairness"[306] and facilitate accurate fact-finding.[307] The following sections will analyze each *Mathews v. Eldridge* prong and conclude that children have a due process right to counsel in dependency proceedings.

### *A. The Child's Interests at Stake*

Children have significant private interests at stake in dependency proceedings. As established in Parts I and II, a child's constitutional right to family integrity is implicated at each adjudicatory step of dependency proceedings.[308] The right to family integrity is a fundamental right[309] that transcends a child's capacity to assert it and must be fiercely guarded.[310] Although a child's right to family integrity is arguably "symmetrical" to that of a parent's right to family integrity,[311] children have more collateral interests at stake and thus merit more procedural protections than the Court provided parents in *Lassiter*.[312] While a parent's right to family integrity may be threatened in

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[304] Pokempner et al., *supra* note 37, at 541; Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[305] *Mathews*, 424 U.S. at 335.

[306] *In re* Gault, 387 U.S. 1, 74 (1967) (Harlan, J., dissenting); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 26–27 (1981).

[307] McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971); *Mathews*, 424 U.S. at 344; Pokempner et al., *supra* note 37, at 541, 551.

[308] *See also* Pitchal, *supra* note 268, at 670 n.42 (noting that the class certified in *Kenny A.* included all children who were the subject of dependency proceedings, regardless of whether they were in state custody at the time).

[309] *See* Pokempner et al., *supra* note 37, at 542; *In re* Bridget R., 49 Cal. Rptr. 2d 507, 524, 526–27 (Ct. App. 1996); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (discussing that the right to family integrity is deeply rooted in the nation's history and tradition); Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (discussing "fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'" (citation omitted)).

[310] *See* Malempati, *supra* note 251, at 214; *cf. In re Gault*, 387 U.S. at 36 (discussing a child's need for a "guiding hand" in juvenile delinquency proceedings).

[311] Michael H. v. Gerald D., 491 U.S. 110, 130 (1989) (plurality opinion).

[312] 452 U.S. 18, 31–32 (1981) (holding parents do not have a due process right to counsel in termination of parental rights hearings).

dependency proceedings, it is the child who risks physical displacement, psychological disruptions, and long-term harm.[313]

Children have a substantial interest in accurate fact-finding procedures to avoid erroneous removals, unwarranted delays in family reunification, and the bias inherent to the best interests of the child standard and concurrent permanency planning.[314] Along with the child's interest in unwarranted state intrusion on the right to family integrity, children have interests in their physical liberty, long-term psychological wellbeing, and security—all of which are implicated during removals and while residing in foster care.[315] Upon entering foster care, a child's physical liberty is restricted as the child may be moved between multiple placements with no say in the matter.[316] As the Washington Supreme Court summarized, "[i]t is the child, not the parent, who may face the daunting challenge of having his or her person put in the custody of the State as a foster child, powerless and voiceless, to be forced to move from one foster home to another."[317] The child's interests implicated in dependency proceedings are substantially greater than that of the child's parents and therefore require greater protection.

### *B. The Risk of Erroneous Deprivation: CAPTA's Inadequate Protections*

Existing procedure does not adequately safeguard a child's right to family integrity in dependency proceedings. As the Supreme Court has described,

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[313] *See supra* Section II.C; *see also* Pitchal, *supra* note 268, at 676–82 (describing "the differences in degree and in kind between children's liberty interests and that of their parents" in dependency proceedings). As one California court summarized:

> If anything, children's familial rights are more compelling than adults', because children's interests in family relationships comprise more than the emotional and social interests which adults have in family life; children's interests also include the elementary and wholly practical needs . . . to have stable and permanent homes in which each child's mind and character can grow, unhampered by uncertainty and fear of what the next day or week or court appearance may bring.

*In re Bridget R.*, 49 Cal. Rptr. 2d at 524 (citation omitted).

[314] Barbara Ann Atwood, *The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 FAM. L.Q. 63, 86 (2008); *see also* ROBERTS, *supra* note 64, at 113 (quoting a judge's opinion that it will be rare that reunification with natural parents after a child removal will be viewed as in the child's "best interests" in comparison to adoption by the child's foster parents); *cf. Lassiter*, 452 U.S. at 27 (noting that "[a] parent's interest in the accuracy and injustice of the decision to terminate his or her parental status is . . . commanding" given the possible outcome that the state not just infringes upon the parent-child relationship, but ends it).

