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Journal of the American Academy of  
**Matrimonial Lawyers**



**CONSTITUTIONAL ISSUES IN  
FAMILY LAW**

Volume 35    2022    Number 1

**Offices of the Academy**

209 W. Jackson Blvd.  
Suite 602  
Chicago, Illinois 60606

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Subscriptions are available for \$100.00 per year (\$50.00 for educational institutions, judges and AAML Chapters) and individual issues may be purchased for \$30.00 per copy from: Journal of the American Academy of Matrimonial Lawyers, 209 W. Jackson Blvd., Suite 602, Chicago Illinois 60606.

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ISSN 0882-6714

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Journal of the American Academy of  
**Matrimonial Lawyers**



Volume 35

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This issue is devoted to:

**CONSTITUTIONAL ISSUES IN FAMILY LAW**

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## About This Issue

This issue of the Journal is devoted to Constitutional Issues in Family Law. We have an excellent collection of articles with contributions by the most prominent family law professors in the country. They cover issues ranging from the second amendment as it pertains to cohabitants, the fifth amendment privilege against self-incrimination, and the constitutional rights of parents. There are also articles on the Indian Child Welfare Act and the Supreme Court's recent controversial abortion decision. First and fifth amendment issues are also discussed as are changes to the MMPI, a psychological tool often used in family courts. As usual, the issue concludes with an excellent bibliography of articles related to the topics mentioned.

Our Issue Editors are Laura Morgan and Anne Berger. Ms. Morgan is the owner/operator of Family Law Consulting in Amherst, Massachusetts, where she provides research and writing services to family law attorneys nationwide. Laura is the author of *CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION* (2nd ed. 2021-2022) and the co-author of *ATTACKING AND DEFENDING MARITAL AGREEMENTS* (2nd ed. 2010), as well as dozens of law review articles. She has also presented at over 100 CLEs, and serves on the Board of Editors of the Journal of the American Academy of Matrimonial Lawyers and The Family Law Journal, and previously served on the Board of The Family Advocate. Anne L. Berger has been practicing law in Massachusetts for over 50 years. She is a fellow of the American Academy of Matrimonial Lawyers and a fellow of the International Academy of Family Lawyers and has served in multiple positions on the governing board of both organizations. Ms. Berger is also a former Chair and a current Trustee of the International Commission on Couples and Family Relations and has served on the JAAML Editorial Board for a number of years. Her practice concentrates on complex matrimonial matters with international components.

Our first article is entitled, *Equality, Gestational Erasure, and the Constitutional Law of Parenthood* by Katharine K. Baker. Her article addresses the criticism that preferential treatment of gestational mothers discriminates against fathers or that the law's approach to gestational involvement unfairly excludes same sex partners from parental rights and that they both endorse a kind of gestational erasure, albeit for different reasons that relate to the foundations of parenthood as genetics or parental involvement. She argues, however that discounting the relevance of gestation will have serious consequences for the law of abortion, adoption, and custody, placing already vulnerable women at more risk of being controlled by men they want to escape. Further, that current constitutional doctrine, which recognizes the importance of ges-

tation is not inconsistent with LGBTQ equality in parenthood. Professor Baker is a University Distinguished Professor of Law at 11T Chicago-Kent college of Law. She is an expert in family law, particularly in the modern law of marriage and parenthood, and she has written extensively on sexual violence and misconduct, especially in the lives of young adults. Her work focuses on the intersection of women's intimate lives and the law. Prof. Baker's articles have been published in numerous journals, including the Harvard Law Review, Yale Law Journal, University of Chicago Law Review, Minnesota Law Review, and Boston University Law Review. She has been a visiting professor at Yale Law School, the University of Pennsylvania Law School, and Northwestern Law School. She is a graduate of Harvard-Radcliffe College and the University of Chicago Law School, where she served as a Comments Editor for the Law Review.

Joseph Blocher and Maisie Wilson authored *Living With Guns: Legal and Constitutional Considerations for Those Cohabiting with Temporarily Prohibited Possessors*. Professor Blocher is the Lanty L. Smith '67 Professor of Law at Duke Law School, where he also co-directs the Center for Firearms Law. He has published articles on the Second Amendment in leading law reviews—including Yale, Harvard, Stanford, NYU, Virginia, and Chicago—as well as popular outlets like the New York Times and Washington Post. With Darrell A.H. Miller, he is co-author of *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* (CAMBRIDGE 2008). Maisie Wilson is a first-year associate in the complex litigation and trials group at a large law firm in New York City. She is a 2021 graduate of Duke Law School, and she received a Bachelor of Arts in Music and History from Florida State University. Her work has previously been published in the Duke Law Journal. In their article they discuss whose decisions about gun possession in the home should be privileged when there is a conflict between or among cohabitants, an issue that has become more salient given the increased risk of gun-linked intimate partner violence in the Covid era. They suggest that analyzing this question demonstrates the ways in which the right to keep and bear arms is intertwined with other rights and interests, including within a single family or cohabiting unit. To illustrate the point, they focus specifically on the question of whether a legal gun owner may face legal liability while cohabiting with a temporarily prohibited possessor.

In *The Constitution, Paternity, Rape, and Coerced Intercourse: No Protection Required*, Karen Syma Czapanskiy addresses the question of whether a man who has engaged in coerced intercourse must nevertheless be given legal parenthood status. She argues that the Constitution does not require such a result because sourcing paternity in genetics is not a constitutional requirement, and due process is not denied when the man's claim to fatherhood is protected by minimal procedures. Furthermore, she contends that women who are victims of rape or coerced intercourse are denied equal protection when more than minimal due

process is provided to protect a claim of fatherhood when the pregnancy resulted from coerced intercourse. Professor Czapanskiy is Professor Emerita, University of Maryland Carey School of Law. She has taught and written extensively about family relationships, gender, disability, special education and poverty. In retirement, she anticipates continuing to contribute to legal and policy debates, participating in electoral politics, riding horses, baking bread, and mentoring younger professionals.

Our next article was contributed by Professor Maxine Eichner and is entitled *When the Helping Hand Hurts: How Medical Child Abuse Charges Are Undermining Parents' Decision-Making Rights over Children's Medical Care*. She reports that “medical child abuse” (MCA) charges are now increasingly being leveled against parents by doctors. Proponents of this new “diagnosis”—mainly pediatricians who specialize in child abuse—argue that parents who seek medical care that a doctor deems unnecessary have committed abuse, and doctors should “diagnose” this abuse and report it to child protection authorities. Her primary thesis is that these MCA charges as conceptualized and weaponized against parents, constitute a gross and devastating infringement on parents’ constitutional right to determine their children’s medical care. She describes the recent origin of MCA charges and demonstrates that the broad definition of MCA adopted by physicians constitutes an unprecedented and unconstitutional expansion of the state’s power to supervene and supervise parents’ medical decision-making. She criticizes the process through which physicians identify cases of MCA which particularly targets parents of children with rare or complex health conditions. She suggests that through these cases courts are expanding physicians’ authority beyond their proper bounds in medical neglect cases and finally she proposes legislative reforms and litigation strategies to protect parents’ constitutional rights. Professor Maxine Eichner is the Graham Kenan Distinguished Professor of Law at the University of North Carolina School of Law. In addition to her work on medical child abuse, she writes on issues at the intersection of law and political theory, focusing particularly on how U.S. social welfare law and market forces affect families, as well as on issues of feminist theory. Professor Eichner is the author of *THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED)* (OUP, 2020), as well as *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* (OUP, 2010). In addition, she has written numerous articles and chapters for law reviews, peer-reviewed journals, and edited volumes on law and political theory, and was an editor of a family law casebook.

The Indian Child Welfare Act is the subject of our next article written by Professor Ann Laquer Estin. It is entitled, *Equal Protection and the Indian Child Welfare Act: States, Tribal Nations, and Family Law* and offers family law practitioners an introduction to the unique balance of federal, tribal, and state authority with respect to Native Ameri-

can communities and tribal members, and the Supreme Court's distinctive equal protection jurisprudence in this context. It considers the challenges posed by cross-border family litigation from this perspective, arguing that states have an important role to play in recognizing and supporting the ties between tribes and their members. It discusses the interaction of state and tribal courts in family law matters and describes the Supreme Court's approach to equal protection in federal Indian law cases including in the *Brakeen* case which is currently pending before the Court. She concludes by suggesting that the experience gained with ICWA can be used to expand state and tribal comity and collaboration in child welfare and other family law matters, including domestic violence, child support, custody, and divorce. Professor Estin is Aliber Family Chair at the University of Iowa College of Law. She teaches courses including Family Law, Federal Indian Law, and has written several books, including the *INTERNATIONAL FAMILY LAW DESK BOOK* (2nd ed. 2016) and *DOMESTIC RELATIONSHIPS: A CONTEMPORARY APPROACH* (2nd ed. 2018). Before her academic career, she practiced family law in Denver, Colorado.

Our next article focuses on the recent Supreme Court abortion decision and is entitled *Dobbs V. Jackson Women's Health and The Post-Roe Landscape* by Professor Yvonne Lindgren. The article examines some of the important takeaways of the decision itself and the likely reverberations it will have on other areas of law and reproductive healthcare more broadly. It closely examines the Court's various opinions to consider what they reveal about the new standard of review for abortion, the shift in power among the members of the Court itself, as well as what the opinion signals might come next. It further explores the future of abortion in a post-*Roe* landscape as the abortion rights movement moves from the defensive to the offensive posture and discusses emerging constitutional theories for sourcing the abortion right, as well as federal and state executive and legislative actions to protect abortion access. Finally, she assesses the potential impact of the end of *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* on criminalization of abortion and self-managed care, the surveillance of pregnant people, and adjacent issues, including reproductive health and assisted reproductive technology. Yvonne ("Yvette") Lindgren is an Associate Professor of Law at University of Missouri-Kansas City School of Law. She earned her LL.M. and J.S.D. from U.C. Berkeley School of Law and her J.D. from Hastings College of the Law. She was a post-doctoral fellow at the Center on Reproductive Rights and Justice at Berkeley Law. She is the author of numerous articles related to her research interests which are reproductive rights and justice, constitutional law, and health law policy.

The Minnesota Multiphasic Personality Inventory (MMPI), a psychological tool frequently used in family law cases has been again revised and our next article offers reader an overview. Dr. Chris Mulchay is the author of *The Revised MMPI-3 and Forensic Child Custody Eval-*

*uations: A Primer for Family Lawyers* which is designed to provide family court attorneys with information concerning the newest version of the MMPI, abbreviated as the MMPI-3. It is a 335-item self-report inventory and although has a very similar inventory to the previous version its updates include its normative data, as well as improved items, and improved scales. Attorneys should understand the strengths and limitations of the MMPI-3 in the context of forensic parenting evaluations and how the new version may apply to clients and courts. In addition to describing the new features the article addresses *Daubert* and addresses the controversy surrounding the use of psychological testing in family court evaluations. The article concludes with challenges to the MMPI-3. Chris Mulchay is a licensed psychologist practicing in Asheville, North Carolina. He is the co-author with Benjamin Garber, PhD, and Dana Prescott, JD, PhD, LMSW of *THE FAMILY LAW PROFESSIONAL'S FIELD GUIDE TO HIGH-CONFLICT LITIGATION: DYNAMICS, NOT DIAGNOSES* (ABA, 2021).

Changes in the formation of families have led to increased conflicts regarding custodial rights. Professor Tom Oldham focuses specifically on disputes between parents and non-parents in his article entitled *Changing Norms in the United States for Resolving Custody Disputes Between a Parent and a Non-Parent*. His article discusses the rationale for the strong parental presumption and how it can be rebutted. It further describes the compromise position where there is a parental preference unless compelling circumstances exist and then highlights jurisdictions where no parental presumption is applied in custody disputes between a parent and a defacto parent or psychological parent. He evaluates the strengths and weaknesses of the various approaches and the extent to which parents' constitutional rights are impacted by these various approaches. J. Thomas Oldham is the John Freeman Professor of Law at the University of Houston Law School where he has taught Family Law and Community Property for 41 years. He is a member of the Board of Editors for the Family Law Quarterly and has written extensively about premarital agreements, equitable distribution, conflicts of law in divorce, community property and child support. He played center field for the 1970 Dennison University Big Red baseball squad.

Professor Mark Strasser is the author of our next piece entitled, *Day of Reckoning: On Non-Custodial Parents' Rights to Teach Their Children Religion*. In it he suggests that while the U.S. Supreme Court has long recognized that the Constitution protects the right of parents to impart religious values to their children, it has never addressed the Constitution's limitations on the states with respect to how those states resolve divorced parents' disputes about their children's religious training. He points out that state courts have adopted various approaches when seeking to balance the parent's respective rights and their children's interests, but he argues that many state approaches do not take adequate account of existing Religion Clause guarantees and are un-

likely to pass muster under the current Court's increasingly robust view of free exercise protections. He concludes that many states will likely have to modify their approaches with respect to the conditions under which noncustodial parents may be prohibited from instructing their children on religious matters, best interests of the children notwithstanding. Professor Strasser is the Trustees Professor of Law at Capital University Law School in Columbus, Ohio. His teaching and research are primarily in Constitutional Law and Family Law broadly construed. He has written numerous articles and several books including *FREE EXERCISE OF RELIGION AND THE UNITED STATES CONSTITUTION: THE SUPREME COURT'S CHALLENGE* (ROUTLEDGE, 2018). His current focus tends to be on First Amendment and Family and Reproductive issues.

Our final article was written by Brett R. Turner and is entitled, *Fifth Amendment Privilege in Family Law Litigation*. Mr. Turner begins by examining the basic parameters of the privilege and when and how the privilege can be waived which is essential to determining the practice scope of the privilege. He then illustrates how the privilege applies to documents and other forms of nontestimonial evidence and finally, he highlights the adverse consequences of asserting the privilege. He cautions attorneys that while there are similar privileges under state law that generally track the protection given by the federal provision, it is best to confirm that approach since there is no requirement that the federal and state privileges exactly mirror one another. Mr. Turner is Senior Attorney at the National Legal Research Group. He is the author of *EQUITABLE DISTRIBUTION OF PROPERTY* (4th ed. 2021) and the co-author (with Laura W. Morgan) of *ATTACKING AND DEFENDING MARITAL AGREEMENTS* (2ND ED. 2012). He also was the former Editor of *Divorce Litigation*.

We conclude the issue with another excellent bibliography of articles on the topic of constitutional issues in family law by Professor Allen Rostron, William R. Jacques Constitutional Law Scholar and Professor of Law at the University of Missouri – Kansas City School of Law.

Mary Kay Kisthardt  
Executive Editor  
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# Equality, Gestational Erasure, and the Constitutional Law of Parenthood

by  
Katharine K. Baker\*

## Abstract

This article calls into question the abundance of academic writing that criticizes, as inconsistent with equality principles, the constitutional law of parenthood. Some of this criticism, concerned with gender stereotypes, argues that the current doctrine's preferential treatment of gestational mothers inexcusably discriminates against fathers. Other critics focus on how the Supreme Court's approach to gestational investment excludes same sex partners from parental rights. Both of these critiques argue that the work of gestation has been overvalued. They both endorse a kind of gestational erasure, but they differ sharply on where they root the essence of parenthood. Those concerned about equal treatment for fathers root parenthood in genetics. Those concerned about equal treatment for same sex partners root parenthood in parental investment. This article highlights the tension between these positions and challenges those willing to erase the relevance of gestation at both a normative and practical level. It explains how discounting the relevance of gestation will have serious consequences for the law of abortion, adoption, and custody, placing already vulnerable women at more risk of being controlled by men they want to escape. Further, this article argues that the current constitutional doctrine, which recognizes the salience of gestation, necessarily incorporates what LGBTQ advocates argue must be incorporated into decisions about parenthood: parental investment. What is inconsistent with LGBTQ equality in parenthood is not a regime that recognizes gestational investment, but one that reifies the genetic essentialism on which the gender-stereotype critique relies.

## INTRODUCTION

In the last ten years there has been a flurry of academic writing criticizing the constitutional law of parenthood. This scholar-

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\* University Distinguished Professor of Law, IIT Chicago-Kent College of Law. Thanks to Michelle Oberman and all of my colleagues who have made comments over the years on the arguments I've finally brought together in this piece.

ship assails what it sees as “separate spheres ideology,”<sup>1</sup> “maternalist norms,”<sup>2</sup> “regressive tendencies,”<sup>3</sup> and, the Supreme Court’s “partial and incomplete”<sup>4</sup> approach to gender equality in the parenthood context. In short, this scholarship argues that the Supreme Court has used biological differences between men and women to justify preferential parental treatment for mothers. The last decade has also seen remarkable movement in state courts towards securing greater parental rights for same sex partners of legal parents. This change has also been rooted in notions of equality. An emerging body of law suggests that same sex partners should be treated as opposite sex partners in the law of parenthood.

These two strands of this equality reasoning, one centered on a critique of treating fathers differently than mothers and the other centered on a critique of treating same sex parents differently than opposite sex parents, share an interest in discounting what the Supreme Court has, to date, been willing to reward: gestational labor. But they differ sharply on where they root the essence of legal parenthood. Those concerned about equal treatment for fathers inevitably root legal parenthood in genetics: parenthood is a genetic fact; everything else is social construction. Those concerned about equality for same sex parents root legal parenthood in function: parenting is a verb; relationship, not genes, should matter to questions of parenthood. There is thus an inherent tension between the arguments that suggest mothers and fathers should automatically be treated equally and those that suggest same sex partners must be treated as opposite sex partners are.

The response to this tension in state legislatures and courts has been mostly, though not uniformly, to expand the class of potential parents to enable more men to claim parenthood by virtue of genetics and more same sex parents to claim

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<sup>1</sup> Cary Franklin, *Biological Warfare: Constitutional Conflict over ‘Inherent Differences’ Between the Sexes*, 693 SUP. CT. REV. 1, 14 (2018).

<sup>2</sup> Kristin Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race and Nation*, 123 YALE L.J. 2134, 2205 (2014).

<sup>3</sup> Courtney M. Cahill, *The New Maternity*, 133 HARV. L. REV. 2221, 2231(2020).

<sup>4</sup> Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2268 (2017).



parenthood based on function. For instance, notwithstanding Supreme Court precedent sanctioning the marital presumption of paternity, most states allow a genetic father to sue for paternity in order to overcome the marital presumption.<sup>5</sup> The 2017 Uniform Parentage Act and many state courts now allow an adult who has functioned as a parent to sue for parental rights even if the legal parent does not want to share them.<sup>6</sup> In the language of equality scholarship, states have responded to equality arguments by ratcheting up: affording the privileges that were formerly reserved for a few (those who gestated children) to more potential legal parents.<sup>7</sup> In ratcheting up in this manner, current trends have diminished the salience of gestational labor.

This article challenges, at both a normative and practical level, those willing to discount gestational investment. It explains how discounting the relevance of gestation will have serious consequences for the law of abortion, adoption, and custody, placing already vulnerable women at more risk of being controlled by men they want to escape. Further, and possibly more controversially, this article argues that the current constitutional doctrine, which recognizes the salience of gestation, necessarily incorporates what LGBTQ advocates argue must be incorporated into decisions about parenthood: parental investment. Honoring gestation as investment is a means of recognizing parenthood as a verb. Ultimately, conceptualizing parenthood as a set of rights that flow from the obligations one has accepted, not a status one acquires through sex, allows the law to incorporate new family forms, honor those who take care of children,

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<sup>5</sup> See, e.g., 2017 UNIF. PARENTAGE ACT §§ 602, 607 (giving standing to a man alleging himself to be the genetic father); see also Ill. Parentage Act of 2015, 750 ILL. COMP. STAT. §§ 46/602, 46/617 (giving standing to a man alleging himself to be the genetic father and allowing genetic testing to overcome the presumption of parentage based on marriage or a previous adjudication of parentage).

<sup>6</sup> 2017 UNIF. PARENTAGE ACT § 609 (establishing standing in a parentage action of an individual who can establish the elements of de facto parentage).

<sup>7</sup> For more on ratcheting up and down, see Lois Seidman, *The Ratchet Wreck, Equality's Leveling Down Problem*, 2330 GEO. FAC. PUBL'NS 1 (2020); see also Deborah Brake, *When Equality Leave Everyone Worse Off: The Problem of Leveling Down*, 46 WM. & MARY L. REV. 513 (2004).

and render irrelevant the moralism that has traditionally linked legal parenthood to sexual activity.

The article proceeds as follows. Part I summarizes both the Supreme Court doctrine that vests greater rights in the gestator at birth and the gender-stereotype critique of that doctrine. It unpacks how much the gender-stereotype critique relies on genetic essentialism to confer parental status and it explains how the gender-stereotype critique perpetuates a different kind of sex inequality, one that undervalues and ignores the work that women have disproportionately done. From caretaking to clerical work to emotional support, the law – and many other disciplines – have a long history of treating what women do as somehow inevitable, unworthy of formal recognition or compensation.<sup>8</sup> The Supreme Court's attention to gestational labor has been an exception to that pattern. Part I concludes with a discussion of paternity law. It is paternity law that best justifies genetics as the root of parenthood, but as Part I explains, paternity law is a normatively and practically feeble foundation on which to rest a modern or workable approach to parental rights.

Part I is descriptive and then normative. Part II takes a predictive turn and explores the likely ramifications, for the law of abortion, adoption, and custody, of elevating genetics over gestation as the source of parenthood. It highlights how the story that the gender-stereotype critique tells (or refuses to tell) about gestation bears a striking resemblance to the stories that antiabortion activists tell (or refuse to tell) about gestation, and it demonstrates how the gender-stereotype critique leads to a legal regime in which gestators have fewer rights to terminate their

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<sup>8</sup> See Katharine B. Silbaugh, *Turning Labor into Love: Housework and the Law*, 99 NW. U.L. REV. 1, 36-54 (1996) (exploring the numerous ways in which courts and governmental agencies treat women's domestic labor as freely given, not work entitled to compensation); see also ANN OAKLEY, *THE SOCIOLOGY OF HOUSEWORK* (1972) (exploring how sociology as a discipline refused to consider women's work as a subject worthy of study); Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein and Tushnet's Constitutional Law Commentary*, 89 COLUM. L. REV. 264, 267-69 (1989) (detailing how traditional treatment of women's inequality fails to address how women's work is routinely ignored as work); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1589-1605 (1996) (explaining how the failure to tax housework bars women from the kind of wage protections that men enjoy).

pregnancy, less ability to extinguish their parental rights if they want their child to be adopted, and significantly less freedom to escape an unwanted connection to a man with whom they once had sex. Part II concludes with a discussion of how those who advocate for greater father's rights in the custody context rely on the same genetic essentialism that the gender-stereotype technique does. Reifying that genetic essentialism will lead courts to where fathers' rights groups want to go, away from basing parental determinations on demonstrated parental investment.

Part III returns to the tension between the gender essentialism of the gender-stereotype critique and the factors that LGBTQ equality advocates say should be the source of parenthood. Part III argues that it is not gestation, but genetics, that should be dismissed as a source of parenthood. Contrary to those who argue, on behalf of LGBTQ equality, that honoring gestation is part of the problem for LGBTQ parents, Part III suggests that honoring gestation is more aptly seen as part of the solution for a parental regime that honors those who invest in children. At birth, it is the gestator who has indisputably invested more.<sup>9</sup> It is the equality claims of genetic fathers, much more than the traditional deference to gestational investment, that pose the greatest threat to LGBTQ parenting equality. If the law is to take parental investment seriously in conferring parental rights, it should take gestational investment seriously as well. This does not give the gestator greater parental rights forever, only during the time when her relative investment is so much greater.<sup>10</sup>

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<sup>9</sup> It is possible that an expectant non-gestating parent spends a great deal of money on behalf of the yet unborn child or uses labor to construct goods that the child would eventually use, but any of that investment would have value regardless of the child's eventual existence. Furniture and diapers, not to mention investing in making oneself healthier for the sake of the coming child, have value that exists apart from the child. The gestator's investment has no comparable external value. She invests her time and labor and health for nothing in return except the birth of the child.