[315] *See supra* Section II.C; Pokempner et al., *supra* note 37, at 531.

[316] Pitchal, *supra* note 268, at 681–82 ("[*A*]*ll* children in state custody are at the whim of state officials to decide where they will live at any given moment."); *see also* Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 837 (1977) (discussing the instability of foster care placements in New York City).

[317] *In re* Dependency of MSR, 271 P.3d 234, 242 (Wash. 2012).

dependency "proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge,"[318] which "magnify the risk of erroneous factfinding."[319] The risk of subjectivity is exacerbated by the largely informal, unreviewable nature of dependency proceedings.[320] Consequently, children routinely face the risk of erroneous removals and delays in family reunification due to the discretion inherent to dependency proceedings—often tainted by racial and socioeconomic bias—rather than receive the assurance of factual integrity that the fundamental right to family integrity demands.[321] Recognizing these risks, Congress attempted to increase children's procedural protection by requiring all states that accept funding under CAPTA to provide representation for children in dependency proceedings in 1974.[322] However, as held by the *Kenny A.* court, CAPTA's provisions "do not adequately mitigate the risk of such errors."[323]

CAPTA contains ambiguous language that has resulted in widespread variance in state implementation. CAPTA provides that:

> [I]n every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, including training in early childhood, child, and adolescent development, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings[.][324]

The open-ended provision that the child's representative "may be an attorney or a court appointed special advocate" is the source of most inconsistencies.[325] For example, some states appoint an attorney-guardian *ad litem* ("attorney-GAL") for every child in dependency proceedings to advocate for the child's best

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[318] Santosky v. Kramer, 455 U.S. 745, 762 (1982).

[319] Kenny A. *ex rel.* Winn v. Perdue, 356 F. Supp. 2d 1353, 1361 (N.D. Ga. 2005) (quoting *Santosky*, 455 U.S. at 762).

[320] Pitchal, *supra* note 268, at 687.

[321] *See supra* Sections II.A, II.C; *see also* Amy Sinden, *"Why Won't Mom Cooperate?": A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 354 (1999) ("The fallacy, of course, is that this claim treats the 'best interests of the child' as some objectively determinable absolute, when in fact it is an extremely malleable and subjective standard."); Huntington, *supra* note 202, at 255 (observing that the best interests of the child standard "gives nearly boundless discretion to the court").

[322] 42 U.S.C. § 5106a(b)(2)(B)(xiii).

[323] *Kenny A.*, 356 F. Supp. 2d at 1361.

[324] 42 U.S.C. § 5106a(b)(2)(B)(xiii).

[325] *Id.*; *see* Taylor, *supra* note 37, at 609; Suparna Malempati, *Beyond Paternalism: The Role of Counsel for Children in Abuse and Neglect Proceedings*, 11 U.N.H. L. REV. 97, 103–04 (2013); Atwood, *supra* note 314, at 87.

interests—but not the child's express wishes.[326] Other states appoint attorneys to represent the child's expressed wishes while a layperson guardian *ad litem* ("GAL")—sometimes known as a court appointed special advocate ("CASA")—represents the child's best interests.[327] Finally, other states require appointed attorneys to serve a dual function of advocating both the child's express wishes and best interests or to appoint independent counsel when an attorney-GAL's best interests position conflicts with the child's expressed interests.[328] Issues arise under each of these models: first, layperson volunteers are inherently ill-equipped to protect a child's interests; second, attorney-GALs are ethically limited in their scope of advocacy. The following paragraphs address these issues in turn.

First, due to the nature of their training and demographics, layperson CASA/GAL volunteers do not adequately safeguard a child's interests. A central issue with the CASA/GAL model is that it centers the highly-subjective best interests of the child standard—creating a significant risk for bias.[329] The risk of bias is heightened given that the demographics of CASA volunteers do not reflect the population they serve. The majority of CASA volunteers are middle-aged white women[330] with merely thirty hours of initial training and twelve continuing education hours per year.[331] Nevertheless, even when volunteers are able to set aside their worldviews and biases about something as intensely personal and private as a child's home life, they lack the legal power to hold the government accountable for violations of the child's right to family integrity.[332] A study in Washington found that children represented by best-interest advocates, such as GAL/CASA volunteers, were less likely to have their well-being, preferences, and express interests presented at hearings than children with

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[326] *See, e.g.*, *In re* W.L.H., 739 S.E.2d 322, 325 (Ga. 2013) (holding that a child did not have standing to independently appeal a deprivation finding when his guardian *ad litem* did not think the appeal was necessary).