<sup>10</sup> See *infra* text accompanying notes 13-16 (discussion of unwed father cases). Moreover, as discussed *infra* text accompanying note 129, the vast majority of gestators consent to share parental rights (with partners) before birth or just after. So vesting greater rights in the gestator only when she does not consent to share only affects those situations in which the gestator has reasons not to share.

Part IV concludes by suggesting that ultimately, though courts and recent parentage acts appear to be ratcheting up by treating more potential parents like gestators, an embrace of gestational erasure may well result in a kind of ratcheting down - treating no one as particularly privileged with regard to parental status. If current trends continue, parentage questions may just become best interest of the child free-for-alls in which no one gets preferential treatment as a parent. Under such a regime, it is unlikely that genetic fathers will emerge with significantly more rights, though gestators who want to escape toxic relationships with former sexual partners will be significantly worse off and, because they are not genetically related, potential LGBTQ parents will still be at a comparative disadvantage for parenthood because they will never be able to claim the genetic connection in which genetic fathers root their entitlement.

## **I. Constitutional Parental Rights and the Gender-stereotype Critique**

### *A. The Doctrine and Its Critics*

In an (in)famous line of cases, the Supreme Court vested primary parental rights of a sexually conceived child born to an unmarried woman in the gestator of the child.<sup>11</sup> Without the legal act of marriage serving as an agreement to share parental status, the Court has held that unwed fathers can be treated differently than unwed mothers, at least up until the time that the

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<sup>11</sup> The qualifiers “sexually conceived” and “unmarried” are critically important. Parental rights for children produced non-sexually are governed by reproductive technology contracts (sperm donation or surrogacy), not constitutional law. To date the Supreme Court has not suggested any constitutional problem with those contracts. Marriage is and always has been treated as an agreement that included the rights and obligations of parenthood for the spouse of the woman who gave birth during the marriage. See Katharine K. Baker, *Bargaining or Biology - The History and Future of Paternity Law and Parental Status*, 14 CORNELL J. L. & PUB. POL’Y 1, 25 (discussing the way in which the marital presumption of paternity, which for centuries was all but irrefutable, has always treated marriage as a kind of contract for parental status of any children born to the marriage). For purposes of this article, it is important to underscore that both men and same sex partners can secure equal parental rights at birth either through contract or marriage. See *infra* text accompanying notes 125-126.

biological mother's and the genetic father's investment in the children can be considered similar.<sup>12</sup> Investing in a post-birth relationship with his genetic issue makes a genetic father similarly situated to the woman who gave birth to the child and has continued to rear it.<sup>13</sup> But at birth, he is not similarly situated.

In *Caban v. Mohammed*,<sup>14</sup> the Court found that because the father had, with the consent of the mother, "come forward and participated in the rearing of the child[ren]" (aged 4 and 6), he was entitled to equal treatment as a parent.<sup>15</sup> The mother's greater gestational investment became less important over time because the effort both genetic parents put into parenting after the children were born diminished the relative weight of the mother's greater initial contribution. In contrast, the father in *Lehr v. Robertson*<sup>16</sup> had spent no time with his child after it was born and the Court found the father and mother were dissimilarly situated. The biological mother had blocked the genetic father's access to the child and the relationship between the two genetic parents had clearly soured. Because he was never able to develop a relationship with his genetic issue, Mr. Lehr was never able to render himself similarly situated to the mother. Equal protection did not demand comparable treatment.

Equality champions question cases like *Lehr* and a line of citizenship cases that suggest biological mothers can be treated differently than genetic fathers.<sup>17</sup> Professor Douglas NeJaime questions the "organiz[ation of] family around the biological

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<sup>12</sup> The unwed genetic fathers who lost their constitutional claims to parental status include Leon Quilloin, *Quilloin v. Wolcott*, 434 U.S. 246 (1978); Jonathon Lehr, *Lehr v. Robertson*, 463 U.S. 248 (1983); Michael H., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

<sup>13</sup> In *Michael H.*, 491 U.S. 110, a plurality of the Court endorsed the traditional exception to this premise. If the law has already conferred parental status on the husband of the mother and neither husband nor wife wants to disrupt the legal status of the assigned parents, then the genetic father cannot necessarily establish paternity, even if he has a relationship with the child.

<sup>14</sup> 441 U.S. 380 (1979).

<sup>15</sup> *Id.* at 392-93.

<sup>16</sup> 463 U.S. 248 (1983).

<sup>17</sup> For explication and criticism of the citizenship cases, see Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 705-06 (2014) (arguing that the citizenship cases use a "rigid notion of biological sex and outdated and stereotypical conceptions of fathering"); see also Collins, *supra* note 2.

mother”<sup>18</sup> because of its “troubling implications in terms of both gender and sexual orientation.”<sup>19</sup> Professor Clare Huntington, who has argued that unwed parents should have equal parenting time at birth,<sup>20</sup> questions the values that influence what she calls “deeply normative judgments, for example that giving birth creates a connection between mother and child.”<sup>21</sup> Comparably, Professor Cary Franklin criticizes citizenship cases that allow a genetic father who had a relationship with his child (though had not legally registered as a father) to be treated differently than a biological mother “who long ago lost touch with, or indeed never even met” her child.<sup>22</sup> The citizenship cases, like the unwed father cases, treat most mothers and fathers differently by making it easier for a U.S. citizen gestator than an unwed U.S. citizen genetic father to convey citizenship on children.<sup>23</sup> Professor Kristin Collins suggests this disparate treatment is rooted in “maternalist norms.”<sup>24</sup> Professor Courtney Cahill suggests that the constitutional law of maternity is “regressive” because of the way in which it makes assumptions about mothers’ connection to children whom they gestate.<sup>25</sup>

All of these authors argue that by vesting greater parental control in the person who has given birth, courts reinforce problematic stereotypes about women’s caretaking ability and women’s deeper bonds with children. For purposes of this article, one can concede that vesting greater rights in a gestator may reinforce some of these stereotypes. If there were no independent reason for vesting greater rights in the gestator, reinforcing those stereotypes would arguably be cause for changing the doctrine. But, as the next section will detail, the preferential treatment of

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<sup>18</sup> NeJaime, *supra* note 4, at 2314.

<sup>19</sup> *Id.* at 2309.

<sup>20</sup> Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 227 (2015).

<sup>21</sup> Clare Huntington, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 292 (2018).

<sup>22</sup> Franklin, *supra* note 1, at 27.

<sup>23</sup> See *Nguyen v. INS*, 533 U.S. 53, 57 (2001); *Miller v. Albright*, 523 U.S. 420, 441 (1998) (both holding that a genetic child of an American father who was not born in the United States does not have a right based on his genetic parentage to be considered a citizen).

<sup>24</sup> Collins, *supra* note 2, at 2205.

<sup>25</sup> Cahill, *supra* note 3, at 2229.

gestators is solidly grounded in valid notions of desert. Vesting gestators with greater rights at birth reflects gestators' wildly disproportionate investment in pregnancy.

### B. *Gestational Investment and the Attempt to Erase It*

The routine, normal costs that a gestator incurs during pregnancy are breast pain, dizziness, fatigue, insomnia, hemorrhoids, leg cramps, varicose veins, urinary incontinence, and nausea – often for weeks at a time and only sometimes limited to mornings.<sup>26</sup> Common complications from pregnancy, complications that put the gestational woman's health and/or life at risk, include anemia, depression, ectopic pregnancy, gestational diabetes, sciatica, high blood pressure, and preclampsia/toxemia.<sup>27</sup> Potential genetic fathers and same-sex partners incur none of these symptoms and risks, nor do they have to curtail alcohol or drug use, monitor their diet, take appropriate vitamins, get sufficient sleep, or stay off their feet. Gestators are advised to attend at least sixteen medical appointments over the course of nine months and there are usually extra ultrasounds and "routine" emergency visits necessitated by odd pains, curious wetness, spotting, or bleeding.

Just as important, there are significant criminal and civil ramifications to being pregnant.<sup>28</sup> Genetic fathers and other potential parents either physically cannot, or practically never are, charged with these crimes or civil violations. In some jurisdictions, gestators are prosecuted for crimes like manslaughter and endangering a fetus because they take recreational drugs or

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<sup>26</sup> See generally RONALD S. GIBBS ET AL., DANFORTH'S OBSTETRICS AND GYNECOLOGY (10th ed. 2008) (detailing the very long list of physical ramifications of pregnancy, many of which are very unpleasant).

<sup>27</sup> See U.S. Dep't Health & Human Servs., *Pregnancy Complications*, WOMEN'S HEALTH, <https://www.womenshealth.gov/pregnancy/youre-pregnant-now-what/pregnancy-complications> (last visited May 8, 2022).

<sup>28</sup> Several commentators have argued that the law's regulation of pregnant women's behavior itself violates equality principles. See, for instance, MICHELLE GOODWIN, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD* (2018). I take no position on the validity of those laws here. My point is merely that, at present, there are profoundly asymmetrical legal duties associated with impending parenthood.

drink too much while pregnant.<sup>29</sup> These gestators may or may not be committing these acts with another expectant parent, drinking and drugging together, but the other expectant parents are not prosecuted. Their inability or decision not to get pregnant translates into an inability to commit the crimes of endangerment. In the civil arena, judges in some states commit addicted pregnant people to mental health facilities, even though non-pregnant addicts would never be committed to such facilities.<sup>30</sup> Then there are the gestators who believe they are less far along in their pregnancy than they actually are, and take abortifacients, later to be prosecuted criminally for manslaughter and sometimes murder.<sup>31</sup> Gestators, usually young girls, in denial about their pregnancy, not sure what is happening to them, who give birth alone and scared, usually into a toilet, are prosecuted for murder and sent to jail.<sup>32</sup> Presumably, if the genetic fathers were with these young women when they gave birth into toilets they could be prosecuted as accomplices, but that virtually never happens. Genetic fathers, same-sex partners, parents, uncles, friends - everyone but the gestator - can distance themselves from the fetuses and the responsibilities that the law imposes on those who gestate them. Gestators are uniquely responsible as a matter of criminal and civil law for the health of the babies they are producing.

To suggest, as most equality proponents do, that gestation should not be relevant to parental rights is to erase this labor, performed exclusively by women (and the incredibly few trans pregnant men who now gestate), and ignore the physical and legal risk that gestators alone incur. Perhaps it is a sign of great progress in our battle against stereotypes that we can now think that a woman who gestated a child for nine months, ate for it, slept for it, risked her own life for it, felt it kick and summersault and hiccup, has no “connection”<sup>33</sup> with and “never met”<sup>34</sup> the

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<sup>29</sup> Lynn Paltrow & Jeanne Flaven, *Arrests of and Forced Interventions on Pregnant Women in the United States*, 38 J. HEALTH POLS., POL'Y & L. 299, 313-14 (2013).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> For these accounts in the women's own words, see CHERYL MEYER & MICHELLE OBERMAN, *WHEN MOTHERS KILL: INTERVIEWS FROM PRISON* (2008).

<sup>33</sup> See Huntington, *supra* note 21.



child, but those are remarkable statements nonetheless. Perhaps gestating women do not necessarily feel an emotional bond with the infant to whom they give birth – but they clearly have felt the child. They had no choice. The connection between gestator and child is hardly just “normative.”<sup>35</sup> And no one else, even if they have made a genetic contribution, has been connected to the child in the same way.

Professor NeJaime questions the “gendered logic of reproductive biology”<sup>36</sup> and thereby implies it is a cerebral, social construction, i.e. “logic,” that has gendered the law’s approach to reproduction. But of course it is not just logic that genders reproduction, it is gestation. NeJaime rejects the relevance of gestation and celebrates the acceptance of surrogacy contracts because the law’s willingness to sever gestation from parental status for surrogates “undermines the salience of a key justification [i.e. gestation] for gender-differentiated parental recognition.”<sup>37</sup> But gestational labor is treated very differently in surrogacy contracts than it is in cases of sexual reproduction.<sup>38</sup> Gestational surrogates can get paid for their gestational labor. Gestational mothers who conceive sexually cannot. NeJaime elides this critical distinction. The idea that we should celebrate surrogacy contracts because they undermine the salience of gestation for parenthood runs the risk of discouraging attention to the salience of gestation in the 98.7% of pregnancies that result from sexual intercourse.<sup>39</sup> If a child is conceived sexually neither genetic parent can alienate their parental rights pre-birth and they cannot receive compensation for alienating their parental

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<sup>34</sup> See Franklin, *supra* note 1, at 27.

<sup>35</sup> See Huntington, *supra* note 21.

<sup>36</sup> See NeJaime, *supra* note 4, at 2314.

<sup>37</sup> *Id.* at 2304.

<sup>38</sup> See Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. Rev. 2037, 2053-56 (discussing how the Uniform Parentage Act and case law assume without explaining that contracts should be enforced in situations involving non-sexual conception, but not in cases of sexual conception).

<sup>39</sup> For the statistics on how many children are conceived sexually, see Centers for Disease Control, *Assisted Reproduction, 2016 ART Reports*, <https://mail.google.com/mail/u/0/#search/jwenger%40kentlaw.iit.edu/p2?projector=1> (“Today, approximately 1.7% of infants in the United States are conceived using ART”).

rights post-birth. They would be criminally responsible for baby-selling if they did so.<sup>40</sup> That women can now freely alienate their gestational labor, in the rare instances when they are allowed to get paid for doing so, hardly means that the law should discount the importance of gestational labor when the law prohibits women from getting paid for it.

Professors David Fontana and Naomi Schoenbaum, building on the work of Professor Dara Purvis, argue that some men do make investments comparable to what the gestator does during gestation. Professor Purvis suggests that men should be awarded parental rights at birth if, prior to birth, the intended father made an investment, by, for instance, requesting paternity leave and/or acquiring furniture and/or reducing safety risks to the child once born.<sup>41</sup> Fontana and Schoenbaum argue that equality demands that the law take into account the work that expectant fathers do to contribute to pregnancy, work that they say includes quitting smoking, exercising their core muscles in anticipation of carrying and feeding a new baby, buying goods that the child will need, and accompanying the mother to medical appointments.<sup>42</sup> They suggest that the Court's reliance on "overbroad stereotypes"<sup>43</sup> about the work men do not do has resulted in a profound mistake in the law of equality and pregnancy. Instead of comparing "a pregnant woman and a man [who can never face] similar physical complications," the law should be comparing "a pregnant woman and an expectant father."<sup>44</sup>

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<sup>40</sup> See, e.g., MISS. CODE § 97-3-52 (2013), This is not the place to go into a full analysis of why the law does not recognize pre-birth contracts for parental rights and responsibilities with regard to sexually produced children. Men are not allowed to sign away their parental rights in such circumstances either. Suffice it to say that such contracts are thought to encourage the commodification of children, the exploitation of women, and the abandonment of children by genetic fathers. Perhaps these policy concerns are outdated, but if the law continues to prohibit women from alienating their gestational labor for sexually produced children and starts refusing to honor their gestational labor with greater parental rights, the law will be erasing all salience of that labor.

<sup>41</sup> Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 681 (2013) (Purvis' list of potential investments by intended fathers is more lengthy).

<sup>42</sup> David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy* 119 COLUM. L. REV. 1, 33 (2019).

<sup>43</sup> *Id.* at 14.

<sup>44</sup> *Id.* at 25.

Certainly, non-gestator expectant parents can invest in a child they are expecting. These authors are right to celebrate the importance of non-gestators helping to share the burdens of an upcoming birth. But to suggest that such investments rise to the level of constitutional importance because they are comparable to gestational investment is an entirely different matter. There is a meaningful difference between choosing to quit smoking or drinking in solidarity with one's partner and being civilly and criminally responsible if one does not do so. There is a meaningful difference between exercising your core muscles in preparation for holding a baby, and having your core muscles overwhelmed beyond all recognition by the exponential growth in one's torso. There is a meaningful difference between accompanying someone who is cramping and spotting and being the person who is actually cramping and bleeding. Those differences are not just rooted in stereotype.

Moreover, as a matter of biology, not stereotype, the male and female investments in a zygote are not equal. Egg producers use many more resources to produce one egg than sperm producers use to produce one sperm because the egg provides the food reserves that the fertilized egg initially needs to grow.<sup>45</sup> Those food reserves are just as essential to the reproduction process as is the genetic parents' DNA, but the egg, and only the egg, has those food reserves. Thus, even though any child shares equal amounts of genetic material from egg and sperm providers, the female gamete contributes much more to the child than the male gamete.<sup>46</sup> There is disproportionate female investment even before conception. The law may choose to ignore that greater

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<sup>45</sup> RICHARD DAWKINS, *THE SELFISH GENE* 141-42 (1976) (explaining the biological differences in male and female gametes).

<sup>46</sup> The market of gametes clearly rejects the notion that male and female gametes are of equal value. Men can get paid as little as \$75 for donating sperm (which can be done on a lunch break). Women get paid between \$5,000 and \$25,000 for eggs; the process involves surgery and is much more arduous. See Brooke Edwards, *The High Cost of Giving Up Your Eggs*, NYU LIVEWIRE (Apr. 30, 2007), [http://journalism.nyu.edu/publishing/archives/livewire/archived/high\\_cost\\_eggs/](http://journalism.nyu.edu/publishing/archives/livewire/archived/high_cost_eggs/) [<https://perma.cc/9JCF-JTL8>] (suggesting that the going rate for egg donation in New York city was \$8000 and in California certain egg donors got paid as much as \$25,000); Ethics Comm. of the Am. Soc'y for Reprod. Med., *Financial Compensation of Oocyte Donors*, 88 *FERTILITY & STERILITY* 305, 306, 308 (2007).

investment, but acknowledging that investment – that biological fact - is not a “maternalist norm.”<sup>47</sup> Indeed, that this fact is so little-known is a useful metaphor for illustrating how women’s greater contributions to pregnancy are rendered invisible by the focus on genetic contribution alone as the origin of parenthood. Equality frames encourage reductionist approaches to what should matter for parental status and the gender-stereotype critique assumes that the only thing that should matter is genetics, thus rendering invisible the disproportionate work that gestators do.

### C. *The Unpersuasive Response of Paternity Law*

Defenders of the gender-stereotype critique might respond by noting that even if the genetic father does not participate equally in gestation, at birth – if the child was conceived sexually – he is equally responsible for the child financially. The law of paternity holds the genetic father of a sexually produced child accountable for child support once the genetic connection is established. In practice, as will be discussed more extensively below, most genetic fathers are only held responsible if the mother wants them to be,<sup>48</sup> but they can be held financially responsible based on genetics alone.<sup>49</sup>

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<sup>47</sup> See Collins, *supra* note 2.

<sup>48</sup> When a child is produced sexually, it is the mother alone who knows who the genetic father might be and, at least given the state of the law currently, she has considerable control over whom to share that information with. At birth, the law will automatically hold the gestator responsible for the child (unless she has signed a valid gestational surrogacy contract.) If, at birth, she has not disclosed the relevant information about the genetic father, the law has no way of knowing who the genetic father might be. Putative father registries can inform men who have registered as potential fathers about any legal proceedings involving a child whom they think they might be genetically related to, but if a man does not know that the woman with whom he had sex is pregnant, he has no way of knowing that he should register as a putative father. See, e.g., *Putative Father Registries*, ACAD. OF ADOPTION & ASSISTED REPRODUCTION ATT’YS (2018), <https://adoptionart.org/adoption/birth-expectant-parents/putative-father-registries>.

<sup>49</sup> See 2017 UNIF. PARENTAGE ACT (citing statutes assigning parentage based on genetics); Baker, *supra* note 38, at 2051-52 (The genetic regime “assigns parentage based on the fact that two people had sex and if that sex produced a child, there is no defense to parentage”).

As I have argued elsewhere, paternity law, and the genetic essentialism on which it relies, penalizes men for engaging in reproductive sex.<sup>50</sup> Paternity law holds men accountable for child support even when the sex that produced the child was procured by fraud or if the man was a victim of statutory rape.<sup>51</sup> Contracts absolving a genetic father of responsibility for a child are enforceable if a man ejaculates into a test tube but are unenforceable if he ejaculates during intercourse.<sup>52</sup> Paternity law is rooted as much in the policing of sex as in the protection of children and it imposes strict liability on men who engage in reproductive sex.

Moreover, most of the time, paternity law fails at its purported goal of privatizing dependency and getting resources to children. From its inception, paternity law has been more about protecting the public fisc than protecting children or honoring the rights of fathers.<sup>53</sup> In the United States, the extensive paternity-based child support enforcement apparatus authorized by Congress in the 1980s and 90s was established for precisely that purpose.<sup>54</sup> Congress began to mandate that states increase paternity enforcement as it grew increasingly worried about how much money was being spent on aid to children.<sup>55</sup> Congress rewards states with high paternity establishment rates because it believes that the more genetic fathers that can be identified, the less the

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<sup>50</sup> See Baker, *supra* note 38, at 2053.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 2054-56; see also *Ferguson v. McKiernan*, 940 A.2d 1236, 1245 (Pa. 2007) (invoking what that court calls the “common sense distinction between reproduction via sexual intercourse and the non-sexual clinical options for conception.” The court goes on to hold that different rules for parental responsibility follow from that distinction).

<sup>53</sup> *Id.* at 2043-45 (describing the origins of rules holding the genetic progenitor responsible for the financial support of a child born to an unmarried woman). The rules came from the Pope because at that time it was local parishes, not the state, that assumed most of the responsibility for caring for the poor. *Id.*

<sup>54</sup> *Id.* at 2048-49 (describing Congressional action on child support enforcement in the 1970s and 80s).

<sup>55</sup> See Leslie J. Harris, *Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality*, 2013 MICH. ST. L. REV. 1295, 1304 (citing Social Service Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (codified at 42 U.S.C. §§ 651-669 (2012))).

chance a child will become dependent on the state.<sup>56</sup> But the vast majority of child support that gets paid in this country gets paid by parents who willingly accepted – with the consent of the other legal parent – parental status.<sup>57</sup> Most of these fathers pay what they owe voluntarily.<sup>58</sup> The child support that does not get paid is usually owed by genetic fathers who do not have enough money to pay what the state says they owe.<sup>59</sup> Naming these genetic fathers as legal fathers, vesting them with the rights so that the state can impose on them obligations, does little to get resources to the children who need those resources. Eighty-eight percent of noncustodial parents who live in poverty are in arrears on child support and that arrearage constitutes a majority of the unpaid child support in this country.<sup>60</sup>

In short, paternity law does not work. Its origins lie in a moralistic attempt to regulate extramarital sex in order to dimin-

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<sup>56</sup> Jana Singer, *Marriage, Biology and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 252 (2006).

<sup>57</sup> The paternity of most children born to unmarried mothers is established in the hospital or shortly thereafter by the signing of a voluntary acknowledgement of paternity. FY2009 Annual Report to Congress, OFF. CHILD SUPPORT ENFORCEMENT (Dec. 1, 2009) (In 2009, 1.17 million of the 1.81 million children born to unwed mothers had their parentage established by a VAP). See also Ronald Mincy et al., *In-Hospital Paternity Establishment and Father Involvement in Fragile Families*, 67 J. MARRIAGE & FAM. 611 (2005) (paternity of most children born to unmarried mothers is established by VAP).

<sup>58</sup> See Leslie J. Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 476 (demonstrating that most child support that gets paid gets paid voluntarily). Plenty of parents contest the amount of child support they owe – the dollar amount they owe may feel involuntary - but that is distinct from disputes about whether someone owes child support at all. It is possible that some men accept parental status only because they know that if the mother wanted to sue them in paternity, she could. Perhaps, if we got rid of paternity law, far fewer men would willingly accept parental responsibility. If policy-makers are worried about there being too many single mothers if we dispense with paternity law, that undercuts those who suggest that it is courts, not the fathers themselves, who are responsible for fathers' more limited time with children.

<sup>59</sup> Tonya Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 646 (2012) (“About 26% of noncustodial fathers are poor (about 2.8 million) and the vast majority of this group (approximately 88%) does not pay any child support”).

<sup>60</sup> *Id.* at 646, 649.

ish the state's responsibility for children and it does not deliver on its espoused goal of getting more resources to children. It is a remarkably thin reed on which to rest the argument that genetic fathers and gestators should be treated equally at birth.