[327] Taylor, *supra* note 37, at 611.

[328] Connecticut, Iowa, Mississippi, New York, and Pennsylvania allow for a GAL to be appointed if there is a conflict between the child's express wishes and the child's best interests. *Id.*

[329] Youmans v. Ramos, 711 N.E.2d 165, 178 (Mass. 1999) (Lynch, J., dissenting) (referring to the best interests analysis as a "standardless principle"). For a discussion on the shortcomings of the "best interests" doctrine, see *In the Best Interests of the Child Asylum-Seeker: A Threat to Family Unity*, 134 HARV. L. REV. 1456 (2021). For a critical discussion of layperson GAL/CASA volunteers, see Amy Mulzer & Tara Urs, *However Kindly Intentioned: Structural Racism and Volunteer CASA Programs*, 20 CUNY L. REV. 23 (2016).

[330] *See* Mulzer & Urs, *supra* note 329, at 43 (citing CALIBER ASSOCIATES, EVALUATION OF CASA REPRESENTATION: FINAL REPORT 2–3 (1999), https://perma.cc/GMM6-WQBT) ("Eighty to ninety percent of CASAs are white. Surveys of local CASA programs who that the typical volunteer is a white woman between 40 and 59 years of age who has had college or post-graduate education.").

[331] *See, e.g.*, *Training & Supervision*, DALL. CASA, https://www.dallascasa.org/how-to-volunteer/training-supervision/ (last visited Nov. 5, 2021) (describing training requirements in Dallas, Texas).

[332] Kelly, *supra* note 201, at 297.

independent attorneys.[333] Fundamentally, CASA/GAL volunteers are not trained to cross-examine witnesses or equipped with the legal toolbox to hold the state accountable to the same degree as an attorney.[334]

Second, even when a child is represented by an attorney-GAL, the child does not reap the full benefits of legal counsel. Attorney-GALs cannot fully advocate for the child's interests as required by the Model Rules of Professional Conduct ("MRPC"). The requirement that attorney-GALs advocate for the "best interests" of the child[335] directly conflicts with MRPC Rule 1.2's requirement that lawyers abide by and zealously advocate for their client's interests and decisions[336]—creating an ethical dilemma when the child's express objectives run contrary to the attorney-GAL's perceived best interests.[337] While some states, such as New Hampshire, attempt to resolve this issue by requiring the attorney-GAL to disclose conflicts and courts to appoint independent counsel, disclosure of the conflict itself raises ethical issues and may unduly influence the judge's perspective.[338]

Moreover, attorney-GALs cannot represent children to the same extent as independent counsel because they are not bound by confidentiality as required by MRPC Rule 1.6.[339] The lack of attorney-client privilege is particularly concerning due to the highly sensitive nature of information a child might

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[333] Needham, *supra* note 37, at 744–45. Additionally, a 2020 study of CASA volunteers found that most CASA volunteers merely parroted the social worker recommendations—only disagreeing with the social worker in 6% of cases. Kelly, *supra* note 201, at 296 n.275. Finally, volunteers are not held to the same professional ethical standards as attorneys—resulting in no accountability mechanism for zealous and diligent advocacy. *See* Taylor, *supra* note 37, at 618.

[334] *See, e.g.*, Needham, *supra* note 37, at 745–46.

[335] Malempati, *supra* note 251, at 194, 213–14; *see, e.g.*, Div. Youth & Fam. Servs. v. Robert M., 788 A.2d 888, 904–05 (N.J. Super. Ct. App. Div. 2002) (describing how a GAL is an independent fact finder and investigator for the court and distinguishing how attorneys for children in abuse and neglect proceedings are required to zealously protect the "child's fundamental legal rights").

[336] MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2020). Rule 1.2 applies even when a client has diminished capacity. *See id.* at r. 1.14.

[337] *See* Malempati, *supra* note 251, at 213–14 ("When lawyers take on [the role of attorney-GAL], they necessarily cease to function as traditional advocates. . . . If the lawyer fails to advocate for what the child client wants or prefers, the lawyer fails in his ethical duties and professional responsibilities to the client."); *see also In re* J.P.B., 419 N.W.2d 387, 391 (Iowa 1988) ("[The duty to advocate the client's interests] may present an ethical dilemma in a juvenile proceeding where the objective is *always* the best interest of the child, not the child's personal objective.").