## II. The Foreseeable Consequences of Gestational Erasure

As this article goes to press, the dangers of rooting parenthood in genetics and discounting the relevance of gestation, even in the name of equality, are paramount. In a post *Roe v. Wade*<sup>61</sup> world, with state legislatures having much more power over abortion regulation, how the law treats the salience of gestation becomes critical to abortion law. No doubt, conservative state legislatures will simply outlaw as much abortion as they can. But other states, particularly progressive states that may be most attuned to concerns over gender stereotypes, will have to confront issues and balancing tests that *Roe* had previously settled. As state legislatures take on the responsibility of weighing the relative interests at stake in abortion regulation, they will hear a notable overlap between the rhetoric of the anti-abortion movement and the rhetoric of the gender-stereotype critique regarding the salience of gestation. This rhetoric may influence state legislators' willingness to protect the power that the Supreme Court has previously afforded to gestators. This could have ramifications not only for abortion law, but for adoption and custody law as well.

### A. *The Rhetorical Parallels Regarding Gestational Erasure*

Most people are familiar with the story that anti-abortionists tell with pictures. Many of us have seen the billboards or the blogs depicting a grainy picture of something that looks like a very small baby inside a sack. There is only one character in this story, only one image in the picture: the fetus.<sup>62</sup> What one never

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<sup>61</sup> 410 U.S. 113 (1973) (finding a constitutional right to terminate a pregnancy in the first two trimesters).

<sup>62</sup> The pictures provide an image that corresponds to the idea that the fetus is a child. In fact, the mass of cells at the time most abortions are performed, in the first weeks of pregnancy, looks nothing like those pictures, which usually convey an image taken at 19 weeks of pregnancy. See CELESTE M. CON-

sees on the billboards is the corresponding pictures or descriptions of a woman at 10 or 15 or 20 weeks pregnant. She is growing and changing just as the fetus is, but her evolution is irrelevant to their story.

Comparably, the gender-stereotype critique, while it generally protects a gestating woman's right to bodily integrity and hence abortion, neglects to explore or explain what the process of gestation might mean for the gestator. It assumes that the investment the gestator makes is worth nothing more than the right to cease making that investment. Once she gives birth, the gender-stereotype critique suggests she sacrifices the greater right she had to control the child's destiny. Thus, birth – when the child leaves the gestator's body – becomes a kind of magic moment at which equal parental rights attach.

In relying on one magic moment – birth – as the onset of parental rights, the gender-stereotype critique shares much with the stories anti-abortionists tell about pregnancy. For anti-abortionists, the magic moment is conception. In the words of the vigorously pro-life former Surgeon General, C. Everett Koop, once sperm meets egg, “that one cell with its 46 chromosomes contains the whole genetic code . . . written in DNA molecules, that will, if not interrupted, make a human being just like you or me.”<sup>63</sup>

The former Surgeon General's suggestion that gestation is a passive process, an exercise in *not interrupting*, provides a classic example of gestational erasure. For the gender-stereotype critique the magic moment is birth, not conception, but both accounts ignore the process between conception and birth.<sup>64</sup> Pro-

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DIT, *DECODING ABORTION RHETORIC: COMMUNICATING SOCIAL CHANGE* 213 (1990). Over 91% of abortions are performed before 13 weeks, well before any fetus has matured to look like the common pictures. See Centers for Disease Control, *Abortion Surveillance Findings and Reports*, [https://www.cdc.gov/reproductivehealth/data\\_stats/abortion.htm](https://www.cdc.gov/reproductivehealth/data_stats/abortion.htm) (last visited May 8, 2022).

<sup>63</sup> C. Everett Koop, *A Physician Looks at Abortion*, in *THOU SHALT NOT KILL . . . THE CHRISTIAN CASE AGAINST ABORTION* 9 (Richard Ganz ed., 1978).

<sup>64</sup> Most proponents of the stereotype critique maintain that a gestating woman should retain the right to terminate a pregnancy, that such a right is grounded in her bodily integrity, autonomy, or a thick conception of equality that would afford women the right to terminate an unwanted pregnancy in order to participate as full market actors and citizens. See, e.g., Fontana &



life advocates argue that morality should compel us to focus on conception and ignore gestation. The gender-stereotype critique argues that equality should compel us to focus on birth and ignore gestation.

As scholars have noted before, equality frames are particularly ill-suited to analyze the reality of pregnancy. Writing from an international perspective over twenty years ago, Professor Kim Lane Scheppelle suggested that constitutionalizing the law of gestation and abortion changes how it can be presented.<sup>65</sup> The law, particularly constitutional law, is not good at taking into account women's "whole life situation . . . [and] . . . the many factors" with which gestators must contend.<sup>66</sup> The way constitutional courts resolve issues, especially equality issues, is usually through analogic reasoning; they find "other cases [that] might be reasonably judged as similar to the case at hand."<sup>67</sup> Scheppelle identifies two main problems with this for abortion jurisprudence. "First, there are no perfect or even reasonably good analogies to pregnancy and abortion."<sup>68</sup> Second, "drawing bright lines is particularly problematic because pregnancy is a gradual and developmental process."<sup>69</sup> Magic moments, like conception and birth, are bright lines: gradual processes on either

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Schoenbaum, *supra* note 42, at 43-46 (explaining that even within their equality paradigm giving expectant fathers' rights, women retain an autonomy interest that allows her to terminate the pregnancy). For more on these theories of where women's right to abort comes from, see Ruth Bader Ginsburg, *Some Thought on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 386 (1985) (suggesting that the court in *Roe* focused too much on autonomy and not enough on equality); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 274 (1992) ("Because *Roe* and its progeny treat pregnancy as a physiological problem, they obscure the extent to which . . . [it] impose[s] material deprivation and dignitary injustices on those who perform its work").

<sup>65</sup> Kim L. Scheppelle, *Constitutionalizing Abortion*, in *ABORTION RHETORIC: PUBLIC POLICY IN CROSS-CULTURAL PERSPECTIVE* 29 (Marianne Githens & Dorothy McBride Stetson, eds, 1997) ("making abortion a constitutional question changes how abortion can be represented and how competing arguments can be staged").

<sup>66</sup> Condit, *supra* note 62, at 177.

<sup>67</sup> Scheppelle, *supra* note 65, at 47.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 49.

side of a bright line do not matter to magic moment analysis. This allows both sides to avoid trying to find reasonable analogies for gestation because they simply erase its relevance from their analysis.

### B. *Abortion and Father's Rights*

To be clear, most gender-stereotype advocates accept that a woman's right to bodily integrity gives her the right to terminate her pregnancy during gestation,<sup>70</sup> but affording genetic fathers full parental rights at birth suggests that the balancing usually employed in abortion analysis, the state's interest in the life of the fetus versus the woman's interest in bodily integrity, is incomplete.<sup>71</sup> If the genetic father has such a robust interest in the child once born, then the genetic father also has an interest that must be balanced against the gestator's bodily integrity and autonomy. That is a balancing, both the genetic father and the state on one side and the gestator on the other, that is much more likely than the current balancing to come out against the gestator's interest in terminating the pregnancy.

Vesting the sperm provider with equal rights at birth poses other dangers to abortion rights as well. When a child is conceived sexually, the human reproductive process, not gendered logic or separate spheres ideology, vests key pieces of information in the gestating mother alone. Absent in utero genetic testing or purchased gametes, the gestator is the only person who can know with certainty who the genetic father is and even she may not be sure.<sup>72</sup> Antiabortion advocates attempt to eliminate this informational asymmetry by endorsing laws that require a pregnant woman to disclose her pregnancy to her sexual part-

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<sup>70</sup> See *supra* note 64.

<sup>71</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (balancing "the woman's right to terminate her pregnancy before viability" with "the other side of the equation [which] is the interest of the State in the protection of potential life").

<sup>72</sup> See, e.g., *In re Parentage of G.E.M.*, 890 N.E.2d 944 (Ill. App. Ct. 2008) (in disputed paternity case involving a signed VAP, the mother acknowledged sexual relationships with three different men "at or near the time of conception").

ner.<sup>73</sup> The gender-stereotype critique has yet to wrestle with this informational asymmetry. But if “equality requires treating those traditionally excluded from the parentage regime as full participants,”<sup>74</sup> equality law presumably should work to eradicate the informational advantage that biology, not just law, gives gestating women. If the right to abortion is rooted *only* in bodily integrity, then perhaps there is nothing wrong with forcing a woman to disclose her pregnancy to the potential father. Her bodily integrity is not affected by imposing on her a duty to disclose her pregnancy to others.

To date, the Supreme Court has upheld a woman’s unilateral power to keep information about her pregnancy private. The Court has justified giving a woman this unilateral power because of the enormous impact that pregnancy has on a gestator.<sup>75</sup> The Court has also recognized that disclosing a pregnancy to a sexual partner can trigger violence against the pregnant woman.<sup>76</sup> It is worth noting that the Court’s concerns about violent men are every bit as stereotypical as whatever assumptions they may make about maternal bonding. The vast majority of men are not violent when they learn they may be a genetic father. But that stereotypical fear of violent men looms large in the abortion jurisprudence that has vested gestators with the right to control the information about their pregnancies. If the primary concern is with eradicating gender stereotypes in the name of equality, it is hard to justify the gestator’s right to keep her pregnancy private.<sup>77</sup>

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<sup>73</sup> Pro-life activists have long endorsed spousal notification requirements in abortion law. Up until now, the Supreme Court has struck those notification requirements down. *See infra* note 75 and text accompanying.

<sup>74</sup> NeJaime, *supra* note 4, at 2332.

<sup>75</sup> *See Casey*, 505 U.S. at 896 (“It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother’s liberty than on the father’s”); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 71 (1976) (striking a spousal notification requirement because “only one of the two marriage partners can prevail . . . [A]s between the two, the balance weights in her favor”).

<sup>76</sup> *Casey*, 505 U.S. at 888-95 (discussing the threat of domestic violence with a spousal notification provision).

<sup>77</sup> If the law were to mandate disclosure of a known pregnancy to the genetic father, gestators who did not want to disclose would have an incentive not to confirm that they were pregnant. They cannot disclose what they do not know. This could be a serious mistake from a public health standpoint. Refus-

The ineluctably gendered, biological realities of gestation have always made equality frames in the pregnancy context difficult. The constitutional law of both abortion and parenthood has struggled with this problem, landing imperfectly, but definitively on the side of vesting gestators with more control both during pregnancy and right after, when the gestator's investment in the child is unmistakably greater than anyone else's. Those who insist that gestators should not have rights at birth suggest that a bodily integrity or autonomy distinction can justify the difference between honoring her rights during the pregnancy and not honoring them at birth. But bodily integrity will not necessarily trump both the genetic father's *and* the state's interest in having the child carried to term and it does not explain why a gestator should not have to disclose the pregnancy to a genetic father. The genetic father's rights will be meaningless if he is not made aware that he can exercise them. If he has a constitutional right at birth, presumably he has a right to the information that would allow him to exercise that right. As will be clear below, affording a genetic father a right to that information will mean that the law can force a gestator to become irreversibly entwined with the genetic father.

### *C. The Impact on Adoption Law*

A woman's right not to disclose her pregnancy to the genetic father is critical to the current law of adoption. The right not to disclose her pregnancy to the genetic father has allowed countless women to secure an adoption for a child they have just gestated without having to assume parental obligations themselves. It has also allowed pregnant women to escape relationships with men they did not want in their lives. If the genetic father knows he is the father, he can prevent the gestator from placing a child with an adoptive family and he can force her to be a mother, even if he assumes primary parenting responsibility as the father.

In oral arguments in *Dobbs v. Jackson's Women's Health*, Justice Amy Coney Barrett made much of safe haven laws, which, in theory, allow women to relinquish parental rights of a

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ing to confirm one's pregnancy is bad for the health of the gestator and the fetus alike.

child to whom they have given birth without any penalty.<sup>78</sup> But Justice Coney Barrett failed to acknowledge how much power a genetic father may have to deprive a pregnant woman of that right to relinquish parenthood. If a potential father knows the woman with whom he had sex got pregnant, he can register with a putative father registry and hold the state to a burden to notify him of any legal proceedings — including adoption proceedings — regarding the child. He can file an independent paternity action for a child he believes is his genetic issue. In doing so, he can compel the woman who has given birth to be a mother.

A man who establishes himself as a legal father can sue the gestational mother for maternity, just as she could sue him for paternity.<sup>79</sup> He cannot compel her to exercise custodial rights, but he can compel her to pay for the child and — possibly much more importantly — he can put her in a position of (i) leaving the child with a man whom she did not think fit to be a parent and/or (ii) fighting for custodial rights that she does not want, and/or (iii) sharing parenthood with a man she wants to escape.<sup>80</sup> In all of these scenarios, she will likely be forced to maintain some kind of relationship with the genetic father. And that may be exactly what he wants. As Professor Jennifer Hendricks has shown, there is considerable evidence that some men who learn they are genetic fathers refuse consent to adoption as a way “not of mak-

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<sup>78</sup> Oral Argument at 54:07, *Dobbs v. Jackson Women’s Health Org.*, (No. 19-1392), [https://www.supremecourt.gov/oral\\_arguments/audio/2021/19-1392](https://www.supremecourt.gov/oral_arguments/audio/2021/19-1392). For an example of a safe haven law, *see, e.g.*, 325 ILL. COMP. STAT. 2/1 – 2/55 (2015). Notably, the Illinois Safe Haven Law requires that the agency trying to place a baby left at a safe haven check the putative father registry, 325 ILL. COMP. STAT. 2/50(h)(1). If the putative father is located and comes forth to name the mother, she is no longer free not to be a mother.

<sup>79</sup> If safe haven laws were interpreted to allow the mother to relinquish parental rights and responsibilities even if the father comes forward and sues her for support, that would render paternity laws very problematic for gender equality advocates. Mothers would be free to abandon their children, but fathers would not.

<sup>80</sup> Letting the genetic father assume full custodial rights would mean that the genetic father could rear the child with the belief that their mother simply abandoned them because she wasn’t exercising custodial rights as opposed to the story many adoptees get told, which is that their birth mother was trying to ensure that they had a better home.

ing or preserving a connection to the child, but of maintaining control over the mother.”<sup>81</sup>

Consider the mother in *Lehr* – Lorraine Robertson - who clearly did not want Jonathan Lehr, the genetic father, to be part of her or her child’s life. She refused to allow Jonathan to develop a relationship with his genetic issue. It is easy to tell a story about Lorraine as a conniving, deceitful woman, who, in order to prioritize her own desires, was willing to subvert her child’s and the child’s genetic father’s interest in a loving parent-child relationship.<sup>82</sup> That is the story that unnerved the dissent and probably most advocates of the gender-stereotype critique. The accuracy of that story largely depends on the facts that were bitterly contested between the parties with regard to how much effort the genetic father, Jonathan, actually put into trying to establish a relationship with the child.<sup>83</sup> Lorraine maintained that he did not try to establish a parental relationship until she had married another man, who moved to adopt the child.

The uncontested facts tell a story that has not gotten as much attention. Lorraine was a young single mother, whose father had been killed in Viet Nam and who was estranged from her mother and stepfather. Helen Lehr, Jonathan Lehr’s mother,

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<sup>81</sup> Jennifer Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 532 (2017). In *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2558 (2013), an unwed father case the Supreme Court decided under the Indian Child Welfare Act, the genetic father had testified that he agreed to relinquish his parental rights only because he thought that by doing so he could eventually re-establish a relationship with the mother. He then revoked his consent, but the operative point is that he used his right to consent as a means of maintaining contact with the mother, not creating a relationship with the child. See also Esther Rosenfeld et al., *Confronting the Challenge of High Conflict Personality in Family Court*, 52 FAM. L.Q. 79 (2020) (discussing the problem of parents keeping a marital relationship alive by continually challenging custody arrangements).

<sup>82</sup> Courts routinely describe women as “lying” or “deceitful” in cases in which they refused a man’s wish to maintain a relationship with her during pregnancy. See Mary Burbach & Mary Ann Lamanna, *The Moral Mothers: Motherhood Discourse in Biological Father and Third Party Cases*, 2 J.L. & FAM. STUD. 153, 164 (2000) (discussing cases in which courts criticize women who are trying to escape a relationship with the genetic father of child).

<sup>83</sup> Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2363-64 (2016) (discussing dispute between the parties in *Lehr*).

took pity on Loraine and “took her under her wing.”<sup>84</sup> It was in the context of that parent/child like relationship between Helen and Lorraine, that Jonathan and Lorraine started dating. It was not a stable relationship. They moved in together and then broke up and moved in together again and then broke up. Lorraine became pregnant and the child was born in 1976. Jonathan visited Lorraine in the hospital but not after that.

The gender-stereotype critique, and those who endorse joint custody at birth, would assign Jonathan equal rights once the child was born. That would leave Lorraine with having to abandon the child or stay stuck where she was, unable to move with her child, lest she disrupt Jonathan’s parental rights, unable to avoid a relationship with Jonathan, with whom she would have to negotiate parenting responsibilities, and trapped raising her child in the context of adult relationships that were at best extremely difficult and at worst incestuous. The only way to avoid him would be to avoid the child. Adherents of the gender-stereotype critique who believe in abortion rights would presumably advise Lorraine to abort the pregnancy if she wanted to avoid those toxic relationships. She would have unilateral control to truncate the genetic father’s relationship with a child if she aborted, but no control once the child was born. Under this view, the work she does in gestation gives her *less* control than she had before she did the work of gestation.

Lorraine Robertson wanted to keep the child and move away from Jonathan. Consider the dissent in a more recent case of a gestator who brought her pregnancy to term, but wanted to put her child up for adoption. The gestator in *In re Adoption of J.S.* made plans for a different couple to adopt the child.<sup>85</sup> When the genetic father found out, he tried to block the adoption, but failed to fill out an affidavit averring that he could and intended to provide for the child. Utah law required an alleged genetic father trying to block adoptions to submit such an affidavit. The question presented to the Utah Supreme Court was whether the affidavit requirement constituted gender discrimination under the equal protection clause because women who carried a child

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<sup>84</sup> *Id.*

<sup>85</sup> *In re Adoption of J.S.*, 358 P.3d 1009 (Utah 2014).

to term did not need to fill one out if they wanted to keep the child. The majority found no equal protection violation because

mothers express their commitment to their offspring through the voluntary decision to carry a child to term – a decision that commits them to the statutory responsibility of caring and providing for the child as a legal parent . . . [The statute] requires a parallel commitment [from men] in the form of a written affidavit. The parallelism may not be perfect . . . but it is not unconstitutional.”<sup>86</sup>

The dissent rejected that approach. Citing *United States v. Virginia*<sup>87</sup> and *Bradwell v. Illinois*,<sup>88</sup> the dissent suggested that the majority’s assumption that gestating the child indicates a commitment to the child is a gender stereotype forbidden under equal protection principles. The dissent argued that the majority’s reliance on the mother’s decision not to abort the child was unrealistic because the decision to carry the child to term for so many women is involuntary. That is, because, in practice, so many women do not have access to a safe and legal abortion, or they find out about their pregnancy too late, they should be treated just like men who do not have a right (yet) to decide whether the child will be brought to term.<sup>89</sup> It is the decision to gestate, not the gestation itself, that the dissent thinks is critical and because, in states hostile to abortion, women are not free to make a decision about gestation, women are similarly situated to men (who cannot make that decision either). The dissent in *J.S.* thus creates yet a third magic moment. For the antiabortionists, the magic moment is conception, when the genetic parents’ comparable genetic contributions meet.<sup>90</sup> For much of the gender-stereotype critique the magic moment is birth, when both men

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<sup>86</sup> *Id.* at 1011.

<sup>87</sup> 518 U.S. 515 (1996) (cited passim) (notably, though not mentioned by the dissent, the Court in *Virginia* suggested that “women’s admission would require accommodations [to] . . . physical training programs for female cadets”). *Id.* at 540. The dissent in *J.S.* must have thought that the physical differences between men and women that the Court suggested could justify different training programs were more significant, as differences, than pregnancy is from not being pregnant.

<sup>88</sup> 83 U.S. 130 (1872) (deciding that a restriction keeping women from practicing law does not violated equal protection) (cited at *Adoption of J.S.*, 358 P.3d at 1038 n.37, 1044).

<sup>89</sup> *Adoption of J.S.*, 358 P.3d at 1043.

<sup>90</sup> *But see supra* notes 45-46 and text accompanying (explaining that women must invest more in any one ova than men invest in any batch of sperm).



and women are equally genetically connected to the child just born. For this dissent, the magic moment is the decision to gestate, which, in states hostile to abortion, does not exist for either men or women so they are similarly situated. Again, equality frames reduce gestation to magic moments in order to make the comparisons that equality analysis demands, but those magic moments bear little resemblance to the gradual, complicated, and varied reality of gestation. For this dissent, the gestator's eight to nine months of gestation did nothing to suggest she should be treated differently than the genetic father. And because he should be entitled to parental status, she should be forced to be a parent also.

In coming to the defense of women against what it sees as pernicious stereotype, the dissent in *J.S.* also fails to note that, in this case, the mother was quite sure that she wanted the child to be adopted by another couple, not be raised by the genetic father and herself. The dissent never acknowledges that parental rights cases are usually zero sum affairs. What the genetic father gains in terms of rights, the gestator loses in terms of control.<sup>91</sup> The actual women in these cases gestate the children for nine months and want to be rewarded for that labor with decision-making authority at birth. The dissent in *J.S.* and others whose primary concern is gender stereotypes, would deny them that right in the name of protecting them from harmful maternal stereotypes. The gender equality critiques not only require that the work of gestation be ignored, gestators must lose rights as the pregnancy progresses in order to combat gender stereotypes.

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<sup>91</sup> This was true of the unwed father cases (*Caban*, *Quilloin*, *Lehr* and *Michael H.*, discussed *infra* at notes 132-136 and accompanying text), though not the citizenship cases. The mother in *Caban* wound up with less control over her own life because she had to continue to navigate a relationship with the genetic father of her children (who was in New York while she was living in Puerto Rico). As discussed, Lorraine Robertson would have been forced to maintain a relationship with Jonathan Lehr if he had been able to become the legal father. Comparably, in *Michael H.*, Carol, the mother – and Gerald, the marital, legal father – would have lost control over their established family if Michael H. had been declared the father. That same kind of dynamic is not at issue in most of the citizenship cases because granting citizenship to the child of a genetic father who is a U.S. citizen a court would not be affecting the rights of any U.S. citizen mother by conferring citizenship on the child.

#### D. Gender Equality and Custody Battles

The debates surrounding parental rights at birth often grow, as children grow, into debates around appropriate custody standards for mothers and fathers.<sup>92</sup> Gender-stereotype critiques argue that courts differential treatment of mothers and fathers in custody determinations is a reflection of gender stereotypes. In contrast, many women's and mothers' groups argue that the differential treatment is rooted in differential investment.

Today, fathers in middle class and upper middle class families - who are much more likely to have custody rights determined in a divorce proceeding because they are much more likely to have married - are awarded more custodial time than they used to be.<sup>93</sup> This greater custodial time reflects the transformation of gender norms for married couples. Men in two parent households now do more caretaking than they did fifty years ago, though, on average, they still do much less than women.<sup>94</sup>

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<sup>92</sup> When divorcing parties agree to share custody, which the vast majority of divorcing couples do, courts readily concur in whatever agreement parents come to. Most divorcing couples work out reasonable shared custody arrangements. Custody questions become hard when the parties do not agree. Then courts need defaults. Which default promotes equality best? One that assumes an equality of investment that often does not exist, or one that recognizes inequality in fact, so as to reward the parent who has invested disproportionately?

<sup>93</sup> Maria Cancian et al., *Who Gets Custody Now? Demographic Changes in Children's Living Arrangements After Divorce*, 51 DEMOG. 1381, 1390 (2014) (noting that the percentage of fathers getting full shared or partial shared custody in Wisconsin increased dramatically from 1988 to 2008); Timothy Grall, *Custodial Mothers and Fathers and Their Child Support: 2015*, CURRENT POPULATION REP., U.S. CENSUS 2 (2020) ("Fathers have become more likely to be custodial parents over the past 22 years, increasing from 16 percent in 1994 to 19.6 percent in 2016").

<sup>94</sup> Fifty years ago, mothers did 75% more childcare than did fathers. A.W. Geiger et al., *6 Facts About U.S. Moms*, PEW RES. CTR. (May 8, 2019), <https://www.pewresearch.org/fact-tank/2018/05/10/facts-about-u-s-mothers/>. Today, in homes in which both parents work full-time (roughly 46% of two parent households), see Eileen Patten, *How American Parents Balance Work and Family Life When Both Work*, PEW RES. CTR. (Nov. 4, 2015), <https://www.pewresearch.org/fact-tank/2015/11/04/how-american-parents-balance-work-and-family-life-when-both-work/>), mothers spend 30% more time on childcare and housework than men. Juliana M. Horowitz, *Who Does More Work at Home When Both Parents Work? Depends on Which One You Ask*, PEW RES. CTR. (Nov. 5, 2015), <https://www.pewresearch.org/fact-tank/2015/11/05/who-does-more-at-home-when-both-parents-work-depends-on-which-one->

Using a best interest of the child standard, courts reward fathers who have invested in caretaking with more custodial time.

This increased amount of custodial time after divorce is not enough for most men's rights groups, who routinely fight for more custodial time than they are awarded under a best interest of the child standard. Since the 1980s, in state legislatures across the country, men's rights groups, in the name of equality, have fought for more joint custody.<sup>95</sup> Women's rights groups have fought back, usually with a counter-proposal for a gender-neutral "primary-caretaker" standard, which awards the person who was primarily responsible for childcare with more custody.<sup>96</sup> The women's groups have not had success with the primary caretaker standard, but neither have men achieved the forced equality of a joint custody standard. As Elizabeth Scott and Robert Emery have explained, in most states this has resulted in a "gender-war" stalemate.<sup>97</sup>

Most legislatures refuse to take sides in this gender war and settle for the status quo "best interest of the child" standard, though the vast majority of best interest statutes list factors like "time spent with the child" and/or "caretaking" as factors that should be considered in a best interest analysis.<sup>98</sup> In other words, the best interest standard encourages the recognition of the parent who invested most. That is why fathers get more custodial time than they used to, but still less than many women. Women's

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you-ask/. In the 54% of two parent household in which the mother works part-time or not at all, those numbers will be even more disproportionate.

<sup>95</sup> See Sharon Jayson, *More Dads Demand Equal Custody*, USA Today, June 14, 2014, <https://www.usatoday.com/story/news/nation/2014/06/14/fathers-day-divorce-custody-partner-husbands-wives/10225085/>; *Fathers Child Custody Rights*, CUSTODYXCHANGE, <https://www.custodyxchange.com/custody/fathers-child-custody-rights.php> (last visited May 9, 2022) (describing why fathers should get equal rights because they are fathers, not because of their demonstrated commitment). For a fuller account of the men's rights groups efforts, see Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79 (2016).

<sup>96</sup> Elizabeth Scott & Robert Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best Interest Standard*, 77 L. & CONTEMP. PROBS. 69, 76 (2014).

<sup>97</sup> *Id.* at 70.

<sup>98</sup> See, e.g., 750 ILL. COMP. STAT. 5/602.7 (b)(3) (instructing courts to take into account "the amount of time each parent has spent performing caretaking functions" in the best interest analysis).

rights advocates tend to be satisfied enough with a best interest standard because women still tend to be awarded custody that is somewhat proportional to their disproportionate investment.<sup>99</sup>

Men's rights groups fighting for joint custody standards implicitly argue that it is their genetic connection that entitles them to equal time. Anything other than equal time, they suggest, must reflect gender stereotype. But if the only reason men receive less custodial time is because of separate spheres ideology and gendered logic, why would the men's rights groups fight a gender-neutral primary caretaker standard? The primary caretaker standard and the assessment of relative investment within the best interest standard, both of which fathers groups fight, ask a court to assess hours spent caretaking. This is not ideology; it is math.<sup>100</sup>

The gender-stereotype critique might argue that it is a sexist gender ideology that creates the preferences that lead many parents to divide labor in a gendered fashion. Perhaps it is the law's job to combat that ideology by refusing to honor those preferences. But ignoring the differentiated patterns of work in order to effectuate gender equality perpetuates a different kind of well-documented inequality, ignoring the work that women do.<sup>101</sup>

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<sup>99</sup> Scott & Emery, *supra* note 96, at 75.

<sup>100</sup> In a recent article, Ann Alstott, Anne Dailey, and Douglas NeJaime have argued that parenthood decisions should be based not on primary caretaking (which they suggest is too mechanistic and insufficiently attentive to the child's psychological development), but on a judicial determination of psychological parenthood. Ann L. Alstott et al., *Psychological Parenthood*, 106 MINN. L. REV. \_\_\_ (2022). No doubt, this proposal allows for a more nuanced, holistic approach to parental status determinations than a primary caretaker standard and it tries to narrow the problems with vagueness that plague best interest determinations. The authors suggest that courts rely heavily on psychological experts to determine psychological parenthood. *Id.* at 11-12. This approach envisions a deep faith in psychological experts, though they acknowledge that historically family law's reliance on experts has opened the door to bad science and various biases. *Id.* Perhaps more tellingly for this article, these authors conclude that at birth, before any parent has an opportunity to develop what experts would label a psychological relationship with the child, the law uses biology (which I take to mean genetics) to determine parenthood in cases of sexual reproduction. They adopt this approach in the name of "certainty," though in doing so they vest genetic fathers with equal rights and thus erase a mother's greater gestational investment. *Id.* at 11, 31.

<sup>101</sup> See *supra* note 8.

Moreover, to the extent joint custody embodies a belief that it should be genetics not investment that determines custodial time, a joint custody presumption simply substitutes its own problematic ideology, genetic essentialism. As will be made more clear below, the genetic essentialism ideology is especially dangerous for those concerned about parental rights for LGBTQ parents.

For many parents in low income communities in which gender norms are still quite entrenched, honoring genetic parenthood with a presumption of joint custody in the name of equality is even harder to justify. In her comprehensive and sympathetic ethnographic work in the inner city, Kathryn Edin finds that men in her studies maintain strong allegiance to “traditional sex roles.”<sup>102</sup> Parenting by most non-married straight couples is far more gendered, far less mutual and far less cooperative than it is in most married relationships. As Naomi Cahn and June Carbone note, “egalitarian norms . . . do[ ] not reflect working-class realities . . . [Norms of] interdependence and sharing . . . fail[ ] to express the implicit terms of working-class relationships.”<sup>103</sup> Treating most unmarried parents as equal partners in the parenting project suggests a paradigm very different from “the terms the parties have chosen for themselves.”<sup>104</sup> As Edin and her co-author, Timothy Nelson, concluded after studying parenting attitudes of unwed genetic parents in the inner-city, “she, he, and the community at large assign her – not them - ultimate parental responsibility.”<sup>105</sup> In many communities, unwed genetic fathers “leave all the hard jobs – the breadwinning, the discipline, and the moral guidance – to the moms.”<sup>106</sup>

Without a deep allegiance to genetic essentialism, why should equality principles demand that the law award custodial time to a genetic father when he has left all the hard parenting

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<sup>102</sup> KATHRYN EDIN & MARIA KEFALAS, *PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE* 203 (1st ed. 2005).

<sup>103</sup> June Carbone & Naomi Cahn, *Marriage Markets: How Inequality Is Remaking the American Family* 118 (2014).

<sup>104</sup> June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 59 (2016).

<sup>105</sup> KATHRYN EDIN & TIMOTHY NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* 81 (1st ed. 2013).

<sup>106</sup> *Id.* at 18.

jobs to the mother? That would be treating unalikes alike.<sup>107</sup> It would mean that the disproportionate work that the mother has done, the breadwinning, the discipline, and the moral guidance, should be discounted, or erased, in the name of securing equality.

The calls to override women's disproportionate caretaking with presumptions of joint custody parallel the calls to erase women's gestational contribution at birth. In both cases, equality advocates argue that equality demands erasure of women's investment in children so as to effectuate a more equal approach to parenting. The argument for equal parental rights at birth is the argument for joint custody regardless of investment. Gestational erasure paves the way for erasure of the caretaking work that many women continue to disproportionately perform. In contrast, the primary caretaker standard and the Supreme Court doctrine that honors gestation are functional standards. They look at who has done the work of parenting. They treat parenting as a verb, not a genetic constant. The overlap between the "women's groups" argument and the calls for same sex parent equality is clear. Parental investment should be rewarded with corresponding parental rights. Part III elaborates on that overlap.

### **III. Taking LGBTQ Parenting Rights Seriously**

To this point, this article has focused mostly on the gender-stereotype critique and its willingness to sanction gestational erasure. As suggested earlier, an LGBTQ equality critique has also sanctioned gestational erasure because so many LGBTQ parents cannot or do not get pregnant. Ultimately, though, the LGBTQ critique must distance itself from the gender equality critique because the gender equality critique roots parenthood in a genetic connection to the child that LGBTQ parents will never share. To paraphrase what the Massachusetts Supreme Judicial Court wrote regarding linking marriage to genetic parenthood, the genetic essentialism in the gender-stereotype critique "singles out

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<sup>107</sup> See ARISTOTLE, *THE NICOMACHEAN ETHICS* 112 (David Ross et al. eds., 1991) ("[t]his is the origin of quarrels and complaints – when either equals have are awarded unequal shares, or unequals equal shares."); Kenneth I. Winston, *On Treating Like Cases Alike*, 62 CALIF. L. REV. 1, 5 (1974) ("Thus, a law is justly applied when applied to all those and only those who are alike in satisfying the criteria specified in the law . . .").

the one unbridgeable difference between same-sex and opposite-sex couples” and makes it critical to parenthood.<sup>108</sup>

At present, courts that champion the LGBTQ parental equality argument appear confused about the inherent tension between the sex equality and LGBTQ equality critiques. Consider two fairly recent state Supreme Court decisions implicitly rejecting, in the name of LGBTQ equality, the relevance of genetics. The high courts of both New York and Maryland, relying on what they read as the equality mandate implicit in the legalization of same-sex marriage, directed their states to adopt a functional test for parentage so that a same sex partner could sustain a claim for parental rights.<sup>109</sup> The courts held that unmarried same sex partners should be treated as unmarried opposite sex partners. Did these courts mean to suggest that same sex partners who cannot have a genetic connection to a child must be treated as opposite partners who do? What does the legalization of same sex marriage say about how the law must treat the non-genetically related non-married opposite sex partner? *Obergefell* and statutes legalizing same sex marriage *require* providing same sex partners with a functional path to parenthood *only* if they require that the law treat a partner who *is not* genetically related to her partner’s child as a partner who *is* genetically related to his partner’s child. The 2017 Uniform Parentage Act<sup>110</sup> and some courts that have recognized more than two parents<sup>111</sup> seem to have

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<sup>108</sup> Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 962 (Mass. 2003) (the Massachusetts Supreme Judicial Court was referring to why procreation should not be considered the essence of marriage, but the logic equally applies to why genetics should not be considered the essence of parenthood).

<sup>109</sup> Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 490 (N.Y. 2016) (suggesting that their previous decision rejecting functional parenthood was “unsustainable” in light of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)); Conover v. Conover, 146 A.3d 31, 49 (Md. 2016) (suggesting the Maryland legislature’s adoption of same sex marriage “undermined” the courts’ previous rejection of functional parenthood).

<sup>110</sup> See generally 2017 UNIF. PARENTAGE ACT § 612 [hereinafter 2017 UPA] (detailing the nature of proceedings to adjudicate parentage in which many different “kinds” of parents [genetic, presumptive, de facto etc.] are considered as equally entitled to consideration under a “best interest” standard).

<sup>111</sup> Naomi Cahn & June Carbone, *Parents, Babies, and More Parents*, 92 CHI-KENT L. REV. 9, 20-35 (2017) (discussing cases in which courts have recognized three parents and not treating genetic parents as entitled to greater rights than functional parents).

adopted this approach, but no state has reckoned with everything this might require.

Among other things, suggesting that parents who are not genetically related must be treated as parents who are genetically related would seem to mandate the elimination of paternity law, which requires treating genetic parents as uniquely entitled to and responsible for parental status.<sup>112</sup> It also calls into question the Supreme Court's illegitimacy doctrine, much of which demands that states treat children as the legal offspring of their genetic parents.<sup>113</sup> It would also suggest that the *Obergefell* Court meant to override decades of family law that has treated step-parents (who have functioned as parents) differently than legal parents.<sup>114</sup> A comprehensive investment approach to parenthood, like the one endorsed in this article, would require all of these changes, but it seems unlikely that either the courts in New York or Maryland were demanding such changes.

#### A. *Liberty or Equality?*

Although a champion of these opinions and the LGBTQ equality critique, Professor NeJaime has more recently suggested

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<sup>112</sup> The Massachusetts Supreme Judicial Court has held that same sex partners should not be treated as (genetically related) opposite sex partners when it comes to child support. *See* T.F v. B. L., 813 N.E.2d 1244, 1250 (Mass. 2004) (holding that a former partner who agreed to co-parent a child but left the relationship before the child was born not responsible for child support because “‘Parenthood by contract’ is not the law in Massachusetts”).

<sup>113</sup> *See generally* Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. REV. 1647 (2015) (exploring how the illegitimacy cases rely on genetics as the root of parenthood and are therefore inconsistent with emerging trends in family law that honor reproductive technology contracts and alternative families that do not share genetic connections).

<sup>114</sup> The 2017 UPA and many states resist holding step parents (who often function as parents) responsible for any child support for fear that people would not be willing to marry a parent with children for whom they might some day be found responsible. The 2017 UPA allows only the person alleging him or herself to be a de facto parent to initiate a proceeding (§ 609) because of “concerns that stepparents might be held responsible for child support.” 2017 UPA § 609 cmt, at 51-52. Twenty years ago, the ALI Principles expressed a comparable concern, *see* AMERICAN LAW INSTITUTE, PRINCIPLES OF FAMILY DISSOLUTION § 3.03, cmt. to Reporters note, at 420 (2001) (codifying the idea that a functional parent can assert rights but not be held involuntarily responsible for obligations).



that same sex partners' parental rights should flow not just from equality principles, but from the substantive due process rights that the Supreme Court has found in family members.<sup>115</sup> Exploring various Supreme Court cases, including the unwed fatherhood cases, *Moore v. City of East Cleveland*<sup>116</sup> and *Smith v. Organization of Foster Families for Equality and Reform*,<sup>117</sup> NeJaime argues that the Supreme Court has afforded some protection to established family-like relationships, regardless of whether they fall into traditional, legally recognized family forms.<sup>118</sup> He uses this nuanced understanding of how relationship has mattered constitutionally to argue that same sex parents may have constitutionally protected liberty interests in their relationships with the children they have parented.

There are important differences between this liberty-based due process approach to parental rights and the equality approach to parental rights, but there is also significant overlap, as people familiar with unwed fatherhood cases know. Abdiel Caban, in *Caban v. Mohammed*, and Jonathan Lehr, in *Lehr v. Robertson*, made both due process and gender-based equal protection claims to parenthood.<sup>119</sup> Caban won on his equal protection claim so the Court did not decide his due process claim.<sup>120</sup> Lehr lost on both. Caban's and Lehr's due process claims built on Peter Stanley's winning claim that unwed fathers have a lib-

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<sup>115</sup> Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 275 (2020) ("This article takes the crucial first step of building the case for a liberty interest that includes non-biological parent-child bonds").

<sup>116</sup> 431 U.S. 494 (1977) (describing the protection of an extended family's right to live in the same home).

<sup>117</sup> 431 U.S. 816 (1977) (assuming a liberty interest in foster parents who developed a relationship with foster child).

<sup>118</sup> NeJaime, *supra* note 115, at 305-13.

<sup>119</sup> Peter Stanley, the genetic father in *Stanley v. Illinois*, 405 U.S. at 658, and Leon Quilloin in *Quilloin v. Walcott*, 434 U.S. 246, 255-56 (1977), also made equal protection arguments but they focused more on the problem with treating wed fathers differently than unwed fathers, not on any problem with treating mothers differently than fathers. (Caban made the gender equality argument for the first time in the Supreme Court and the Court declined to evaluate it. *Caban*, 441 U.S. at 254, n.13).

<sup>120</sup> *Caban*, 441 U.S. at 395, n.16 ("express[ing] no view" on Caban's substantive due process claim because of the ruling under the Equal Protection clause).

erty interest in their parental status.<sup>121</sup> Stanley had lived with two of his three children – invested in a relationship with them – for most of their lives and the Court held that the state could not presume him unfit as a parent just because he and the mother never married.<sup>122</sup> In contrast, the Court dismissed Jonathan Lehr’s due process claim because Lehr had not developed a relationship with his genetic child.<sup>123</sup> It was the absence of that relationship that also rendered him dissimilarly situated to the mother.<sup>124</sup>

Together, the unwed father cases make clear that relationship matters to both the potential parent’s liberty interest and gender equality claims. The stronger a potential parent’s relationship with the child, (i) the more the potential parent’s liberty interest obligates the state to let him be heard on questions of parental status and (ii) the more similarly situated he is to the gestational mother for equal protection analysis. For purposes of this article though, it is important to underscore the differences between an equality approach and a due process approach. The equality approach encourages severing gestation from parental rights analysis in order to make the gestator seem similarly situated to other potential parents. A due process approach suggests that one’s liberty interest in parenthood grows in proportion to one’s investment with a child. It leaves room for, and indeed may require, honoring gestation.

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<sup>121</sup> Because he won his due process claim, the Court did not decide Stanley’s equal protection claim.

<sup>122</sup> Leon Quilloin made a claim comparable to Stanley’s but lost. He argued that his liberty interest in a parental relationship with his genetic child gave him the right to block the adoption of the child by the mother’s new husband. The Supreme Court held that because he had “never exercised actual or legal custody over his child and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection or care of the child” he did not have a protectable liberty interest in a relationship with the child. *Quilloin*, 434 U.S. at 256.

<sup>123</sup> Genetics gave him no more than the kind of process that New York had given him, which was the opportunity to register with a putative father registry. *LEHR*, 463 U.S. at 263-64.

<sup>124</sup> *Id.*

### B. *Building a Liberty Interest*

Currently, if a potential parent is not the gestator who has already invested at birth, the only way to make an investment worthy of a parental liberty interest is by (i) having an amicable enough relationship with a gestator who is willing to allow the functional parental relationship with the child to develop or (ii) having a legal right that entitles one to invoke the law to force the gestator to allow the functional parental relationship to develop.<sup>125</sup> Today, that legal right to compel action on the part of the legal parent can come from (a) marital status (the marital presumption), or from (b) some other jointly executed legal formality indicating shared parental rights with the gestator (adoption, a reproductive technology contract assigning parental rights, a signed VAP or parenting agreement), or from (c) genetics. The legal formalities in options (a) and (b) are available to opposite sex and same sex partners equally.<sup>126</sup> It is only (c), genetics, that is not. Thus, there are two critical distinguishing characteristics of the parental right rooted in genetics. First, it will always be unavailable to a same sex partner. Second, it is the only path that does not require the consent of the gestator or legal parent.<sup>127</sup>

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<sup>125</sup> The exceptions to this rule are gestational surrogacy agreements and adoptions by single parents. In those instances it is not the gestator, but the legal parent (who has gone through legal formalities to become the legal parent), with whom the potential parent must forge a relationship so that the legal parent allows a parent-child relationship to develop in someone other than themselves.

<sup>126</sup> To the extent that some states resistant to LGBTQ rights generally make these legal formalities difficult for LGBTQ parents, the equality principles expressed by the Supreme Court in *Obergefell* and the high courts of New York and Maryland arguably should control. Certainly, if a non-genetically related opposite sex partner has a root to parenthood through a legal formality like marriage or adoption or contract, a non-genetically related same sex partner should be afforded the ability to engage the same formality. For a survey of different state treatment of same sex partner parenthood opportunities, see Susan Hazeldean, *Illegitimate Parents*, 55 U.C. DAVIS L. REV. 1583 (2022).

<sup>127</sup> In practice, an alleged genetic father does not even have to prove a gestator's consent to the sexual act that produced the child. Proving genetic connection is remarkably easy and in most states all that is required to prove paternity even if the gestator did not consent to the sex that resulted in the pregnancy. Statutes that allow a gestator to dismiss the claims of an alleged father if the pregnancy was the result of a sexual assault still require the ges-

Same sex partners who want to rely on investment as a source of parenthood are ineluctably dependent on a legal parent to let a relationship with the child develop. Genetic progenitors are not. Why should genetic progenitors have rights independent of the gestator when same sex partners do not? If the law is concerned with treating same sex partners like opposite sex partners, then it should treat partners who share a genetic connection to the child like partners who do not. It should eliminate genetics, not gestation as a source of parenthood. Then opposite sex partners and same sex partners would be treated equally.<sup>128</sup>

Of course, eliminating genetics as a source of parenthood and equalizing the position of same sex and opposite partners, which is a kind of ratcheting down, still leaves a system that the equality champions are most suspicious of: A regime in which the gestator has more rights than other potential parents at birth. But a parental approach that takes parental investment seriously demands such an approach. At birth, she has by far the most significant connection with the child. Even if stereotype has exaggerated its power; even if some women reject the children they

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tator to prove the sexual assault. For instance, the 2017 UPA requires that a woman alleging the alleged father committed sexual assault in the conception of the child must prove it by clear and convincing evidence, 2017 UPA § 614(2). Proving sexual assault is notoriously difficult. See Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 235-45 (2015). It is exponentially more difficult to prove sexual assault than to prove genetic connection and if the gestator fails to prove sexual assault, she runs the risk of being labelled a non-cooperative parent, who may be less worthy of custodial time. See Joan Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation*, 35 L. & INEQUALITY 311 (2017) (discussing how women's allegations of abuse can backfire).

<sup>128</sup> This is a kind of ratcheting down, taking rights that genetic progenitors currently have away, but the opposite approach, ratcheting up by providing same sex partners with the same standing as opposite sex partners would likely create mayhem. If the overriding concern is equality and genetic progenitors have standing based on one sexual encounter, then presumably anyone who had sex with the gestator, regardless of whether that sex resulted in a pregnancy, should have standing to sue for parenthood. The law could not grant standing only to those who had sex that resulted in pregnancy because that would inevitably exclude all same sex partners. Ratcheting down, by eliminating genetics, rather than ratcheting up by granting standing to everyone who behaved like the genetic progenitor (i.e., had sex with the person who became pregnant) is a much more manageable approach to parental status.

have just gestated; even if physical and emotional connection are different, as compared to everyone else in the world, at birth, the gestator has more of a relationship to the child than anyone else. If constitutional rights stem from relationship, it is hard to see how the law could countenance the discounting of gestation.

To the extent equality proponents are concerned about the specter of gestators having grossly superior power as parents, it is important to note that the vast majority of gestators agree to share that power through the legal formalities previously mentioned. Marriage, a VAP, a reproductive technology contract or some other formal indication that the parties agree to share parenting responsibilities all trigger a co-parent's rights.<sup>129</sup> Most gestators are eager to share the rights and obligations that they earn during gestation. It is what critics see as a facial affront to gender equality, much more than gestators' demonstrated monopoly on parental status at birth, that seems to generate so many of the equality critiques.

That perceived facial affront to notions of gender equality is an affront only if one supports an underlying genetic essentialist ideology. Taking LGBTQ parenting seriously requires rejecting that ideology. Honoring gestation is not an affront to notions of LGBTQ parenting equality because honoring gestation takes investment not genetics as the starting point for parental rights. The gender essentialism implicit in the gender-stereotype critique is much less compatible with an investment-based approach to parental status than is a regime that vests substantial rights in a gestator at birth. An investment approach that incorporates gestation treats parenting as a verb and refuses to "single[ ] out the one unbridgeable difference between same-sex and opposite-sex couples" to make it critical to parenthood.<sup>130</sup>

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<sup>129</sup> Most children born in this country are born to married gestators and thus they have two parents at birth. See *Unmarried Child-Bearing*, NATIONAL CENTER FOR HEALTH STATISTICS, CENTERS FOR DISEASE CONTROL, <https://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm> (last visited May 9, 2022) (approximately 60% of children born in the United States are born to married gestators). The majority of children born to unmarried gestators have another legal parent who signed a Voluntary Acknowledgment of Paternity very shortly after birth. FY2009 Annual Report to Congress, *supra* note 57.