[338] Taylor, *supra* note 37, at 618–19; *see supra* note 302 and accompanying text.

[339] *See* MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2020) (describing client-lawyer confidentiality rules); *see, e.g.*, People v. Gabriesheski, 262 P.3d 653, 660 (Colo. 2011) (holding that attorney-client privilege did not apply to the statements a child made to her attorney-GAL).

disclose in abusive situations.[340] Children may be less likely to disclose critical information without the assurance of confidentiality.[341] While the state-variable CAPTA model may have provided a beneficial framework for state experimentation initially, the Supreme Court has made clear that well-intentioned systems must "be candidly appraised" over time.[342] In application, CAPTA has not effectively protected a child's right to family integrity. Instead, children must be guaranteed independent counsel at all dependency proceedings.

### *C. The Value of Additional Safeguards: Giving the Child a Voice*

Guaranteeing children independent counsel is an effective safeguard against erroneous deprivation of children's private interests in dependency proceedings—particularly the child's fundamental right to family integrity. This section details the impact of recognizing a child's right to counsel in practice.

First, a child's lawyer has the legal toolbox that layperson CASA/GAL volunteers lack. Unlike the layperson CASA/GAL model previously described, lawyers have the skills and training to file motions and compel the government to provide the child appropriate services or compel actions of another party.[343] According to one study in Florida, researchers found that the number of motions filed in cases where the child had an attorney was 46.5% higher than in cases where the child did not have an attorney.[344] Children with attorneys also had nearly 50% more status checks than children without attorneys—giving the judge access to more information during adjudications.[345] Second, appointing independent counsel from the outset of dependency proceedings resolves the ethical conundrums faced by GAL-attorneys by eliminating the GAL's primary duty to the court; instead, independent counsel would represent and owe a duty to the child alone.[346]

Additionally, a child's lawyer in dependency proceedings can improve fact-finding and fundamental fairness by holding the state to its burden of proof and

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340 *See* Lauren Girard Adams, Lourdes M. Rosado & Angela C. Vigil, *What Difference Can a Quality Lawyer Make for a Child?*, 38 LITIG. 29, 32–33 (2011) (attributing a case where a child did not disclose that she was being sexually abused at her foster care placement to the absence of attorney-client protected conversations).

341 *Id.* at 33.

342 *In re* Gault, 387 U.S. 1, 21 (1967).

343 Taylor, *supra* note 37, at 614–15.

344 ANDREW E. ZINN & JACK SLOWRIVER, EXPEDITING PERMANENCY: LEGAL REPRESENTATION FOR FOSTER CHILDREN IN PALM BEACH COUNTY 9 (2008).

345 *Id.* at 9–10.

346 Taylor, *supra* note 37, at 618–19.

fulfillment of statutory obligations.[347] Vivek Sankaran, director of the Child Advocacy Law Clinic and the Child Welfare Appellate Clinic at the University of Michigan Law School, describes how conclusory statements about reasonable efforts and reunification are often accepted by the court without proper inquiry.[348] For example, at one hearing, a caseworker stated, "I didn't make reasonable efforts to reunify because the mother was homeless and was living in a room in a shelter."[349] The child's representative did not ask why the caseworker did not make any efforts toward reunification or explore less intrusive options for the mother and child than separation.[350] Instead, the judge mechanically checked the box that "reasonable efforts had been made, consistent with the circumstances," and moved on without pausing to consider the gravity of the child's constitutional rights at stake.[351] Appointed counsel for the child could challenge assertions and assumptions about the reasonableness of state efforts to ensure that the child's right to family integrity is safeguarded.[352]

### *D. The Government's Interests Implicated by a Child's Right to Counsel*

The final *Eldridge* prong, the government's interests, also supports a child's right to counsel. Overall, the government's interests largely align with the child's interests.[353] The Supreme Court has recognized that the state has an interest in preserving family integrity.[354] Pursuant to its parens patriae authority, the state also has an interest in the wellbeing and care of children.[355] In fact, the *Kenny A.* court found that the state and children had a combined "fundamental interest" that "far outweigh[ed] any fiscal or administrative burden that a right to appointed counsel may entail."[356]

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[347] *See* Pokempner et al., *supra* note 37, at 556; Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 28 (1981); *cf. In re Gault*, 387 U.S. at 41 n.69 (citing findings that appointed counsel in delinquency proceedings eliminated issues of procedural fairness and increased accuracy of fact-findings).