<sup>130</sup> *Goodridge*, 798 N.E.2d at 962. See *supra* discussion in text at note 108.

#### IV. CONCLUSION

In the introduction, I suggested that in response to the gender-stereotype critique and the LGBTQ equality critique many courts and state legislatures have begun to ratchet up by affording the privileges that were formerly reserved for a few (gestators) to more potential legal parents. The trend is to expand the class of people who can claim parental status. In Part III, I suggested that the far more sensible approach is to ratchet down and take away the rights the law currently grants genetic progenitors. This would treat genetic progenitors and same sex partners equally, but still honor the disproportionate work that gestators do. Even if one does not accept the ratcheting down analysis in Part III, contemporary practice indicates that the current attempt to ratchet up may, in many instances, result in a different kind of ratcheting down, one that takes away preferential treatment for gestators and does not afford anyone preferential treatment as a parent. As explained below, this will likely not afford those previously excluded from parenthood substantial rights, though it could cause some gestators real harm.

In cases in which parental status is contested, and courts use the kind of expansive approach to standing endorsed by the 2017 Uniform Parentage Act, courts are instructed to or have simply decided to use a best interest of the child standard to determine parental status.<sup>131</sup> This standard has not been much help to genetic fathers claiming a constitutional right to parental status. It was the best interest of the child standard that Abdiel Caban, Leon Quilloin, Jonathan Lehr, and Michael H. all challenged as unconstitutional. Before reaching the Supreme Court, Abdiel Caban had an opportunity to convince a court that the adoption of his genetic children by their mother's new husband was not in the children's best interest. He lost.<sup>132</sup> Leon Quilloin had an op-

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<sup>131</sup> See 2017 UPA § 613(a) (“The court shall adjudicate parentage in the best interest of the child based on . . . [a list of factors including “(6) other equitable factors.”]); Baker, *supra* note 11, at 13-14 (discussing cases in which courts use a best interest standard to assign parental status); Cahn & Carbone, *supra* note 111, at 28-29 (discussing courts' use of best interest standard in cases involving three parents).

<sup>132</sup> *Caban*, 441 U.S. at 384 (Caban, who had visitation rights at the time of the adoption hearing, presented evidence suggesting that the adoption by the mother's new husband should not go forward).

portunity to argue that his legitimation petition was in his child's best interest. He lost.<sup>133</sup> Jonathan Lehr was never given the opportunity to prove that the adoption of his genetic child by someone else was not in the child's best interest, but the family court judge made very clear that had Jonathan tried, he would have lost.<sup>134</sup> That was why, on appeal, the New York courts found there was no abuse of discretion in not letting Lehr's paternity petition proceed.<sup>135</sup> And under California law, Michael H., as an interested party, had an opportunity to prove that continued contact with his genetic child would be in the child's best interest.<sup>136</sup> Michael, and all of these genetic fathers, argued they were constitutionally entitled to something more than just a best interest of the child adjudication to determine parenthood.

The reason Caban was the only one of these genetic fathers to win was not because he proved it was in the child's best interest that he be considered the father. He won because New York gave the genetic mother but not the genetic father the right to veto an adoption. If instead of granting both a genetic father and

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<sup>133</sup> *Quilloin*, 434 U.S. at 251 (the lower court concluded that granting either Quilloins' visitation petition or his request for visitation would not be in the child's best interest).

<sup>134</sup> The trial court wrote that "even if a thorough and complete investigation into the illicit relationship between the mother and the putative father . . . were made and certain unfavorable information concerning the mother's mental and emotional instability were revealed, it is difficult to see how such information, no matter how derogatory, could in any way be significant . . . to the court's decision as to whether or not the stepfather's application for the adoption of this child should have been approved [as in the best interest of the child.] In the Matter of Jessica Martz, an Infant, 102 Misc. 2d 102, 115 (N.Y. Fam. Ct. 1979). At the Supreme Court, Lehr was implicitly arguing that the best interest determination was unconstitutional in his case because he had a constitutional right to be treated as a father, in which case his consent to adoption would have been needed.

<sup>135</sup> 463 U.S. at 254-55.

<sup>136</sup> Section 4601 of the California Civil Code gave *Michael H.*, as an interested party, the right to petition for visitation rights if he could establish that it was the best interest of the child. If he had been found to be the legal father, visitation would have been presumed to be in the child's best interest, but that presumption could have been rebutted. See *Michael H.*, 491 U.S. at 133 (Stevens, J, concurring in the judgment). It was section 4601 that swayed Justice Stevens into joining the plurality and finding against any greater constitutional right in Michael because his relationship gave him a right to petition for visitation rights under a best interest standard.

a genetic mother the right to veto an adoption, states simply eliminate the parental veto provision, there is no equality problem. Then states can do as the 2017 Uniform Parentage Act suggests, and just conduct best interest of the child determinations among everyone who might have an interest in parenting a particular child. But all of the genetic father claimants, including Caban, lost under that standard.<sup>137</sup>

In the citizenship context, the Supreme Court has already endorsed ratcheting down to ensure equality. In *Sessions v. Morales-Santana*,<sup>138</sup> the Supreme Court invalidated a provision of the Immigration and Nationality Act that imposed a lesser residency requirement on a U.S. citizen gestational mother than on a U.S. citizen genetic father whose child was born abroad. The Supreme Court held that the differential treatment with regard to residency for mothers and fathers violated the equal protection clause, but instead of treating unwed fathers as the statute treated unwed mothers, the Court held that unwed mothers should be held to the same residency requirements as unwed fathers. Equality principles were satisfied once the court ratcheted down, just as they will be if states simply refuse to let any adult assume presumptive rights as a parent. Parentage hearings can just be best interest of the child free-for-alls in which all potential parents are treated equally.

If that is the case, the future of parentage law is going to depend on how willing courts are to endorse meaningful multi-parent parenthood. To date, when presented with competing claims to parenthood from multiple parents, courts have used something like a parental investment standard to award primary custody rights to one person.<sup>139</sup> Because equal sharing of physi-

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<sup>137</sup> Proponents of giving courts discretion to confer parentage under a best interest test have suggested that courts “have shown themselves capable of making these determinations” NeJaime, *supra* note 115, at 371 (citing Carlos Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 AM. U. J. GENDER SOC. POL’Y & L. 623, 653-56 (2012)). The men in the unwed father cases would likely contest that observation.

<sup>138</sup> 137 S. Ct. 1678 (2017).

<sup>139</sup> See Cahn & Carbone, *supra* note 111, at 52 (“As courts decide actual disputes among potential parents, they are implementing the three-parent doctrine in a manner that accords primary parenting rights to one adult rather than granting shared decision-making rights to multiple adults. As they understand,



cal and decision-making custodial rights becomes logistically and emotionally untenable the more parents there are, the less likely it is that multiple parents can secure equal parental rights.<sup>140</sup> Equal parenting rights and responsibilities are feasible if there are only two parents, but that equality of rights and obligations becomes rapidly less feasible as the number of parents increases. If the trend to consider more additional potential parents continues to lead courts to use a best interest standard heavily influenced by a parental investment standard, then genetic fathers will secure more rights only if they invest significantly more in parenting (a process over which they have limited control if the genetic father and gestator did not live together at the birth of the child.)

In a best interest of the child free-for-all at birth, a gestator is still likely to be able to prevail as the primary custodian at birth. Consider a gestator like Lorraine Robertson.<sup>141</sup> As a gestator she will also be a lactator who can claim that breast-feeding is in the child's best interest.<sup>142</sup> She will get primary custody because joint physical custody is usually not in an infant's best interest.<sup>143</sup> She will have to struggle with the contentious

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one parent typically has consistently provided care and stability for the child, and that is the parent who should be given more rights").

<sup>140</sup> *Id.* at 40 (courts that have recognized more than two parents do not "assign equal rights concerning decision-making authority, nor do they grant equal amounts of custodial time following dissolution of the parental relationship." ); *see also* Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 714 (2008) (suggesting that a more inclusive parenthood regime is also one that is likely to lead to a more hierarchal parenthood regime). Many parents choose to parent in groups of three or four. There is nothing inevitable about the number two. But the fact that some groups choose to parent together and do so successfully does not mean that a court can meaningfully or successfully compel groups of three or four to parent together. If a court is involved, the parents have already proven themselves incapable of working out the day-to-day decisions that parents sharing custody must work out in order for a shared custody arrangement to be successful. This is why the courts tend to resort to a more hierarchal award of custodial rights.

<sup>141</sup> *See supra* notes 82-84.

<sup>142</sup> *See The Benefits of Breastfeeding for Baby & for Mom*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/articles/15274-the-benefits-of-breastfeeding-for-baby--for-mom> (last visited May 9, 2022).

<sup>143</sup> Marsha K. Pruett & J. H. DiFonzo, *Closing the Gape: Research Policy, Practice, and Shared Parenting*, 52 FAM. CT. REV. 152, 161-62 (2014); Bruce Smyth et al., *Legislating for Shared Time Parenting After Parental Separation:*

relationship she has with the genetic father, who may well try to prevent her from developing a romantic relationship with someone else, but if she has the fortitude, she will be free to develop a relationship with another adult whom she can then let develop a functional parent relationship with the child. That new functional parent will present much like Robertson's new husband did in the original case and those two will likely retain primary custody because they will have invested the most. Men like Lehr will emerge with some visitation rights, but the primary parents will be the gestator and her new partner.

Gestators like the mother in *In re Adoption of J.S.*,<sup>144</sup> who do not want to keep the child, will instead treat the potential adoptive parents like intended parents, inviting them to doctor's appointments and encouraging them to make the kind of investments that those who are in favor of equal rights for genetic fathers at birth argue entitle fathers to equal rights at birth.<sup>145</sup> Again, the genetic father can make a claim for parenthood and courts may not be willing to dismiss him entirely, but if the question of who should be the primary parents is made using a best interest of the child standard, it is hard to see how the adoptive parents will not seem better suited as parents than the genetic father, who will have been estranged from the gestational process and whom the gestator can testify will be a bad parent. The adoptive parents will present as making all the same kind of investments as same sex partners do. To award primary parental right to the genetic father over the adoptive couple is to suggest that there is something inferior to the kinds of investment that same sex partners make, at least when compared to genetic connection.

In both of those situations, the visitation rights of the genetic father will act as a significant restriction on the parental autonomy of the primary parents, though people who favor multiple parenthood may think that is a reasonable compromise. The gestators who will be most disadvantaged by this best interest of the child free-for-all regime are the ones who want to parent on their

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*Insights from Australia?*, 77 L. & CONTEMP. PROBS. 109, 141 (2014) (both suggesting that benefits of significant shared custody can be reduced or reversed if child is too young, which is generally thought to be younger than age 4).

<sup>144</sup> See *supra* notes 85-86 and accompanying text.

<sup>145</sup> See Fontana & Schoenbaum, *supra* note 42; Purvis, *supra* note 41.

own, or who end up parenting on their own, or who have not found an appropriate adoptive family yet. It is these parents who are likely to have to share extensively with the genetic fathers they are trying to avoid. Courts are much more likely to afford that genetic father significant rights if the gestational mother is parenting on her own.<sup>146</sup> In cases in which the genetic parents are already so estranged that she is actively trying to hide her pregnancy from and exclude him, the result is likely to be a deeply contentious (and therefore bad for the child) relationship between the parents.

Thus, despite the influence of arguments that ground themselves in principles of equality, what will emerge for a parentage system that treats everyone who might have a parental interest as equally entitled to sue for parental status is a world with less equal parenting and more potential fighting, but not very different results in terms of custodial time awarded. Most potential parents who have been denied significant parental rights under a regime that rewards the work of gestation will continue to be denied significant parental rights under a regime that erases it, but for a different reason – because such a denial will be in the child’s best interest.

It is the gestators who want to abort their pregnancies, or parent alone or have their child adopted without having to worry about interference from men with whom they once had sex who will be most affected by a regime that erases gestation. They will be forced to share with men they want to escape. Just as important, erasing gestation in order to treat genetic parents on par with gestators puts same sex partners at an inherent disadvantage. Gestational erasure elevates the relevance of genetics and leaves LGBTQ parents having to fend off claims from genetic parents instead of just arguing on equal terms for parental rights based on investment.

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<sup>146</sup> In sperm donation situation, courts have been more influenced by a genetic father’s professed intent to parent than a gestational mother’s intent that she not share parental rights. Susan Boyd, *Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility*, 25 WINDSOR Y.B. ACCESS JUST. 63, 70 (2007).



## Living with Guns: Legal and Constitutional Considerations for Those Cohabiting with Temporarily Prohibited Possessors

by  
Joseph Blocher & Maisie Wilson\*

### Introduction

The Second Amendment is frequently portrayed as among the most individualistic of constitutional rights, even within the broadly individualistic American rights tradition.<sup>1</sup> Especially now that the U.S. Supreme Court has detached the Amendment from the collective entity—the “well regulated militia”—that might otherwise be central to its interpretation and implementation,<sup>2</sup> the paradigmatic figure for the right to keep and bear arms is a lone person defending himself or herself (and his or her family) against physical threats.<sup>3</sup> Given the Court’s description in *District of Columbia v. Heller* of an “individual right”<sup>4</sup> whose “core” is

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<sup>1</sup> See, e.g., Clark M. Neily III, *The Right to Keep and Bear Arms in the States: Ambiguity, False Modesty, and (Maybe) Another Win for Originalism*, 33 HARV. J.L. & PUB. POL'Y 185, 193 (2010) (calling the Second Amendment a pledge about “spiritual” and “physical autonomy”); Robert Weisberg, *The Utilitarian and Deontological Entanglement of Debating Guns, Crime, and Punishment in America*, 71 U. CHI. L. REV. 333, 337 (2004) (noting the “association of the gun with a form of individual autonomy” (reviewing GUNS, CRIME, AND PUNISHMENT IN AMERICA (Bernard E. Harcourt ed., 2003))).

<sup>2</sup> For an exploration of this theme and consideration of other institutions that might play a similar role, see Darrell A. H. Miller, *Institutions and the Second Amendment*, 66 DUKE L.J. 69 (2016).

<sup>3</sup> See Joseph Blocher & Reva Siegel, *Guns Are a Threat to the Body Politic*, ATLANTIC (Mar. 8, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/guns-are-threat-body-politic/618158>.

<sup>4</sup> *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

self-defense,<sup>5</sup> especially in the home,<sup>6</sup> the right might seem almost entirely self-regarding. It is unsurprising that many opponents of gun regulation invoke language reminiscent of privacy, saying that they merely want to be let alone.

But gun-bearing and gun regulation are embedded in contexts that implicate a wide range of other constitutional and individual interests. Consider that, during 2020 and 2021, armed protestors successfully forced the temporary closure of the Michigan legislature<sup>7</sup> (thereby establishing a playbook for the January 6 Capitol riots<sup>8</sup>), while armed right-wing militia “policed” various public forums,<sup>9</sup> and some individuals displayed weapons at Black Lives Matter protestors.<sup>10</sup> The paradigm scene of an individual defending his home from criminal threats fails to account for these increasingly common use of guns in shared spaces where multiple constitutional interests are in play.<sup>11</sup>

But one need not venture into public spaces to see individuals’ gun-related rights, responsibilities, and interests coming into conflict—the same is true even *within* the home. Whose decisions about guns are to be privileged when one member of a household feels safer with a gun, and others do not?<sup>12</sup> (Here, too, Covid-era events are instructive, given the increased risk of gun-

<sup>5</sup> *Id.* at 630.

<sup>6</sup> *Id.* at 628 (concluding that the home is the place where “the need for defense of self, family, and property is most acute”).

<sup>7</sup> David Welch, *Michigan Cancels Legislative Session to Avoid Armed Protesters*, BLOOMBERG NEWS (May 14, 2020), <https://www.bloomberg.com/news/articles/2020-05-14/michigan-cancels-legislative-session-to-avoid-armed-protesters>.

<sup>8</sup> See Rebecca Boone, *Armed Statehouse Protests Set Tone for US Capitol Insurgents*, STARS & STRIPES (Jan. 7, 2021), <https://www.stripes.com/news/us/armed-statehouse-protests-set-tone-for-us-capitol-insurgents-1.657770> (calling the state capitol protests in Michigan, Idaho, and Oregon, “dress rehearsals” for D.C.).

<sup>9</sup> See, e.g., Evelyn Holmes, *Armed Bystanders Line Black Lives Matter Protest in Indiana*, EYEWITNESS NEWS ABC7 (June 7, 2020), <https://abc7.com/timely-armed-protesters-black-lives-matter-indiana-protest/6234854>.

<sup>10</sup> Jim Salter, *St. Louis Couple Charged for Pulling, Waving Guns at Protest*, ASSOCIATED PRESS (July 20, 2020), <https://apnews.com/article/virus-outbreak-us-news-st-louis-racial-injustice-crime-85e4f25f10b73e8926f6602b6a76bfef>.

<sup>11</sup> Blocher & Siegel, *supra* note 3.

<sup>12</sup> Cf. Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1 (2012). For an analysis of the gendered nature of the gun debate, see

linked intimate partner violence.<sup>13</sup>) What about when one person's desire to self-protect with a gun comes into direct conflict with cohabitants' desires to protect themselves by avoiding firearms? Identifying and analyzing such questions demonstrates the ways in which the right to keep and bear arms is intertwined with other rights and interests, including within a single family or cohabiting unit.

Our goal in this article is to explore that issue through the lens of a concrete and seemingly discrete question: Can a legal gun owner face legal liability while cohabiting with a temporarily prohibited possessor?<sup>14</sup> If, for example, a person is subject to a gun-prohibiting order because a judge has found that he poses an immediate risk to others, must his cohabiting spouse surrender *her* gun as well—especially at a time when her potential need for self-defense might be especially high?

The very act of sharing a home raises that possibility, since it can result in the prohibited person having “constructive possession” of other people's firearms.<sup>15</sup> And yet co-habitation also raises the constitutional stakes, since the Supreme Court has emphasized that Second Amendment interests are “at their apex” in the home.<sup>16</sup> The result seems to be a collision between enforce-

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Susan P. Liebell, *Sensitive Places?: How Gender Unmasks the Myth of Originalism in District of Columbia v. Heller*, 53 *POLITY* 207 (2021).

<sup>13</sup> A survey conducted in late 2020 found that about 50% of service providers to survivors of gender-based violence reported an increase since the pandemic in survivors being threatened by firearms. Kellie Lynch & TK Logan, *Assessing Challenges, Needs, and Innovations of Gender-Based Violence Services During the COVID-19 Pandemic*, UNIV. OF TEX. AT SAN ANTONIO, COLL. FOR HEALTH, CMTY. & POL'Y (Feb. 2021), <https://s3.documentcloud.org/documents/20498812/covid-gender-based-violence-final-report.pdf>.

<sup>14</sup> We focus on temporarily prohibited possessors in the ERPO/DVRO context because we are particularly interested in the application of protective orders that might arise in a family setting. Analogous questions have also arisen in the context of other kinds of prohibited possessors, such as those enumerated in the Gun Control Act. Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended in scattered sections of 18 and 26 U.S.C.) (prohibiting possession by felons, the “mentally defective,” fugitives, and others).

<sup>15</sup> See *infra* notes 87-115 and accompanying text (describing and applying elements of constructive possession).

<sup>16</sup> Joseph Blocher, *Domestic Violence and the Home-Centric Second Amendment*, 27 *DUKE J. GENDER L. & POL'Y* 45, 45 (2020).

ment of person-based prohibitions and the constitutional rights of the *non*-prohibited persons with whom they live.

As a practical matter, it is increasingly important to resolve that tension, as support grows for adoption of temporary gun prohibitions like emergency risk protection orders (ERPOs) and domestic violence restraining orders (DVROs).<sup>17</sup> As opposed to broad class-based restrictions like the federal prohibitions on possession by felons and the mentally ill, ERPOs and DVROs apply to individuals who present an immediate risk of harm to themselves or others.<sup>18</sup> This kind of closely tailored regulation has largely been able to sidestep the trenches in the gun debate, commanding a fair bit of bi-partisan support, as evidenced by the fact that roughly twenty states have adopted ERPOs in the eight years since Parkland.<sup>19</sup> Yet, protective orders still face some significant opposition, and were a primary target of Second Amendment sanctuary cities and counties.<sup>20</sup>

Courts and commentators are still working through a range of complications related to their enforcement, however. For example, many ERPO statutes include a receipt requirement as proof of compliance—does this implicate the Fifth Amendment privilege against self-incrimination?<sup>21</sup> Does court-ordered firearm removal compliance amount to an unlawful search and seizure, especially in light of the limited sources of information regarding firearms possession (often the petitioner in cases of domestic violence)? Such questions tend to focus the constitutional rights and interests of those subject to the orders—people we’ll call *respondents*. But the implementation of those orders also implicates the rights and interests of others in the household—especially those who are legally entitled to own guns. Untangling the rights, responsibilities, and interests implicated in those scenarios

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<sup>17</sup> See *infra* Section II.1.

<sup>18</sup> Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: “Red Flag” Laws and Due Process*, 106 VA. L. REV. 1285, 1305–13 (2020) (describing ERPOs as “retail” gun regulation).

<sup>19</sup> *Id.* at 1285.

<sup>20</sup> *Id.* at 1287.

<sup>21</sup> See, e.g., *State v. Zachary James Marshall*, Memorandum Decision and Order, Kitsap County (Wash.) Dist. Ct. No. 23650101 at 38-57 (May 20, 2020), [https://www.kitsapgov.com/dc/Documents/Kitsap%20County%20District%20Court%20Surrender%20of%20Weapons%20Decision%20\(May%2027%2C%202020\).pdf](https://www.kitsapgov.com/dc/Documents/Kitsap%20County%20District%20Court%20Surrender%20of%20Weapons%20Decision%20(May%2027%2C%202020).pdf).



reveals important lessons about the interpretation and enforcement of these gun laws, and about the Second Amendment more broadly.

To frame the discussion, Part I provides a short Second Amendment primer, focusing on the debate that was central to the Supreme Court's seminal decision in *Heller* and showing how that debate cemented a view of the Amendment that is distinctly individualistic, home-bound, and focused on self-defense. Indeed, the Court seems to equate the self-defense interest of the gun-owner with that of the household as a collective.

As Part II shows, gun regulations like ERPOs and DVROs acknowledge and attempt to address a different kind of gun threat: one that often originates *within* the home, not leveled against it. Especially as these legal devices continue to spread, it will be increasingly important to identify and understand their legal implications—including their impact on cohabitants. In particular, the doctrine of “constructive possession” attributes legal possession where a person can legally possess an object that is not in his or her immediate control.<sup>22</sup> A temporarily prohibited person might therefore end up violating the terms of an order while living with a legal gun-owner. And as we show, that can turn otherwise-legal gun-owning cohabitants into accomplices, or subject them to liability for criminal negligence.

One solution to this problem is to require that cohabitants with knowledge of a gun-prohibiting order safely store their weapons so that the respondent cannot access them. And that, as Part III shows, brings us back to the Second Amendment. In *Heller*, the Supreme Court struck down a direct safe-storage requirement, concluding that such a requirement made it “impossible for citizens to use them for the core lawful purposes of self-defense.”<sup>23</sup> Would a safe storage requirement in the ERPO/DVRO context similarly run afoul of the Constitution? We argue that it would not, and conclude with some thoughts about how evaluation of the question highlights central tensions within the broader Second Amendment debate.

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<sup>22</sup> WAYNE LAFAVE, PRINCIPLES OF CRIMINAL LAW § 5.1(e) (3d ed. 2017) [hereinafter LAFAVE, CRIMINAL LAW].

<sup>23</sup> *Heller*, 554 U.S. at 630.

## I. *Heller's Individualism, and Threats To (and in) the Home*

For generations, the central question for Second Amendment law and scholarship was whether the Amendment's twenty-seven words are limited to militia-related people, actions, and arms, or whether they also encompass a right to keep and bear arms for private purposes like self-defense.<sup>24</sup> Countless articles and books staked out positions on one side or the other<sup>25</sup>—or elaborate alternatives<sup>26</sup>—while courts continued faithfully to apply the militia-based view. For more than two centuries, no federal case struck down a gun law on Second Amendment grounds.<sup>27</sup>

For present purposes, we are interested not in the evidence supporting these competing positions, but the labels that came to be applied to them: the “collective right” (i.e., militia-based) and “individual right” (i.e., private purposes). This framing—collective versus individual—was undoubtedly advantageous for the latter, given the individualism at the heart of most American rights, rhetoric, and doctrine. Little wonder that the “individual right” reading was soon dubbed the “Standard Model” by its sup-

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<sup>24</sup> For a brief overview of the competing positions, see JOSEPH BLOCHER & DARRELL A.H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF Heller* 59–66 (2018).

<sup>25</sup> The literature is far too wide to attempt a list here. For overviews of the debate in the law reviews, see ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 95–99 (2008); Don B. Kates, *A Modern Historiography of the Second Amendment*, 56 *UCLA L. REV.* 1211 (2009); Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 *CHI.-KENT L. REV.* 349, 363–84 (2000).

<sup>26</sup> SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 214 (2006) (describing the right in civic republican terms).

<sup>27</sup> Clark Neily, *District of Columbia v. Heller: The Second Amendment Is Back, Baby*, 2007-2008 *CATO SUP. CT. REV.* 127, 140. We are aware of just two district court opinions that did so, both of which were reversed. See *United States v. Emerson*, 46 F. Supp. 2d 598 (N.D. Tex. 1999), *rev'd and remanded*, 270 F.3d 203 (5th Cir. 2001); *United States v. Miller*, 26 F. Supp. 1002 (W.D. Ark. 1939), *rev'd and remanded*, 307 U.S. 174 (1939).

porters in an impressively effective declaration of scholarly victory.<sup>28</sup>

In 2008's *District of Columbia v. Heller*, the Supreme Court made that victory doctrinal, adopting the private purposes view while heavily citing "individual right" scholarship. In the course of doing so, the majority used the words "individual" and "individuals" a total of 51 times, deriding the notion that a right might be embedded in a "collective" like the organized militia.<sup>29</sup>

Framed thus—as individual versus collective—the question may have seemed easy. But as Justice Stevens pointed out in the first sentence of his dissent: "The question . . . is not whether the Second Amendment protects a 'collective right' or an 'individual right.' Surely it protects a right that can be enforced by individuals."<sup>30</sup> He noted that whether "the Second Amendment protects an individual right does not tell us anything about the scope of that right."<sup>31</sup> Stevens argued, on originalist grounds, that the Amendment was ratified as a structural federalism provision designed to protect state-affiliated militia from disarmament by the federal government.<sup>32</sup>

For the majority, the paradigmatic scene was not a militia muster, but a home invasion. The first sentence of the majority opinion described the question presented in terms of home possession,<sup>33</sup> and repeatedly tied "home" to self-defense,<sup>34</sup> ultimately concluding that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."<sup>35</sup> The Court determined that the "core" interest was one of self-defense, which is "most acute" in the home.<sup>36</sup> And in striking down the District's

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<sup>28</sup> Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 463–64 (1995); see also Kates, *supra* note 25, at 1212 n.7 (noting use even by supporters of militia-based interpretation).

<sup>29</sup> See generally *Heller*, 554 U.S. 570.

<sup>30</sup> *Id.* at 636 (Stevens, J., dissenting).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 637.

<sup>33</sup> *Id.* at 573 ("We consider whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.").

<sup>34</sup> *Id.* at 573, 575, 576, 577, 593, 615, 616.

<sup>35</sup> *Id.* at 635.

<sup>36</sup> *Id.* at 626.

handgun ban, the Court asserted that “the American people have considered the handgun to be the quintessential self-defense weapon,” explaining that “it is easier to use for those without the upper-body strength to lift and aim a long gun” and “can be pointed at a burglar with one hand while the other hand dials the police.”<sup>37</sup> The paradigmatic scene was clear.

It is not our goal here to review the debate about the Second Amendment’s central meaning and scope. *Heller* resolved that question in favor of the private purposes view (reflecting, it should be noted, popular opinion at the time<sup>38</sup>), even as it also affirmed the constitutionality of a wide range of gun laws.<sup>39</sup> Rather, we want to identify and explore two complications inherent in the majority’s individual- and home-focused understanding of the fundamental right to armed self-defense.

First, the “individual” right does not extend to all individuals. As Justice Stevens noted in his dissent, “when it finally drills down on the substantive meaning of the Second Amendment, the Court limits the protected class to ‘law-abiding, responsible citizens.’”<sup>40</sup> Indeed, the majority went out of its way to signal approval for prohibitions on classes of persons, especially felons and the mentally ill<sup>41</sup>—neither of which were at issue in *Heller* itself, but are already prohibited under federal law. Lower courts applying *Heller* have taken that language as constitutional approval of other group-based prohibitions, including limitations on possession by minors, immigrants unlawfully present, and those convicted of domestic violence misdemeanors.<sup>42</sup> The fact that certain *persons*—rather than, for example, certain contexts or actions—fall outside the scope of the right makes the Second Amendment substantively different from other guarantees in the

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<sup>37</sup> *Id.* at 629.

<sup>38</sup> Jeffrey Jones, *Public Believes Americans Have Right to Own Guns*, G????? (Mar. 27, 2008), <http://www.gallup.com/poll/105721/public-believes-americans-right-own-guns.aspx>.

<sup>39</sup> *Heller*, 554 U.S. at 626–27.

<sup>40</sup> *Id.* at 644 (Stevens, J., dissenting).

<sup>41</sup> *Id.* at 626–27 (majority opinion).

<sup>42</sup> Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms after Heller*, 67 DUKE L.J. 1433, 1481 (2018) (noting that just 4% of Second Amendment challenges to prohibited classes of persons have succeeded).

Bill of Rights, including the First.<sup>43</sup> And it sets up potential conflicts, or at least differentials, in people's invocations of the right.

Second, *Heller* conflates the individual gun-owner's self-defense interests with those of the household as a unit. The majority speaks of guns being used against "burglar[s]" and "intruders,"<sup>44</sup> not by or against abusive intimate partners. Threats are cast as emerging from outside the home, not within it, and guns are a way for the family unit to exercise a shared right—one might even say "collective right"—to self-defense.

This, it must be said, reflects a gendered reading of threat.<sup>45</sup> For women in the United States, the primary threats of violence—including gun violence—come from *within* the home. Intimate partners are a greater threat than lurking strangers or home invaders,<sup>46</sup> and most intimate partner murders involve a firearm.<sup>47</sup> (By comparison, about 6% of male homicide victims are killed by an intimate partner.<sup>48</sup>) For some gun rights advocates, the solution is as simple as arming more women.<sup>49</sup> But

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<sup>43</sup> Cf. *Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting).

<sup>44</sup> *Heller*, 554 U.S. at 629-31.

<sup>45</sup> For an analysis of *Heller*'s endorsement of a "patriarchal theory of armed self-defense," see Liebell, *supra* note 12.

<sup>46</sup> Katie Zezima et al., *Domestic Slayings: Brutal and Foreseeable*, WASH. POST (Dec. 9, 2018), <https://www.washingtonpost.com/news/posteverything/wp/2017/06/15/what-do-many-mass-shooters-have-in-common-a-history-of-domestic-violence>.

<sup>47</sup> Emiko Petrosky et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence — United States, 2003–2014*, 66 MORBIDITY & MORTALITY WKLY. REP. 741, 741 (July 2017). See also Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 EVALUATION REV. 313, 313 (2006) (concluding that roughly 60% of intimate-partner homicides are committed with a firearm).

<sup>48</sup> Carolyn B. Ramsey, *Firearms in the Family*, 78 OHIO ST. L.J. 1257, 1278 n.109 (2017) (internal citation omitted).

<sup>49</sup> NRA Women Staff, *The Armed Citizen*, NRA WOMEN (Sept. 24, 2021), <https://www.nrawomen.com/content/the-armed-citizen-september-24-2021> (advocating for more "armed citizens" and citing news article about an armed woman who successfully thwarted her abusive ex-husband's attack and attempted rape by shooting him).

studies show that the very presence of a gun makes it five times more likely that a woman will be killed by an abusive partner.<sup>50</sup>

Putting these two observations together reveals a difficult issue: The right to keep and bear arms, though described in terms of a fundamental individual right, as a practical matter is *not* held equally by all individuals. Even within a single household, rights may diverge. Moreover, despite *Heller*'s conflation of individual with household, people within a home may have divergent self-defense interests—as when one member of a household presents a threat to others. Emphasizing the individualistic and home-bound nature of the right, as *Heller* does, exacerbates these tensions. And attempts to regulate within the household unit, including through the use of targeted, temporary prohibitions against at-risk individuals, can create a possibility of legal liability for *non*-prohibited persons, as Part II explains.

## **II. Legal Gun Owners' Potential Liability While Cohabiting with a Temporarily Prohibited Possessor**

As noted above, *Heller* specifically approves as constitutional a range of laws that prohibit gun possession by certain classes of persons. The most prominent such classes are set out in the federal Gun Control Act, including convicted felons and those who have been adjudicated mentally ill.<sup>51</sup> Courts have overwhelmingly rejected challenges to the constitutionality of those prohibitions; aside from some possible as-applied exceptions, they are on firm constitutional footing.<sup>52</sup>

But what about the liabilities and rights of those who cohabit with a prohibited person? Can they be prosecuted for permitting such a person to “constructively” possess a weapon? Courts in some cases have concluded that they can and that the Second Amendment does not forbid such a result.<sup>53</sup>

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<sup>50</sup> Aaron J. Kivisto et al., *Firearm Ownership and Domestic Versus Nondomestic Homicide in the U.S.*, 57 (3) *AM. J. PREVENTATIVE MED.* 311, 312 (2019).

<sup>51</sup> Gun Control Act of 1968, 18 U.S.C. §§ 921–931.

<sup>52</sup> Ruben & Blocher, *supra* note 42, at 1481.

<sup>53</sup> See *infra* notes 116–119 (discussing constructive liability in cases involving felons).

Increasingly, though, the question is likely to arise in cases involving a different kind of gun regulation: Not broad, class-wide restrictions, but those individualized orders that would temporarily deny guns to those who present an immediate danger to themselves or others—including family members or intimate partners. Such laws have the potential to provide tailored solutions to temporary risks. And yet, because they focus on possession—a complicated concept in cohabitation—they also implicate legal rights and duties beyond those of the respondent.

### *A Primer on Temporary Firearm Prohibition Through ERPOs and DVROs*

ERPOs and DVROs are a means to preemptively take away firearms from specific individuals whom judges have determined are a temporary danger to themselves or others.<sup>54</sup> Though both types of orders have similar goals of targeted gun safety, they also differ in key respects.

#### 1. *ERPOs*

ERPO laws (also known as “red flag” laws<sup>55</sup>) authorize courts to issue orders temporarily banning possession of firearms by those who present an immediate risk of harm to themselves or others.<sup>56</sup> Such laws are temporary civil orders designed “to respond to acute periods of elevated risk of violence” that are specific to the person and the situation.<sup>57</sup>

As of 2020, nineteen states and the District of Columbia have enacted some form of extreme risk law,<sup>58</sup> giving almost half

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<sup>54</sup> *Extreme Risk Protection Orders vs. Domestic Violence Restraining Orders: How Are They Different?*, EDUC. FUND TO STOP GUN VIOLENCE (July 2018) [hereinafter *ERPOs vs. DVROs*, EFSGV], <http://efsgv.org/wp-content/uploads/2018/07/ERPO-DVRO-Comparison-July-2018-FINAL-1.pdf>.

<sup>55</sup> See Blocher & Charles, *supra* note 18, at 1301 (explaining that the term *red flag* “might convey a stigma”).

<sup>56</sup> *The Effects of Extreme Risk Protection Orders*, RAND CORP. (Apr. 22, 2020) [hereinafter *Effects of ERPOs*, RAND], <https://www.rand.org/research/gun-policy/analysis/extreme-risk-protection-orders.html>.

<sup>57</sup> *Id.*

<sup>58</sup> *Extreme Risk Protection Orders: State Laws at a Glance*, BLOOMBERG AM. HEALTH INITIATIVE, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH 2 (Apr. 16, 2020) [hereinafter *ERPOs: State Laws at a Glance*], <https://ameri->

of the U.S. population access to ERPOs.<sup>59</sup> The details of these laws vary by state, but they have some common characteristics. There are generally two types of ERPOs: an emergency *ex parte* version that is available without notice to the respondent and a “final” version that usually lasts up to a year and which the respondent has been allowed to challenge at a noticed hearing.<sup>60</sup> A person subject to the order is unable to purchase or possess guns during the pendency of the order.<sup>61</sup> States differ based on who can petition a court to issue an ERPO, but most allow family or household members or law enforcement to request one.<sup>62</sup> ERPOs also differ in the burden of proof that must be provided, with that burden generally being higher for final orders.<sup>63</sup>

Proponents praise ERPOs because they often allow those closest to the respondent (family members) to proactively take steps to prevent gun violence through individualized, targeted action, which is especially useful because studies suggest that there are “warning signs observable to others before most acts of violence.”<sup>64</sup> In practice, studies have also suggested that ERPOs can lower instances of suicide,<sup>65</sup> and can effectively disarm individuals who have made significant, credible violent threats to

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canhealth.jhu.edu/sites/default/files/inline-files/GENERAL\_StateLawTable\_v7.pdf.

<sup>59</sup> *Extreme Risk Laws*, EDUC. FUND TO STOP GUN VIOLENCE (July 2020) [hereinafter *Extreme Risk Laws*, EFSGV], <https://efsgv.org/learn/policies/extreme-risk-laws>.

<sup>60</sup> *Id.*

<sup>61</sup> *Extreme Risk Protection Order: A Tool to Save Lives*, BLOOMBERG AM. HEALTH INITIATIVE, JOHNS HOPKINS BLOOMBERG SCHOOL OF PUB. HEALTH, <https://americanhealth.jhu.edu/implementERPO> (last visited Feb. 16, 2022).

<sup>62</sup> *ERPOs: State Laws at a Glance*, *supra* note 58, at 2. Other states also allow prosecutors (Connecticut, New York, Vermont, Virginia), mental or general health professionals (D.C., Hawaii, Maryland), educators (Hawaii, New York), or work colleagues (Hawaii) to petition the court for ERPOs. *Id.*

<sup>63</sup> *ERPOs*, GIFFORDS, <https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders> (last visited Feb. 16, 2022).

<sup>64</sup> *Id.*

<sup>65</sup> See generally Jeffrey W. Swanson et al., *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does It Prevent Suicides?*, 80 LAW & CONTEMP. PROBS. 179 (2017).



others.<sup>66</sup> Opponents, however, including the National Rifle Association, criticize ERPOs on the basis that they allow petitions by “persons who have no specific expertise, and who may be mistaken.”<sup>67</sup> To date, no courts have invalidated ERPOs under the Second Amendment.<sup>68</sup>

## 2. DVROs

Domestic violence restraining orders are similar to ERPOs in terms of their targeted approach to gun removal and risk, but are focused specifically on giving domestic abuse survivors a way to defend themselves against abusers.<sup>69</sup> Depending on the state, DVROs can include different types of conditions that the respondent must adhere to, including orders for no contact, orders to move out of a shared home house, orders to attend counseling, and orders that restrict purchasing or possessing firearms.<sup>70</sup>

DVROs that specifically prohibit firearm possession and purchase serve an important role in the public health crisis of violence against intimate partners and family members.<sup>71</sup> As noted above, there is strong evidence that guns can exacerbate intimate partner violence.<sup>72</sup> Federal law prohibits those convicted

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<sup>66</sup> See Jesse Paul, *Colorado’s Red Flag Gun Law Was Used 73 Times in Its First 7 Months. Here’s How the Rollout Has Gone*, COLO. SUN (Aug. 21, 2020, 3:15AM), <https://coloradosun.com/2020/08/21/red-flag-law-colorado-usage>; Ovetta Wiggins, *Red-Flag Law in Maryland Led to Gun Seizures from 148 People in First Three Months*, WASH. POST (Jan. 15, 2019, 7:01 PM), [https://www.washingtonpost.com/local/md-politics/red-flag-law-in-maryland-led-to-148-gun-seizures-in-first-three-months/2019/01/15/cfb3676c-1904-11e9-9ebf-c5fed1b7a081\\_story.html](https://www.washingtonpost.com/local/md-politics/red-flag-law-in-maryland-led-to-148-gun-seizures-in-first-three-months/2019/01/15/cfb3676c-1904-11e9-9ebf-c5fed1b7a081_story.html).

<sup>67</sup> See, e.g., *Washington: VOTE NO ON 1491! Ballot Initiative Will Selectively Target Gun Owners*, NRA-ILA (Sept. 6, 2016), <https://www.nraila.org/articles/20160906/washington-vote-no-on-1491-ballot-initiative-will-selectively-target-gun-owners>.

<sup>68</sup> Blocher & Charles, *supra* note 18, at 1301 (noting that few Second Amendment challenges have been made to extreme risk laws but those have been unsuccessful); Hannah Eason, *Case Challenging Va.’s ‘Red Flag’ Law Dismissed*, NBC12 (Nov. 15, 2020, 3:02 PM), <https://www.nbc12.com/2020/11/15/case-challenging-va-red-flag-law-dismissed>; *ERPOs*, GIFFORDS, *supra* note 63.

<sup>69</sup> *ERPOs vs. DVROs*, EFSGV, *supra* note 54.

<sup>70</sup> *Id.*

<sup>71</sup> *Protective Orders + Firearm Prohibitions*, DISARM DOMESTIC VIOLENCE, <https://www.disarmdv.org> (last visited Feb. 16, 2022).

<sup>72</sup> See *supra* notes 46–50 and accompanying text.

of domestic violence crimes from purchasing or possessing firearms, and it also prohibits possession and purchase by domestic abusers subject to DVROs, if the order meets certain conditions.<sup>73</sup> For federal law to apply to DVROs, the order must have been issued after noticed hearing with opportunity for the respondent to participate, it must protect an “intimate partner,”<sup>74</sup> and there must either be a finding of credible threat to safety or the order’s terms must prohibit acts that cause a threat to safety.<sup>75</sup> Thus, the federal firearms ban does not reach many temporary DVROs.<sup>76</sup>

State-law domestic violence restraining orders are available in all fifty states.<sup>77</sup> The most robust laws prohibit anyone subject to the order from buying or possessing guns while the order is in effect and can require surrender of firearms.<sup>78</sup> Like ERPOs, temporary DVROs can be issued *ex parte* in emergencies, or for longer periods after notice and hearing.<sup>79</sup> About half of the states broaden the scope of who can request gun-restricting DVROs by also allowing former or current romantic partners, cohabitants, or other family members to submit the petitions.<sup>80</sup>

Some states give judges explicit discretionary authority to order firearms removed from the DVRO’s respondent, and some

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<sup>73</sup> *Disarming Domestic Abusers*, COALITION TO STOP GUN VIOLENCE, <https://www.csgv.org/issues/disarming-domestic-violence> (last visited Feb. 16, 2022).

<sup>74</sup> “Intimate partner” is narrowly defined as a current/former spouse, someone with whom the respondent shares a child, or a current/former cohabitant. 18 U.S.C. § 921(a)(32). This definition leaves a significant gap, commonly called the “boyfriend loophole” because it does not reach dating partners who have never lived together with no children in common. *What Is the “Boyfriend Loophole”?*, EVERYTOWN FOR GUN SAFETY (July 29, 2020), <https://everytown.org/what-is-the-boyfriend-loophole>.

<sup>75</sup> 18 U.S.C. § 922(g)(8) (2020).

<sup>76</sup> *Firearm Removal/Retrieval in Cases of Domestic Violence*, PROSECUTORS AGAINST GUN VIOLENCE & THE CONSORTIUM FOR RISK-BASED FIREARM POLICY 7 (Feb. 2016) [hereinafter *Firearm Removal/Retrieval in Cases of Domestic Violence*], <http://efsgv.org/wp-content/uploads/2016/02/Removal-Report-Updated-2-11-16.pdf>.

<sup>77</sup> Blocher & Charles, *supra* note 18, at 1294.

<sup>78</sup> *Domestic Violence & Firearms*, GIFFORDS L. CTR. [hereinafter *Domestic Violence*, GIFFORDS], <https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms> (last visited Feb. 16, 2022).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

states require judges to order firearms removed.<sup>81</sup> Other states give judges broad discretion to order whatever relief they feel is necessary to protect the domestic violence victim.<sup>82</sup> States also vary in the methods used to remove guns from DVRO respondents, though generally they employ methods of surrender, search and seizure of the respondent's home, or a hybrid of the two methods.<sup>83</sup>

### B. *Potential Liability for Prohibited Possessors Cohabiting with Legal Gun Owners*

Individuals subject to ERPOs and DVROs have challenged their orders' constitutionality, but courts have generally concluded that orders premised on a judicial finding of immediate risk satisfy the Second Amendment.<sup>84</sup> What about legal gun owners who cohabit with respondents? If a cohabiting spouse, relative, or friend legally possesses a gun in their shared home, it may fall within the constructive possession of the respondent and thereby cause them to violate the order.<sup>85</sup> In the domestic vio-

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<sup>81</sup> *Firearm Removal/Retrieval in Cases of Domestic Violence*, *supra* note 76, at 8 (citing CAL. FAM. CODE § 6389(c)(1) (2020) ("Upon issuance of a protective order, . . . the court shall order the respondent to relinquish any firearm or ammunition in the respondent's immediate possession or control or subject to the respondent's immediate possession or control.") and DEL. CODE ANN. tit. 10, § 1045(a)(8) (2020) ("After consideration of a petition for a protective order, the Court may . . . [o]rder the respondent to temporarily relinquish to a police officer or a federally-licensed firearms dealer located in Delaware the respondent's firearms and to refrain from purchasing or receiving additional firearms for the duration of the order. . . .")).

<sup>82</sup> *Id.* (citing VA. CODE ANN. § 16.1-253.1 (2020) ("A preliminary protective order may include any . . . other relief necessary for the protection of the petitioner and family or household members of the petitioner.")).

<sup>83</sup> *Id.* at 9. However, this process can be complicated because identifying respondents in possession of guns is not always easy since many states do not maintain comprehensive records of those with licensed firearms and many firearms remain legally or illegally unlicensed. Garen J. Wintemute et al., *Identifying Armed Respondents to Domestic Violence Restraining Orders and Recovering Their Firearms: Process Evaluation of an Initiative in California*, 104 AM. J. PUB. HEALTH e113, e113 (2014).

<sup>84</sup> Blocher & Charles, *supra* note 18, at 1301 (noting that few Second Amendment challenges have been made to extreme risk laws, but those have been unsuccessful).

<sup>85</sup> Nat'l Safe Deposit Co. v. Stead, 232 U.S. 58, 67 (1914); United States v. Perez, 661 F.3d 568, 576 (11th Cir. 2011); *Extreme Risk Protection Orders: New*

lence context, the respondent's cohabitating victim could own a gun, or if the respondent has to move in compliance with a DVRO, a cohabitant in their new living situation might legally possess a gun.<sup>86</sup> Cohabiting with a legal gun owner places the respondent at risk of violating the order (or, worse, misusing the gun in the manner the order was entered to prevent), and also raises the possibility of legal liability for the cohabitant.

More than a century ago, the Supreme Court said that the term *possession* "is interchangeably used to describe actual possession and constructive possession which often so shade into one another that it is difficult to say where one ends and the other begins."<sup>87</sup> Actual possession generally involves true, immediate physical possession.<sup>88</sup> But constructive possession is a legal fiction used "to find possession in situations where it does not in fact exist, but where they nevertheless want an individual to acquire the legal status of a possessor."<sup>89</sup> The doctrine expands the meaning of possession to reach situations where possession must be proven by circumstantial evidence.<sup>90</sup>

Generally, a person has constructive possession over an object when "though lacking such physical custody," that person "still has the power and intent to exercise control over the object."<sup>91</sup> Constructive possession thus generally requires two elements: (1) power to exercise control over the object and (2) intent to exercise that control.<sup>92</sup>

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*Policy Recommendations for Policy and Implementation*, CONSORTIUM FOR RISK-BASED FIREARM POLICY 9, 19 (Oct. 2020) [hereinafter *Policy Recommendations*, CONSORTIUM], <https://efsgv.org/wp-content/uploads/EFSGV-ConsortiumReport2020-ERPOs.pdf>.