[348] Vivek Sankaran, *The Power of Asking Why*, IMPRINT (Nov. 1, 2021, 6:30 AM), https://imprintnews.org/opinion/the-power-of-asking-why/59995.

[349] *Id.*

[350] *Id.*

[351] *Id.*

[352] *Id.*

[353] *See* Jordan *ex rel.* Jordan v. Jackson, 15 F.3d 333, 346 (4th Cir. 1994); Pokempner et al., *supra* note 37, at 552.

[354] Santosky v. Kramer, 455 U.S. 745, 766–67 (1982); Stanley v. Illinois, 405 U.S. 645, 652 (1972).

[355] Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944).

[356] Kenny A. *ex rel.* Winn v. Perdue, 356 F. Supp. 2d 1353, 1361 (N.D. Ga. 2005). The court may have been taking its signal from *Lassiter*, where the Supreme Court stated that "though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here" in reference to the parent's private interest in not having their parental rights erroneously terminated. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 28 (1981).

Even if a court were to analyze the state's interest in fiscal or administrative efficiency, the balance would still weigh in favor of appointing counsel due to its cost effectiveness.[357] In an Indiana class action, one expert witness estimated that a single appointed attorney representing one hundred children could save the state $693,000 alone.[358] A national study by the University of Michigan Law School and a study in Florida found that children with attorneys spent less time in foster care and were more likely to achieve permanency, thus imposing fewer short-term administrative and fiscal burdens on the state.[359] Reducing time spent in foster care also decreases long-term fiscal burdens on the state, because children who spend extended time in foster care are less likely to finish college and more likely to face unemployment and housing instability as adults.[360]

Finally, there is a state interest in promoting the dignity of its citizens and public trust in the system.[361] Giving children a legitimate sense of voice and autonomy through representation will make them less likely to feel that results are arbitrary and may increase their trust in public systems and sense of procedural fairness, thus providing children a sense of stability and acceptance regardless of the proceeding's outcomes.[362]

On balance, children have a due process right to counsel in dependency proceedings. The child's interests are substantial and distinct from those of a parent. The governmental interests largely align with the child's interests and are *de minimis* where they do not.[363] Providing children a due process right to

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[357] Needham, *supra* note 37, at 749–50.

[358] *Id.* at 750. Another scholar has compared the 3:1 cost-to-benefit ratio of providing transitional services to children transitioning out of foster care to argue that providing counsel would result in a similar outcome. Taylor, *supra* note 37, at 617.

[359] *See* Needham, *supra* note 37, at 747–48 (describing studies). In the Florida study discussed, the costs saved by reduced time in foster care and needed services did not outweigh the costs of the appointed attorney—however, the net cost of the appointed attorney was estimated to only be $32 per day. ZINN & SLOWRIVER, *supra* note 344, at 22.

[360] *See* Needham, *supra* note 37, at 751–52.

[361] *See* Pitchal, *supra* note 268, at 693.

[362] Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571, 1618 (1996); *see also* Pitchal, *supra* note 268, at 693 (describing the author's experience representing a fifteen-year-old child's wishes to give the child dignity and hold the state to their burden of proof even when the attorney's argument was unlikely to succeed); Vicky Weisz, Twila Wingrove, Sarah J. Beal & April Faith-Slaker, *Children's Participation in Foster Care Hearings*, 35 CHILD ABUSE & NEGLECT 267, 270–72 (2011) (describing an empirical study involving forty-three children in dependency proceedings that found children "were more likely to view the judge as having made a fair decision when they attended their hearing . . . and were more trusting of their judge"). The same study also found that, contrary to concerns that participation in hearings may harm children, the children's anxiety levels were low prior to attending the hearings and even lower after the hearing, regardless of age. Weisz et al., *supra*, at 269–70; *see also* Pokempner et al., *supra* note 37, at 550 (describing the benefits of the guiding hand of counsel).

[363] *See* Pokempner et al., *supra* note 37, at 554.

counsel would bridge the gaps created by CAPTA, and most importantly, safeguard the child's fundamental right to family integrity from erroneous deprivation. While recognizing a child's right to counsel is a critical first step, it must be thoughtfully implemented to ensure that the child's access to counsel is effective. Part IV discusses such implementation considerations.