<sup>86</sup> Darren Mitchell & Susan B. Carbon, *Firearms and Domestic Violence: A Primer for Judges*, CT. REV. 32, 39 (Summer 2002), <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?/>

&httpsredir=1&article=1148&context=ajacourtreview.

<sup>87</sup> *Nat'l Safe Deposit Co.*, 232 U.S. at 67.

<sup>88</sup> LAFAVE, CRIMINAL LAW, *supra* note 22, § 6.1(e).

<sup>89</sup> Charles H. Whitebread & Ronald Stevens, *Constructive Possession in Narcotics Cases: To Have and Have Not*, 58 VA. L. REV. 751, 761-62 (1972).

<sup>90</sup> LAFAVE, CRIMINAL LAW, *supra* note 22, § 5.1(e).

<sup>91</sup> *Henderson v. United States*, 135 S. Ct. 1780, 1784 (2015).

<sup>92</sup> JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW 133 (8th ed. 2017). Some courts consider "knowledge" an additional element of the analysis, but here we analyze knowledge as a component of both the power and intent elements. *See* Blocher, *The Right Not to Keep or Bear*

### 1. Power to Exercise Control Element

The power-to-exercise-control element of constructive possession necessarily requires knowledge that the object is relatively close and available for control, though circumstantial evidence alone can be used to demonstrate this knowledge.<sup>93</sup> The actual location of the object is influential, though not sufficient, in finding this first element.<sup>94</sup> Courts have said that, “mere proximity to the [object], or mere presence on the property where it is located or mere association with the person who does control the [object] or the property” is not enough to establish power to exercise control.<sup>95</sup> For example, one court found that a defendant was not necessarily in control of drugs that were discovered sandwiched between cushions on the couch where he was sitting at a friend’s house.<sup>96</sup>

Courts generally find that power to exercise control is present when the object is located in a person’s home, even if the house or room is shared with others.<sup>97</sup> The very fact that a respondent has “dominion over the premises where the item is located” can be enough circumstantial evidence for constructive possession.<sup>98</sup> As the D.C. Circuit has explained, “The natural in-

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*Arms, supra* note 12, at 33 (“In criminal law, constructive possession usually requires presence of an object, knowledge of that object, and ability and intent to exercise control over it.” (citing *Rivas v. United States*, 783 A.2d 125, 129 (D.C. 2001))).

Possession can also include joint control, where more than one person is in possession at a single time. JOHN M. BURKOFF, *ACING CRIMINAL LAW* 12 (4th ed. 2020). For example, in one such case the Eighth Circuit found that evidence was sufficient for joint possession of a firearm when a defendant and his girlfriend shared the bedroom where the firearm was discovered. *United States v. Williams*, 512 F.3d 1040, 1044 (8th Cir. 2008).

<sup>93</sup> *United States v. Nungaray*, 697 F.3d 1114, 1117 (9th Cir. 2012).

<sup>94</sup> KAPLAN, WEISBERG & BINDER, *supra* note 92, at 135.

<sup>95</sup> *United States v. Jenkins*, 90 F.3d 814, 818 (3d Cir. 1996).

<sup>96</sup> *Id.*

<sup>97</sup> *United States v. Zavala Maldonado*, 23 F.3d 4, 7 (1st Cir. 1994).

<sup>98</sup> *United States v. Hill*, 79 F.3d 1477, 1485 (6th Cir. 1996); *see also* *United States v. Middleton*, 628 Fed. Appx. 433, 434 (6th Cir. 2016) (affirming a defendant’s firearm sentencing enhancement because the defendant “had dominion over the premises where the gun was found, and so he cannot hang possession of the guns on his roommate alone” (internal quotation omitted)); *United States v. Wheaton*, 517 F.3d 350, 367 (6th Cir. 2008) (affirming a defendant’s sentencing enhancement for constructive possession of a gun concealed in a

ference is that those who live in a house know what is going on inside, particularly in the common areas.”<sup>99</sup> Other courts have emphasized the difference between contraband hidden and in plain view in a common area.<sup>100</sup> Additional factors to support the finding of power to exercise control have included exclusive ownership or access to the object, sole occupancy of the place where the object was found, and incriminating statements or flight.<sup>101</sup>

## 2. *Intent to Exercise Control Element*

The second element of constructive possession, intent to exercise control, can involve a more difficult analysis.<sup>102</sup> Knowledge of the firearm’s presence is again necessary, but intent to control usually requires more than “mere awareness of the firearm.”<sup>103</sup> As with the power-to-control element, courts may infer intent solely from the location of the object itself in the circumstances.<sup>104</sup> But generally there has to be some type of corroborating evidence—a nexus between the person and the object, beyond just proximity.<sup>105</sup> For example, in *State v. Bailey*,<sup>106</sup> the North Carolina Court of Appeals held that the state had failed to produce circumstantial evidence that the defendant, a convicted

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couch because the defendant lived at the house where the gun was found); *Zavala Maldonado*, 23 F.3d at 7.

<sup>99</sup> *Jenkins*, 928 F.2d at 1179.

<sup>100</sup> *United States v. Dorman*, 860 F.3d 675, 681 (D.C. Cir. 2017) (upholding the defendant’s conviction for felon-in-possession for a gun found in the bedroom only he lived in, though his mother stored some of her belongings in the room).

<sup>101</sup> *Id.*

<sup>102</sup> *Zavala Maldonado*, 23 F.3d at 8. Some states may de-emphasize the intent element altogether. See Chad Flanders, “Actual” and “Constructive” Possession in Alaska: Clarifying the Doctrine, 36 ALASKA L. REV. 1, 1 (2019) (expressing a concern that “Alaska’s definition of ‘constructive possession’ invites juries to find possession where the defendant is only near an object and has knowledge of its presence”).

<sup>103</sup> *United States v. James*, 631 Fed. Appx. 803, 805–06 (11th Cir. 2015).

<sup>104</sup> *Zavala Maldonado*, 23 F.3d at 8. *Cf.* *United States v. Bailey*, 553 F.3d 940, 946 (6th Cir. 2009) (holding that the government presented no evidence of the defendant’s constructive possession of a gun that was found underneath the seat of the stolen car he was driving).

<sup>105</sup> See, e.g., *State v. Bailey*, 757 S.E.2d 491, 491 (N.C. Ct. App. 2014); *United States v. Griffin*, 684 F.3d 691, 695 (7th Cir. 2012).

<sup>106</sup> *Bailey*, 757 S.E.2d 491.

felon prohibited from possessing a firearm, constructively possessed an AK-47 registered to his girlfriend that was discovered in the backseat of his own car.<sup>107</sup> The defendant was in the passenger seat while his girlfriend was driving, but the court said that even if the defendant admitted that he knew the firearm was in the car, it would not be enough to establish that the defendant constructively possessed the weapon.<sup>108</sup> He had not formed the required intent to exercise control over the gun.<sup>109</sup>

### 3. Constructive Possession, Cohabitants, and Restrictive Orders

Some states specifically address the issue of legal firearm ownership by cohabitants of prohibited persons.<sup>110</sup> Colorado's ERPO statute explicitly requires that a respondent surrender all of their firearms.<sup>111</sup> Then, if a person other than the respondent is actually the firearm's lawful owner, the firearm will be returned as long as "[t]he firearm is removed from the respondent's custody, control, or possession, and the lawful owner agrees to store the firearm so that the respondent does not have access to or control of the firearm."<sup>112</sup> Other states plainly prohibit the respondent from transferring their seized weapons to cohabitants.<sup>113</sup>

Additionally, some states' DVRO firearm statutes specifically address cohabitants or the victims of domestic violence. Ar-

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<sup>107</sup> *Id.* at 491.

<sup>108</sup> *Id.* at 494.

<sup>109</sup> *Id.*

<sup>110</sup> *See also infra* Part II.D. (discussing three state laws that impose safe-storage requirements on cohabitants of prohibited possessors).

<sup>111</sup> COLO. REV. STAT. § 13-14.5-108 (2020).

<sup>112</sup> *Id.* § 13-14.5-108(5)(a). The District of Columbia's ERPO statute uses almost identical language. D.C. CODE § 7-2510.07(d) (2020) (providing that a seized gun will be returned to the lawful owner "provided, that the firearm or ammunition is removed from the respondent's possession or control, and the lawful owner agrees to store the firearm or ammunition in a manner such that the respondent does not have possession or control of the firearm or ammunition").

<sup>113</sup> *See, e.g.,* MD. CODE ANN., PUB. SAFETY § 5-608(c)(1) (2020) ("A respondent . . . may: sell or transfer title to the firearm or ammunition to: . . . another person who is not prohibited from possessing the firearm or ammunition under State or federal law and who does not live in the same residence as the respondent . . .").

izona's DVRO law expressly disallows seizure of a domestic violence victim's firearm, unless there is probable cause that both parties involved independently committed acts of domestic violence.<sup>114</sup> Minnesota also explicitly forbids a respondent from transferring their firearms to a cohabitant to comply with a DVRO.<sup>115</sup>

However, most states are silent on the issue of cohabitants and how they relate to these restrictive orders. But because respondents have the requisite legal intent to possess a firearm, their constructive possession of a cohabitant's firearms would be incredibly easy to find unless their power to exercise control over the weapon was cut off, for example through secure, locked storage of the weapon.

### *C. Potential Liability for Legal Gun Owners Cohabiting with Prohibited Possessors*

While respondents would be found guilty of violating the order against them if they came into legal possession of their cohabitant's firearms, what legal consequences might cohabitants themselves face if a respondent came into constructive possession of their weapons? Two types of criminal liability are immediately apparent: accomplice liability or reckless endangerment.

#### *1. Accomplice Liability*

A cohabitant might become an "accomplice" of the respondent if the respondent constructively possesses the cohabitant's legally owned firearm.<sup>116</sup> Though the issuance of an ERPO/DVRO is a civil proceeding, violating an ERPO/DVRO is usually a misdemeanor or felony, depending on the state statute.<sup>117</sup> A cohabitant who allows a respondent to constructively possess the

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<sup>114</sup> ARIZ. REV. STAT. ANN. § 13-3601 (2020).

<sup>115</sup> MINN. STAT. § 518B.01(6)(g) (2020).

<sup>116</sup> See C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 734 (2009) (stating that the banning felons-in-possession "goes beyond even stripping the convict of the entire core of the right, by pressuring those who share his household to disarm themselves as well, to avoid the risk of the convict's being prosecuted for unlawful possession based on theories of joint or constructive possession").

<sup>117</sup> See, e.g., 430 ILL. COMP. STAT. § 65/9.5(d) (2020) (stating that an ERPO firearms violation is a misdemeanor); CAL. PENAL CODE § 18205 (2020) (stating that an ERPO firearms violation is a misdemeanor); CONN. GEN. STAT.



cohabitant's firearm could be found to have aided and abetted this crime.<sup>118</sup> Many states' ERPO/DVRO laws include language that deals with individuals who actively furnish firearms to prohibited possessors,<sup>119</sup> but in the constructive possession context, the analysis is more nuanced because the respondent's possession may result from passivity or an omission by the accomplice/cohabitant rather than an affirmative act.<sup>120</sup>

The modern view of "aiding and abetting" is that it is a particular manner of committing a crime, rather than a distinct crime in of itself.<sup>121</sup> Individual state statutes stipulate the requisite mens rea and necessary act or omission of an accomplice in their aid of the main actor (the principal),<sup>122</sup> so the following observations are necessarily general.

Accomplice liability requires the appropriate mens rea and actus reus.<sup>123</sup> There is a split of authority on the appropriate mens rea for accomplice liability: whether actual intent to aid the crime is required, or whether a lesser mental state is enough, such as simple knowledge that the accomplice is aiding the principal or knowledge that "one is aiding reckless or negligent conduct which may produce a criminal result."<sup>124</sup> Most commonly,

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§ 53a-217(b) (2020) (stating that an ERPO firearms violation is a class D felony).

<sup>118</sup> There are many examples of defendants charged with aiding and abetting a felon-in-possession when they assist in the convicted felon's possession. *See, e.g.*, *United States v. Ford*, 821 F.3d 63, 76 (1st Cir. 2016); *United States v. Huet*, 665 F.3d 588, 602 (3d Cir. 2012); *United States v. Samuels*, 521 F.3d 804, 812 (7th Cir. 2008); *United States v. Diaz*, No. 4:17-CR-0038, 2018 WL 6617648, at \*1 (N.D. Ga. Dec. 18, 2018).

<sup>119</sup> *See, e.g.*, CONN. GEN. STAT. § 29-37j (2020) (stating that purchasing a firearm to transfer to a person that the transferor "knows or has reason to believe" is a prohibited possessor is a class C felony).

<sup>120</sup> There could, however, be an issue when the victim of the DVRO is the cohabitating legal gun owner. Generally, the victim of a crime cannot be charged with aiding and abetting that crime. WAYNE R. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* § 13.3(e) (3d ed. 2020) [hereinafter LAFAYE, *SUBSTANTIVE CRIMINAL LAW*].

<sup>121</sup> Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 224 (2000).

<sup>122</sup> LAFAYE, *CRIMINAL LAW*, *supra* note 22, § 12.2(b).

<sup>123</sup> *Id.* § 12.2.

<sup>124</sup> *Id.*; *see also* Weisberg, *supra* note 121, at 232 ("[O]ne finds it very difficult even to sort out and enumerate, much less evaluate, the various notions of the mens rea of complicity.").

the act is that the accomplice's giving "assistance or encouragement or fail[ing] to perform a legal duty to prevent" the crime.<sup>125</sup> Further, participation in aiding and abetting "may be established by circumstantial evidence, and the evidence may be of relatively slight moment."<sup>126</sup>

Accomplice liability in the case of allowing a respondent to constructively possess a firearm would likely at least require the level of mens rea that the cohabitant knew or had reason to know that the respondent was subject to an ERPO/DVRO.<sup>127</sup> The accomplice must have made the "moral" choice to aid a prohibited possessor or omit their duty to act, because otherwise the accomplice would not have any kind of knowledge that their behavior was not innocent.<sup>128</sup> However, courts have held that accomplice liability attaches in felon-in-possession cases when the accomplice knew that the prohibited possessor was a felon, not only when they knew that felons were prohibited from possessing firearms; ignorance of the law is generally not an excuse.<sup>129</sup>

It seems likely that the mental state of actual knowledge of the order will be satisfied in most cases of cohabitants. After all, household members themselves are typically allowed to petition the court for the order, and might well be the impetus for the

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<sup>125</sup> LAFAYE, *CRIMINAL LAW*, *supra* note 22, § 12.2.

<sup>126</sup> *United States v. Samuels*, 521 F.3d 804, 811 (2008) (quoting *United States v. Folks*, 236 F.3d 384, 389 (7th Cir. 2001)).

<sup>127</sup> *See, e.g., id.* at 812 ("[T]o aid and abet a felon in possession of a firearm, the defendant must know or have reason to know that the individual is a felon at the time of the aiding and abetting . . ."); *United States v. Ford*, 821 F.3d 63 (1st Cir. 2016). *Cf.* *United States v. Canon*, 993 F.2d 1439, 1442 (9th Cir. 1993) ("[The defendant] also contends the court should have instructed the jury that he had to know [the principal] was a felon before [the defendant] could aid [the principal's] possession of a firearm. We disagree with these contentions.").

<sup>128</sup> *Rosemond v. United States*, 572 U.S. 65, 78 (2014); *see also Ford*, 821 F.3d at 69 ("This choice [to participate in an illegal scheme] . . . can hardly be presented as such if one does not know the very facts that distinguish the behavior in question from that which is perfectly innocent.").

<sup>129</sup> For example, in *Ford*, 821 F.3d 63, the defendant was convicted of aiding and abetting a felon in possession after she allowed her husband, a convicted felon, to use her semi-automatic rifle for target practice. *Id.* at 65. The First Circuit overturned her conviction on that charge because the trial court had instructed the jury to find her guilty if she "knew or had reason to know" her husband was a felon. *Id.* Instead, the First Circuit said she could only be convicted on actual knowledge of her husband's felony conviction, though she did not have to know that it was illegal for felons to possess firearms. *Id.*

order's entry.<sup>130</sup> Some states allow or require law enforcement to search the residence of the respondent to the order to ensure there are no firearms subject to their possession, making the fact of the order difficult to hide from cohabitants.<sup>131</sup>

The strictest version of mens rea would require the cohabitant to have the actual intent of aiding the respondent in possessing a firearm.<sup>132</sup> In the context of constructive possession by a prohibited possessor, this would mean that the cohabitant/accomplice must intend to empower the respondent to exercise control over the firearm. For example, in *United States v. Huet*<sup>133</sup> when a cohabitant was charged with knowingly aiding and abetting her convicted-felon partner's possession of a firearm, she was alleged to have intentionally aided him in the underlying crime.<sup>134</sup> Generally, this level of mens rea means the cohabitant would have to intentionally allow the respondent to gain constructive possession of the firearm, or the cohabitant would have to intentionally omit precautions necessary to prevent the respondent's constructive possession.

In terms of the required actus reus for accomplice liability, any amount of aid is usually sufficient,<sup>135</sup> and an accomplice does not have to aid in every element of the crime.<sup>136</sup> Specifically, there are generally three types of acts that an accomplice can commit: (1) physical assistance, such as actively furnishing an instrumentality of the offense; (2) psychological assistance, such as encouraging the principal to commit the crime; or (3) assistance by omission if the accomplice has a duty to act, such as a prop-

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<sup>130</sup> *Domestic Violence*, GIFFORDS, *supra* note 78; *ERPOs*, GIFFORDS, *supra* note 63.

<sup>131</sup> *Domestic Violence*, GIFFORDS, *supra* note 78; *ERPOs*, GIFFORDS, *supra* note 63.

<sup>132</sup> LAFAVE, *CRIMINAL LAW*, *supra* note 22, § 12.2(b).

<sup>133</sup> *United States v. Huet*, 665 F.3d 588 (3d Cir. 2012).

<sup>134</sup> *Id.* at 602.

<sup>135</sup> JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 30.04(B)(1) (7th ed. 2015) ("Any aid, *no matter how trivial*, suffices."); *see also* *Commonwealth v. Murphy*, 844 A.2d 1228, 1234 (Pa. 2004) ("With regard to the amount of aid, it need not be substantial . . .").

<sup>136</sup> *Rosemond v. United States*, 572 U.S. 65, 72 (2014).

erty owner having a duty to intervene in a crime on their property.<sup>137</sup>

For physical assistance, it could be enough that the cohabitant was “willing to give the felon access to [the firearm] or to accede to the felon’s instructions about the[ ] future use [of the firearm].”<sup>138</sup> In the ERPO/DVRO context, with the requisite mens rea, physical assistance could take the form of simply leaving a gun-safe or room unlocked. Some ERPO/DVRO statutes even provide their own penalties for a person who actively physically aids a prohibited possessor in actual possession of a firearm.<sup>139</sup>

Psychological assistance can include encouraging the crime or communicating an “assurance of passivity” that the accomplice will not act to stop a respondent’s constructive possession of a firearm.<sup>140</sup> Any act of encouragement or revealing where the firearm is located would easily meet the minimum requirements, should the cohabitant also have the requisite mens rea.

Accomplice liability generally does not stem from a failure to intervene, unless there is an affirmative duty to act to prevent a crime.<sup>141</sup> Specifically, in some cases a property owner may have an affirmative legal duty to prevent a crime that occurs on their own property.<sup>142</sup> Some courts also ascribe a legal duty to cohabitants to aid the other when they become vulnerable to harm, instructive when the respondent is a serious danger to themselves

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<sup>137</sup> DRESSLER, *supra* note 135, § 30.04(A)(1); *see also* MODEL PENAL CODE § 2.06(3)(a).

<sup>138</sup> *Henderson*, 135 S. Ct. at 1784.

<sup>139</sup> *See, e.g.*, CONN. GEN. STAT. § 29-37j (2020) (stating that purchasing a firearm to transfer to a person that the transferor “knows or has reason to believe” is a prohibited possessor is a class C felony).

<sup>140</sup> LAFAVE, CRIMINAL LAW, *supra* note 22, § 12.2(a).

<sup>141</sup> *Id.* § 12.2(a). Arguably, constructive possession itself does not require any affirmative act itself. Corey Rayburn Yung, *The Incredible Ordinarity of Federal Penalties for Inactivity*, 2012 WIS. L. REV. 841, 851 (“For a [constructive possession] conviction, the government must show neither any affirmative act by the defendant acquiring the cocaine nor the defendant exercising actual possession. The criminal act, as defined by statute and the courts, is one with no affirmative conduct at all.”).

<sup>142</sup> DRESSLER, *supra* note 135, § 30.04(A)(4).

or others.<sup>143</sup> An ERPO/DVRO rests on a determination that the respondent presents just such a danger,<sup>144</sup> which in turn might impose on the cohabitant a duty to prevent the respondent's constructive possession of their firearm during the period of the order.

## 2. *Reckless Endangerment or Criminal Negligence*

Cohabitants who allow respondents to constructively possess their legally owned firearm could also be subject to charges for criminal negligence or reckless endangerment. The two charges have similar concepts, and are often used interchangeably for the same idea in criminal statutes.<sup>145</sup> Criminal negligence is a gross deviation from the reasonable standard of care, where the person “takes a substantial and unjustifiable risk of causing the social harm that constitutes the offense charged,”<sup>146</sup> that a reasonable person would be aware of.<sup>147</sup> Doctrinally, recklessness takes this a step further and requires the actor to disregard a “substantial and unjustifiable risk” that she was subjectively aware of.<sup>148</sup> Thus, a charge of criminal negligence/reckless endangerment requires (1) great and unjustifiable risk and (2) subjective or objective knowledge of the risk, regardless of any actual harm that results.

A cohabitant who allows a respondent to constructively possess a firearm is almost certainly taking a great and unjustifiable risk. The very existence of the ERPO or DVRO reflects a judicial

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<sup>143</sup> LAFAYE, *SUBSTANTIVE CRIMINAL LAW*, *supra* note 120, § 6.2(a)(1) (“So also if two people, though not closely related, live together under one roof, one may have a duty to act to aid the other who becomes helpless.”).

<sup>144</sup> Blocher & Charles, *supra* note 18, at 1289.

<sup>145</sup> LAFAYE, *CRIMINAL LAW*, *supra* note 22, § 4.4(b); Micah Schwartzbach, *What Is Criminal Negligence?*, NOLO, <https://www.nolo.com/legal-encyclopedia/what-criminal-negligence.html> (last visited Feb. 17, 2022).

<sup>146</sup> DRESSLER, *supra* note 135, § 10.04(D)(2)(b).

<sup>147</sup> LAFAYE, *CRIMINAL LAW*, *supra* note 22, § 4.4(b); *see also* MODEL PENAL CODE § 2.02(2)(d).

<sup>148</sup> DRESSLER, *supra* note 135, § 10.04(D)(3); *see also* MODEL PENAL CODE § 2.02(2)(c).