## IV. IMPLEMENTATION: ENSURING THE EFFECTIVE ASSISTANCE OF COUNSEL

This Part discusses a few of the considerations necessary to ensure that children have not just a nominal right to counsel but the full effective assistance of counsel. This Comment does not attempt to address the extensive state-level implications of recognizing a child's right to counsel.[364] Instead, this Part recommends several universal best practices. For appointed counsel to effectively safeguard a child's right to family integrity, children in dependency proceedings must be recognized as parties to the proceedings, counsel must be appointed before the first hearing, and appropriate caseload caps must be implemented. Finally, this Part addresses counterarguments and explains why it is essential that the right to counsel is anchored in the child's right to family integrity.

First, children must be recognized as parties to dependency proceedings. States vary on their recognition of children as having party status in dependency proceedings.[365] The attendant privileges and protections of party status—such as receiving notice, the ability to introduce evidence, cross-examine witnesses, and appeal—vary widely by jurisdiction.[366] Consequently, children's party

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[364] Scholars have dedicated considerable space to the mechanics of implementing a right to counsel. *See, e.g.*, Sobie, *supra* note 183, at 816–22 (discussing implementation recommendations for young children); *cf.* Pokempner et al., *supra* note 37, at 558–71 (discussing waiver of counsel provisions and considerations in the delinquency context). *See generally* MODEL ACT GOVERNING THE REPRESENTATION OF CHILD. IN ABUSE, NEGLECT, & DEPENDENCY PROC. (AM. BAR ASS'N 2011) (providing model language); Ira Lustbader & Erik Pitchal, *Implementation of the Right to Counsel for Children in Juvenile Court Dependency Proceedings: Lessons from* Kenny A., 36 NOVA L. REV. 407 (2012) (discussing lessons learned from the 2011 ABA Model Act and *Kenny A.*, including training and support considerations, performance measurements, and independence from the judiciary).

[365] *Compare In re* J.P., 12 So.3d 253, 254 (Fla. Dist. Ct. App. 2009) (citing Florida statute defining the child as a party in dependency proceedings), *and In re* Perez, No. 2003 AP 12 0091, 2004 WL 1171689, at *4 (Ohio Ct. App. May 24, 2004) (citing Ohio statute that a child who is the subject to a dependency proceeding is a party), *with In re* L.C., II, 900 A.2d 378, 381 (Pa. Super. Ct. 2006) (recognizing the class of persons that Pennsylvania case law has conferred party status to in dependency proceedings; children are not included), *and In re* W.L.H., 739 S.E.2d 322, 325 (Ga. 2013) (holding that child does not have standing to appeal in dependency proceedings independent from their guardian *ad litem*).

[366] Anne Elizabeth Goodgame, *Best to Be Seen and Heard: A Child's Right to Appeal Termination of Parental Rights*, 50 GA. L. REV. 1269, 1305 (2016) (discussing the need for a child to have the right to appeal

status and ability to defend their constitutional right to family integrity are tied to their zip code rather than universally guaranteed.[367] Moreover, a child's interests are always impacted by dependency adjudications—making the child by definition a necessary and indispensable party.[368] Correspondingly, children must be conferred full party status.

Failure to confer full party status to children severely restricts the child's attorney from representing the child's interests. A Georgia Supreme Court case, *In re W.L.H.*, is illustrative.[369] There, a child, represented by counsel, sought to appeal the court's finding that he was a dependent child.[370] A dependency finding is one of the first adjudicatory steps toward placement in foster care and termination of parental rights—in this case, it resulted in the child's placement in a group home.[371] When the child appealed, the court held that the child did lacked independent standing to appeal through his attorney because the child's attorney-GAL did not think the appeal was necessary.[372]

In reaching this holding, the court discussed the long-accepted reasoning that children lack capacity to determine their own best interests.[373] Such reasoning harkens back to general concerns about the clash of parental and children's rights raised by the modern children's rights movement.[374] However, as discussed in Section I.A, a commonality of interests exists between the parental and child's right to family integrity—resulting in increased protection to both when the child is given a voice.[375] In *W.L.H.*, the court's deference to the GAL-attorney's recommendation over the child-attorney's appeal effectively denied the child the assistance of counsel and ignored the evolving views of children's legal capacity

for the child's voice to be adequately heard); *cf.* Sankaran, Church & Mitchell, *supra* note 27, at 1177 (criticizing the lack of uniformity of policies and practices dependency proceedings).

367 *See* Sobie, *supra* note 183, at 766–67.

368 An "indispensable party" is someone with "interests that would inevitably be affected by a court's judgment." *Indispensable Party*, BLACK'S LAW DICTIONARY (9th ed. 2009). State laws often reflect this understanding—for example, in Georgia, a party is defined as "one who is directly interested in the subject matter of the litigation, [and] has the right to adduce testimony, to cross-examine witnesses, to control the proceedings, and to appeal from the judgment." Wilkins v. Ga. Dep't of Hum. Res., 337 S.E.2d 20, 24 (Ga. 1985).

369 739 S.E.2d 322 (Ga. 2013).

370 *Id.* at 323. In this case, the child's legal guardians were the child's cousin and her husband, who had custody of the child since he was seventeen months old until the time of the dependency hearing when he was twelve years old. *Id.* at 323–24.

371 *See* Goodgame, *supra* note 366, at 1292; *In re W.L.H*., 739 S.E.2d at 326 (Hunstein, J., dissenting).

372 *In re W.L.H*., 739 S.E.2d at 324.

373 *Id.*

374 *See supra* note 47 and accompanying text.

375 *See supra* notes 63–66 and accompanying text.

in American law.[376] Full party status and the attendant right to appeal must attach with the right to counsel in dependency proceedings.

Additionally, to adequately safeguard the child's right to family integrity, counsel must be appointed for the child before the first dependency hearing—not as soon as is practical. Some of the greatest threats to a child's right to family integrity occur at the first hearing after the child is initially removed.[377] For example, among the thousands of children removed for unsubstantiated reasons, the first hearing is a critical moment to ensure that they are returned to their family immediately rather than remaining in foster care and further exposing their parents and family to unwarranted state surveillance.[378] The consequences of not having counsel during these early, sensitive, adjudicatory moments can quickly amount to substantial constitutional violations.[379] As such, counsel must be appointed immediately.

Furthermore, based on the capacities and administrative findings of each state, counties should consider implementing a caseload cap to ensure appointed attorneys have the capacity to fully and effectively advocate for the children they represent.[380] High caseloads are "major barriers to quality representation" in child welfare cases.[381] The National Association of Counsel for Children recommends that GAL caseloads should never exceed sixty cases.[382] A similar

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[376] For example, under modern-day evolving views of children's capacity, the "mature minor doctrine" allows children to consent to specific health care procedures when they are mature enough to appreciate the consequences of the decision. *See, e.g.*, *In re* E.G., 549 N.E.2d 322, 327–28 (Ill. 1989). Unlike the mature minor doctrine, where the child's legal decision-making rights hinges on case-by-case fact-intensive inquiries, party status should be categorically conferred to children—no matter the child's level of maturity or age. As one scholar described, "[t]o deny the child a voice in proceedings regarding his own emotional and physical well-being is to relegate the child to the status of pre-nineteenth century chattel." Malempati, *supra* note 251, at 206.

[377] *See* Sankaran, *supra* note 298, at 2; *supra* Section II.C.

[378] *See* Meyerson, *supra* note 31.

[379] *Cf.* Duchesne v. Sugarman, 566 F.2d 817, 828 (2d Cir. 1977) (discussing how a mother's and children's rights to family integrity were violated during a twenty-seven-month period when neither had legal counsel).

[380] Taylor, *supra* note 37, at 622. In DeKalb County, Georgia, the caseload cap is 130; in New York, the caseload cap is 150. *Id.* A Connecticut-based advocacy group has argued the cap should be 80. *Id.*

[381] AM. BAR. ASS'N, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILD WELFARE AGENCIES 20 (2004), https://www.americanbar.org/content/dam/aba/administrative/child_law/agency-standards.authcheckdam.pdf. *See generally* NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS (2012) (discussing the duty of public defense programs and lawyers to avoid excessive caseloads).

[382] NAT'L ASS'N OF COUNSEL FOR CHILD., RECOMMENDATIONS FOR LEGAL REPRESENTATION OF CHILDREN AND YOUTH IN NEGLECT AND ABUSE PROCEEDINGS 19 (2022). https://yesedfoundation.org/uploads/1/2/9/6/129669197/nacc_recommendations_final.pdf; CLARIFICATION RE: NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES, NACC (Oct. 10, 2008), https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/certification/red_book_stmt_clarification.pdf.

limit should apply for a child's independent appointed counsel.[383] While this entails some administrative burden, such burdens are outweighed by the need to protect children's rights and may be offset by costs saved from decreasing the time a child spends in foster care.[384]

Finally, regardless of the implementation strategies adopted by states, it is critical that the right to counsel is anchored in the right to family integrity. Leading children's rights expert Martin Guggenheim has repeatedly critiqued the concept of appointing counsel for children.[385] Guggenheim compellingly argues that one of the dangers of children's attorneys is that the attorney will argue for what they deem best, "whether or not such results comport with what the child would want, what the law expects, or what is best for the child."[386] He suggests that attorneys do not like to lose and, consequently, are more likely to rubberstamp caseworkers' opinions and agree to adoption even when family reunification should still be zealously pursued.[387] He warns that "[w]e have not designed or conceived of the children's bar as having been erected to prevent state overreaching."[388]

However, when a child's due process right to counsel is firmly rooted in the child's constitutional right to family integrity, the opposite is true. The very purpose of a right to counsel in dependency proceedings is to prevent the state from unduly intruding upon the child's right to family integrity—from the very first hearing in order to ensure the child's removal was justified, to every subsequent hearing in order to ensure the state is making reasonable efforts to reunify the family. Doing so will help decrease family separation for reasons of unmet material needs, harmful surveillance, or racial basis. Ultimately, in a

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383 *See, e.g.*, *Overview of Fulton County Consent Decree in Kenny A. v. Perdue*, BARTON CHILD L. & POL'Y CTR., http://bartoncenter.net/work/childwelfare/kennya/kenny_a_fulton_summary_20060713.html (last visited Jan. 13, 2022) (noting that the consent decree issued after the *Kenny A.* decision required caseload caps for child attorneys).

384 Kenny A. *ex rel.* Winn v. Perdue, 356 F. Supp. 2d 1353, 1361 (N.D. Ga. 2005); *see supra* notes 357–60 and accompanying text; *cf.* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 28 (1981) (discussing the state's recognition that the cost of appointed counsel for parents in termination proceedings was "admittedly *de minimis* compared to the costs in all criminal actions").

385 *See, e.g.*, Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299, 313–27 (1998) (arguing lawyers will unduly influence the outcome of cases and must be curtailed); Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L.J. 805, 805–06 (2006) (citing past publications arguing against attorneys for children and arguing that such attorneys ultimately serve the state rather than the child).

386 Guggenheim, *How Children's Lawyers Serve State Interests*, *supra* note 385, at 805.

387 *Id.* at 820 n.54, 832.

388 *Id.* at 830.

system that has historically silenced the child and disregarded the child's right to family integrity, it will give the child a voice.

## CONCLUSION

As the Supreme Court noted when it reckoned with the failures of the juvenile justice system and children's right to counsel in delinquency proceedings, "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[389] Similarly, the discretionary and unchecked informality inherent to the child welfare system today is a poor substitute to safeguard a child's interests. When a court restricts a parent's ability to safeguard a child's interests due to allegations of abuse or neglect, and when the state in its parens patriae authority has fallen short of caring for and protecting the child, someone must stand in the breach to safeguard the child's rights and amplify the child's voice.[390]

Recognizing a right to counsel would ensure that children like three-year-old Amanda, ten-year-old Christopher, and five-year-old Deja have a voice in dependency proceedings.[391] To safeguard a child's fundamental right to family integrity in dependency proceedings,[392] children must be guaranteed the due process right to independent counsel.[393] The Constitution can tolerate nothing less.

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389 *In re* Gault, 387 U.S. 1, 18 (1967).

390 *See supra* Part II.

391 *See* Berman v. Young, 291 F.3d 976 (7th Cir. 2002) (Amanda's case); Jordan *ex rel.* Jordan v. Jackson, 15 F.3d 333 (4th Cir. 1994) (Christopher's case); Clifford & Silver-Greenberg, *supra* note 1 (Deja's story).

392 *See supra* Part I.

393 *See supra* Part III.

* Executive Online Editor, *Emory Law Journal*, Volume 72; Emory University School of Law, J.D., 2023; Vanderbilt University, B.S., 2017. I am immensely grateful to my faculty advisor, Professor Melissa Carter, for her patient guidance, practical insight, and unfailing kindness. I am indebted to the entire staff of the *Emory Law Journal*, particularly Everett Stanley, Kristina DuBois, Caitlin Croley, and Tom Hill, for their diligence in refining this piece. Finally, I am thankful to my family and friends for their unwavering support and encouragement. To my parents, Bryan and Carmen Kennedy, thank you for shaping who I am today through your grace, sacrifice, and love.