For an example of a state statute of reckless endangerment, see WIS. STAT. § 941.30(2) (2020) (“Whoever recklessly endangers another’s safety is guilty of a Class G felony.”) and TENN. CODE ANN. § 39-13-103(a) (2020) (“A person commits an offense who recklessly engages in conduct that places or may place another person in imminent danger of death or serious bodily injury.”).

determination of the respondent's temporary individualized extreme dangerousness around firearms.<sup>149</sup> Constructive possession by respondent is thus, *prima facie*, a great risk.<sup>150</sup>

Of course, as discussed in Part. III.A, the cohabitant would necessarily have to know of the respondent's status as a prohibited possessor to meet the proper mens rea of the crime. Otherwise, there would be no way for the cohabitant to know, either objectively or subjectively, of the risk involved in the respondent's constructive possession. But should the cohabitant know of the respondent's status, the cohabitant is objectively and subjectively knowledgeable of the risk. That leaves the question of whether possession is *justifiable*—and thus what steps the cohabitant might take to cut off the respondent's power to exercise control.<sup>151</sup>

#### D. *Avoiding Liability Through Safe Storage*

To avoid the possibility of criminal liability, a cohabitant must prevent the respondent from constructively possessing the firearms in their shared home. The easiest and most obvious way to do this would be to end cohabitation. But moving out is a drastic solution, and there are potentially major costs to such a step—including undermining the goals of the order itself. A person subject to an or ERPO or DVRO is definitionally in an extreme risk state,<sup>152</sup> and disrupting his or her living situation may exacerbate the risk. For ERPO respondents in particular, the risk may be

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<sup>149</sup> See, e.g., Blocher & Charles, *supra* note 55, at 1289 (calling ERPOs “tailored, individualized risk assessments”).

<sup>150</sup> Though a charge for reckless endangerment/criminal negligence would turn on the exact state statute, some states even have specific heightened penalties for reckless endangerment when a firearm is involved. For example, a Virginia statute states that “[i]t shall be unlawful for any person to handle recklessly any firearm so as to endanger the life, limb or property of any person.” VA. CODE ANN. § 18.2-56.1 (2020).

<sup>151</sup> Although our focus here is on criminal liability, it is possible that a cohabitant could also be liable for civil negligence if the cohabitant negligently stored their firearm. However, one scholar argues that “[c]ourts have generally refused to hold gun owners liable for harm [in tort] . . . caused by a third-party actor using a stolen gun.” Andrew Jay McClurg, *The Second Amendment Right To Be Negligent*, 68 FLA. L. REV. 1, 23 (2016).

<sup>152</sup> *Domestic Violence*, GIFFORDS, *supra* note 78; *ERPOs*, GIFFORDS, *supra* note 63.

one of self-harm; preventing deaths by suicide is a key goal of ERPO statutes. In such cases, the value of a stable living situation with relatives or friends—even those who own guns—might outweigh the cost of possible access to a cohabitant’s guns.

Other practical considerations caution against preventing cohabitants from possessing their own guns in their home. Realistically and by design in some statutes, often a cohabitant will be the person who requests the ERPO/DVRO.<sup>153</sup> If cohabitants have reason to fear that their own guns may be taken away, they might be less likely to report the danger that the respondent poses. These concerns are especially heightened where cohabitants themselves are potentially in danger and want to keep weapons for self-defense.

Short of ending co-habitation, the most straightforward way to prevent constructive possession is to store the guns in a way that denies access to the respondent.<sup>154</sup> Some states already have storage requirements as a matter of law. Specifically, California, Connecticut, and New York all require cohabitants of prohibited possessors to keep their firearms locked when stored at home.<sup>155</sup> California law provides that a firearm-owning cohabitant “who knows or has reason to know” that they are living with a person prohibited by state or federal law from possessing a gun must lock or otherwise disable the firearm when they are not carrying it themselves.<sup>156</sup> Violation of California’s law is a misdemeanor.<sup>157</sup> A similar law in New York only applies to prohibited possessors whom the cohabitant “knows or has reason to know” are forbidden from firearm possession under certain federal laws,<sup>158</sup> and requires that the cohabitant store any gun outside of their immediate possession locked or disabled.<sup>159</sup> Connecticut’s

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<sup>153</sup> *Domestic Violence*, GIFFORDS, *supra* note 78; *ERPOs*, GIFFORDS, *supra* note 63.

<sup>154</sup> See Patrick D. Murphree, Comment, “Beat Your Wife, and Lose Your Gun”: *Defending Louisiana’s Attempts To Disarm Domestic Abusers*, 61 *LOY. L. REV.* 753, 785–86 (2015) (arguing briefly that there is no constructive possession if a gun was stored in a way that a domestic abuser could not access).

<sup>155</sup> *Safe Storage*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/child-consumer-safety/safe-storage> (last visited Feb. 17, 2022).

<sup>156</sup> CAL. PENAL CODE § 25135 (2020).

<sup>157</sup> *Id.* § 25135(b).

<sup>158</sup> 18 U.S.C. § 922(g)(1), (4), (8) or (9).

<sup>159</sup> N.Y. PENAL LAW § 265.45 (2020).

law only applies to loaded firearms, but also requires securing the firearm in a locked box when the individual knows or reasonably should know that they are cohabitating with a prohibited person or with a person who poses a “risk of imminent personal injury” to themselves or others.<sup>160</sup>

In its October 2020 policy recommendations, the Consortium for Risk-Based Firearm Policy, the group largely responsible for the development of ERPOs,<sup>161</sup> specifically addressed the question of cohabitants’ rights and duties under ERPO laws.<sup>162</sup> The Consortium recommended that it should be unlawful for “any legal firearms owner to knowingly, recklessly, or negligently allow an individual they know is the respondent to an ERPO to access their firearms.”<sup>163</sup> The Consortium further recommended that cohabitants who have their firearms seized pursuant to an ERPO be able to petition for return of their seized firearms, but that they should make a plan indicating “how the legal owner intends to prevent access by the respondent” with clearly defined civil penalties for failure to follow the plan.<sup>164</sup>

A safe storage requirement or temporary transfer requirement would also be in accordance with *Henderson v. United States*,<sup>165</sup> where the Supreme Court in 2015 held that a felon-in-possession could be allowed to transfer their guns to a third party of their choice, but “only if, that disposition prevents the felon from later exercising control over those weapons.”<sup>166</sup> Importantly, the Supreme Court itself recognized the importance of cutting off a prohibited possessor’s control over the firearms by mandating that the third party would “not allow the felon to exert *any* influence over their use.”<sup>167</sup>

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<sup>160</sup> CONN. GEN. STAT. § 29-37i(2)–(3) (2020).

<sup>161</sup> THE EDUCATION FUND TO STOP GUN VIOLENCE, ABOUT THE CONSORTIUM FOR RISK-BASED FIREARM POLICY, <https://efsgv.org/consortium-risk-based-firearm-policy/about> (last visited Feb. 17, 2022).

<sup>162</sup> *Policy Recommendations*, CONSORTIUM, *supra* note 85, at 19.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 19.

<sup>165</sup> *Henderson*, 135 S.Ct. 1780.

<sup>166</sup> *Id.* at 1786.

<sup>167</sup> *Id.* at 1787 (emphasis added).



### III. Constitutional Considerations

In sum, cohabitants of temporarily prohibited possessors—those subject to an ERPO or DVRO—can potentially face legal liability unless they safely store their weapons. This creates, in essence, a roundabout safe storage requirement, based on the *respondent's* risk profile. Would cohabitants facing criminal liability have a similar argument against the implied safe storage requirement laid out above?

*Heller* invalidated a District requirement that a lawful firearm in the home be rendered “inoperable” by disassembling the firearm or binding it by a trigger lock because, the Court held, doing so it made it “impossible for citizens to use them for the core lawful purpose of self-defense.”<sup>168</sup> The District affirmatively argued that its safe storage law—which had never been enforced against a person using a gun in self-defense—had a self-defense exception, and thus that guns could be unlocked in an appropriate situation of need.<sup>169</sup> These kinds of exceptions are presumed to exist for any law, from speed limits to trespass. The dissenters agreed, emphasizing the majority’s own assumption that a self-defense exception would have applied to colonial-era gun laws.<sup>170</sup> Indeed, *Heller*’s own lawyer said at oral argument that so long as there was a self-defense exception, the District could “require safe storage” of guns, “for example, in a safe.”<sup>171</sup> The majority, however, concluded that D.C.’s particular law did *not* have such an exception,<sup>172</sup> and struck it down for that reason.

By casting D.C.’s safe storage law as prohibiting even the use of weapons in self-defense, *Heller* made the law into an unconstitutional outlier. In the vast majority of cases, self-defense is an implied—and sometimes explicit—exception for otherwise applicable legal prohibitions,<sup>173</sup> meaning that safe storage re-

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<sup>168</sup> *Heller*, 554 U.S. at 628, 630.

<sup>169</sup> See Brief for Petitioners at 56, *Heller*, 554 U.S. 570 (No. 07-290) (arguing that a self-defense exception is fairly implied in the trigger lock requirement); Brief for the United States as Amicus Curiae at 30–31, *Heller*, 554 U.S. 570 (No. 07-290) (same).

<sup>170</sup> *Heller*, 554 U.S. at 686–87, 692–93 (Breyer, J., dissenting).

<sup>171</sup> Transcript of Oral Argument at 72, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

<sup>172</sup> *Heller*, 554 U.S. at 630.

<sup>173</sup> DRESSLER, *supra* note 135, at 152.

quirements should rarely run into the specific problem that D.C. confronted. And yet safe storage requirements do *burden*, if not forbid, the exercise of armed self-defense. That burden—the delay in unlocking a gun or gun safe, for example—can trigger constitutional scrutiny, rather than *Heller*'s apparent finding of *per se* invalidity.<sup>174</sup>

All lower federal courts that have addressed the question have adopted a two-step framework to review Second Amendment challenges.<sup>175</sup> Under that framework, courts first decide whether the regulation touches people, places, or firearms that fall under the scope of the Second Amendment.<sup>176</sup> If not, the Second Amendment is not implicated and the regulation passes review.<sup>177</sup> In making this determination, the courts typically look at the text and history of the original meaning of the Second Amendment right.<sup>178</sup>

For a regulation that does implicate the Second Amendment, courts apply the appropriate level of scrutiny: rational basis review, intermediate scrutiny, or strict scrutiny.<sup>179</sup> If the challenged regulation burdens the “core” of the Second Amend-

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<sup>174</sup> Some courts have upheld such a burden. For example, see *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014), discussed *infra* notes 209-211.

<sup>175</sup> See, e.g., *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *Ezell*, 651 F.3d at 703-04; *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

<sup>176</sup> *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (“Under the first prong, the court asks whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood.”).

<sup>177</sup> SARAH PECK, CONG. RSCH. SERV., *POST-Heller* Second Amendment Jurisprudence 12 (Mar. 25, 2019), <https://sgp.fas.org/crs/misc/R44618.pdf>.

<sup>178</sup> See *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) (“To determine whether a law impinges on the Second Amendment right, we look to whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee.”).

<sup>179</sup> PECK, *supra* note 177, at 15.

ment right, such as self-defense in the home, courts may be especially inclined to apply strict scrutiny.<sup>180</sup>

#### A. *Scope of Cohabitants' Second Amendment Rights*

First, the “coverage” question: does the scope of the Second Amendment reach criminal liability or safe-storage requirements for cohabitants of ERPO/DVRO respondents?<sup>181</sup> And if so, does it burden the “core” of the Second Amendment right substantially?<sup>182</sup>

*Heller* specifically approved as “presumptively lawful” certain “longstanding prohibitions” such as those regarding possession by “felons and the mentally ill.”<sup>183</sup> Some courts have found that ERPOs and DVROs fall within these carveouts,<sup>184</sup> and others have used similar reasoning to uphold regulations burdening cohabitants of people who are subject to “presumptively lawful” regulation.<sup>185</sup>

In *United States v. Huet*,<sup>186</sup> the Third Circuit denied a woman’s Second Amendment defense against grand jury indictment for aiding and abetting a felon in possession of a firearm.<sup>187</sup> The FBI had seized a semi-automatic rifle from the bedroom of Melissa Huet and her live-in boyfriend who was a convicted felon.<sup>188</sup> Though Huet claimed she owned the weapon legally, a grand jury indicted her for aiding and abetting her partner’s prohibited

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<sup>180</sup> See *United States v. Masciandaro*, 638 F.3d 458, 470–71 (4th Cir. 2011) (“[W]e assume that any law that would burden the ‘fundamental,’ core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny.”).

<sup>181</sup> See Jacob D. Charles, *Defeasible Second Amendment Rights: Conceptualizing Gun Laws That Dispossesses Prohibited Persons*, 83 LAW & CONTEMP. PROBS. 53, 54 (2020) (“The question of coverage asks whether the conduct or activity falls within the scope of the particular constitutional guarantee.”).

<sup>182</sup> See *id.* at 57.

<sup>183</sup> *Heller*, 55 U.S. at 626–27 & n.26.

<sup>184</sup> *Hope v. State*, 133 A.3d 519, 525 (Conn. App. Ct. 2016) (“The [Connecticut ERPO] statute is an example of the longstanding ‘presumptively lawful regulatory measures’ articulated in *District of Columbia v. Heller*.”).

<sup>185</sup> See, e.g., *Jackson*, 746 F.3d 953 at 958; *United States v. Huet*, 665 F.3d 588, 601 (3d Cir. 2012); *City of San Jose v. Rodriguez*, No. H040317, 2015 WL 1541988, at \*6 (Cal. Ct. App. Apr. 2, 2015).

<sup>186</sup> *Huet*, 665 F.3d 588.

<sup>187</sup> *Id.* at 603.

<sup>188</sup> *Id.* at 592.

possession.<sup>189</sup> When Huet challenged the indictment under the Second Amendment, the Third Circuit denied her motion to dismiss.<sup>190</sup> Instead, the court held that the indictment did not otherwise bar Huet from owning a legal firearm and her right to possess a gun was not implicated.<sup>191</sup> Instead, the Second Amendment did not protect carrying arms for “any purpose” and Huet’s right to possess a gun did not “give her the right to facilitate Hall’s possession of the weapon.”<sup>192</sup> The court said that *Heller*’s “longstanding prohibitions” like the prohibition allowing Huet’s indictment were “exceptions to the right to bear arms.”<sup>193</sup>

Huet’s difficulty in legally possessing a gun in the home she shared with a prohibited possessor could be considered an imposition on her right.<sup>194</sup> But the court concluded that her right to *own* a firearm was unaffected; the regulation simply restricted the *manner* in which she could do so.<sup>195</sup> The court noted that the indictment raised a “risk” that a cohabitant of a prohibited possessor might be subject “to liability simply for possessing a weapon in the home,” but that this particular case did not go that far.<sup>196</sup>

If a safe-storage requirement or cohabitant criminal liability does not fall under the umbrella of a presumptively lawful regulation, some level of scrutiny would be necessary if the court decided that the conduct falls under the scope of the Second Amendment.<sup>197</sup>

In the ERPO/DVRO context, self-defense could be especially important because cohabitants may need to defend themselves against the person subject to the order. The reasoning behind an ERPO/DVRO, after all, is typically that the respon-

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<sup>189</sup> *Id.* at 593.

<sup>190</sup> *Id.* at 601.

<sup>191</sup> *Id.* at 601–02.

<sup>192</sup> *Id.* at 602.

<sup>193</sup> *Id.* at 600.

<sup>194</sup> *Id.* at 602.

<sup>195</sup> *Id.* For an analysis of how courts apply the First Amendment doctrine of “time, place, and manner” restrictions to Second Amendment challenges to gun laws, see Jacob D. Charles, *Constructing a Constitutional Right: Borrowing and Second Amendment Design Choices*, 99 N.C. L. REV. 333, 351–52 (2021).

<sup>196</sup> *Huet*, 665 F.3d at 601.

<sup>197</sup> PECK, *supra* note 177, at i.

dent is “adjudged to pose a particular risk” of violence.<sup>198</sup> Any cohabitant could therefore plausibly assert a heightened need for armed self-defense.<sup>199</sup> *Heller* further identified the “law-abiding, responsible citizen[ ]” as a person whose interest in bearing arms was elevated.<sup>200</sup> A cohabitant is ostensibly law-abiding and is not directly subject to the restrictions of the order. The cohabitant may even be the law-abiding victim or other person the firearm restriction was intended to protect.<sup>201</sup>

Since regulation of a cohabitant otherwise might burden the core of the right—self-defense in the home by law-abiding citizens—some form of heightened scrutiny would apply.<sup>202</sup> Strict scrutiny is the “most exacting standard of review” where the government must show that the law furthers a compelling government interest while being narrowly tailored to serve that interest.<sup>203</sup> The compelling government interest “must specifically identify an ‘actual problem’ in need of solving,” and the “curtailment of [the constitutional right] must be actually necessary to the solution.”<sup>204</sup> Both of these prongs seem satisfied.

First, the most obvious government interest—public safety and preventing violent crime—is clearly compelling.<sup>205</sup> The na-

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<sup>198</sup> *United States v. Mahin*, 668 F.3d 119, 125 (4th Cir. 2012).

<sup>199</sup> See generally Carolyn B. Ramsey, *Firearms in the Family*, 78 OHIO ST. L.J. 1257 (2017) (analyzing the “costs of ratcheting up the scope and enforcement of [domestic violence] firearms bans”).

<sup>200</sup> *Heller*, 554 U.S. at 635.

<sup>201</sup> See *supra* note 120.

<sup>202</sup> See *Masciandaro*, 638 F.3d at 470–71 (“[W]e assume that any law that would burden the ‘fundamental,’ core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny.”).

<sup>203</sup> PECK, *supra* note 177, at 15.

<sup>204</sup> *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (quoting *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 822 (2000)).

<sup>205</sup> See, e.g., *United States v. Chapman*, 666 F.3d 220, 226–27 (4th Cir. 2012) (holding that “the government has carried its burden of establishing that reducing domestic gun violence is a substantial governmental objective of” [the federal DVRO firearm ban]); *United States v. Bena*, 664 F.3d 1180, 1184 (8th Cir. 2011) (stating that the federal DVRO firearm ban “promote[s] the government’s interest in public safety consistent with our common law tradition”). See also Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1470 (2009) (“[V]irtually every gun control law is aimed at serving interests that would usually be seen as compelling—preventing violent crime, injury, and death.”).

ture of ERPOs and DVROs also suggests that any regulation of a cohabitant would be narrowly tailored. The orders themselves are already tailored specifically to the individual circumstances of the respondent, and a court has decided that the respondent represents an individualized threat to public or private safety.<sup>206</sup> The orders are also temporary—again, tailored to an individualized heightened risk that the respondent poses at that particular time.<sup>207</sup>

A safe-storage requirement during the period of the order is a relatively narrow way to avoid constructive possession by the respondent. A restrictive order would mean nothing if a respondent were able to constructively possess a cohabitant's firearm, alone in a private home with them. In order to remove the danger entirely and serve the order, a cohabitant must cut off the constructive possession or face liability.

Moreover, a safe-storage requirement only regulates the *manner* in which cohabitants exercise their Second Amendment rights. Certain types of safe-storage requirements, different than those struck down in *Heller*,<sup>208</sup> have been upheld as not burdening the core of the right, even within the home. The Ninth Circuit in *Jackson v. City & County of San Francisco*<sup>209</sup> upheld an ordinance that required handguns in the home be stored in a locked container or be disabled with a trigger lock if not being carried on the owner's person.<sup>210</sup> The court held that the ordinance was covered by the Second Amendment, but that it passed intermediate scrutiny.<sup>211</sup>

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<sup>206</sup> See, e.g., Blocher & Charles, *supra* note 18, at 1289 (calling ERPOs “tailored, individualized risk assessments”).

<sup>207</sup> *Domestic Violence*, GIFFORDS, *supra* note 78; *ERPOs*, GIFFORDS, *supra* note 63.

<sup>208</sup> *Heller*, 554 U.S. at 630.

<sup>209</sup> 746 F.3d 953, 964 (9th Cir. 2014).

<sup>210</sup> *Id.* at 958.

<sup>211</sup> *Id.* at 970. Justice Thomas and Justice Scalia disagreed with the Ninth Circuit and dissented from the denial of certiorari in the case. *Jackson v. City & Cnty. of San Francisco*, 135 S.Ct. 2799, 2800 (2015) (Thomas, J., dissenting from denial of cert.). However, the dissenters seemed to imply that they would take no issue with the law in particular circumstances, like having children in the home. *Id.* at 2800 (“The law applies across the board, regardless of whether children are present in the home.”).

In *City of San Jose v. Rodriguez*,<sup>212</sup> Edward Rodriguez's guns were confiscated from his home after his detainment for a mental health episode as required by a type of ERPO under California law.<sup>213</sup> Following the confiscation, the city petitioned for disposition of the firearms, arguing that a return of the weapons could endanger Edward or others.<sup>214</sup> His wife Lori challenged the petition under the Second Amendment because the guns were her joint property—including one gun she owned herself—and she claimed she would take necessary steps to secure the guns in a safe away from her husband the respondent.<sup>215</sup> The trial court upheld the city's petition for disposition of the guns, citing the possibility that Edward could overpower his wife or coerce her into opening the safe.<sup>216</sup> In examining Lori's appeal, the California appellate court found instructive that *Heller* “recognized that the right to keep and bear arms is not ‘a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.’”<sup>217</sup>

## Conclusion

ERPOs and DVROs are powerful, targeted tools to prevent gun violence. But they are only successful to the extent that they actually keep firearms out of the hands of the respondents. Imposing cohabitant liability in the absence of safe storage is a powerful way to prevent the respondent's constructive possession. Such a requirement passes Second Amendment scrutiny and furthers the goals of firearm-restrictive orders.

More broadly, the analysis helps demonstrate that the Second Amendment debate must itself recognize the ways in which

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<sup>212</sup> *Rodriguez*, 2015 WL 1541988.

<sup>213</sup> *Id.* at \*1.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at \*2.

<sup>216</sup> *Id.* at \*3. In the context of the home, *Rodriguez* raises an interesting consideration: the potential for the prohibited possessor to overpower the cohabitant behind closed doors and gain access to the guns, even safely stored. This is especially problematic in DVRO context where a victim/cohabitant may already be involved in the abuser's cycle of domestic violence intimidation and control. See *Dynamics of Abuse*, NAT'L COALITION AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/dynamics-of-abuse>.

<sup>217</sup> *Rodriguez*, 2015 WL 1541988, at \*7 (emphasis in original) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)).

gun rights are embedded in other structures and institutions—including the home. All too often, argument frameworks in the gun debate emphasize gun owners' fundamental individual right to keep and bear arms as if it stands alone, subject to regulation only in the name of "policy" considerations. As we have discussed above, that framing is plainly incorrect, even in the place—the home—where Second Amendment interests are at their "most acute."<sup>218</sup> Especially to the degree that the right itself is described in terms of personal safety, it must take into account the safety not only of gun-owners, but those with whom they interact—and for that matter, cohabit.

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<sup>218</sup> *Heller*, 554 U.S. at 628.



## The Constitution, Paternity, Rape, and Coerced Intercourse: No Protection Required

by  
Karen Syma Czapanskiy\*

You're kidding, right?"

No, it's true, despite the incredulous reaction of nearly every non-lawyer to whom I've mentioned the topic of this article. It's true that a man who rapes a woman or otherwise coerces intercourse usually is the legal father of the child.<sup>1</sup> The question for this article is whether the Constitution requires that result or whether states can constitutionally deny the man legal parenthood status.<sup>2</sup>

My non-lawyer friends, it seems to me, are suggesting that reconsidering the constitutionality of paternal entitlement is timely. My lawyer friends, however, are accustomed to associating genetics with paternity. They may also be more protective of due process and therefore reluctant to deny a person a legal entitlement without robust procedures. My argument addresses both

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<sup>1</sup> I use gendered terms in this article because the subject is pregnancy under circumstances where a person who can become pregnant has vaginal intercourse with a person who has sperm. What is relevant, then, is what the bodies of the two people can or cannot do in terms of producing a child. Most of the time, one is gendered female and one is gendered male, although that is not universal and not mandatory. By using gendered terms, I am not trying to suggest anything about the sexual or reproductive conduct or preferences of people who do not identify as men or women in terms of gender or sexuality.

<sup>2</sup> Coerced sexual intercourse includes criminal acts such as rape, sexual assault, and statutory rape. It also includes intercourse in circumstances that do not give rise to criminal liability, but which occurred without the woman's voluntary participation, as discussed *infra* in text at notes 18-25.

claims. First, sourcing paternity in genetics is not a constitutional requirement. Second, due process is not denied when the man's claim to fatherhood is protected by minimal procedures. Finally, I argue that women are denied equal protection when more than minimal due process is provided to protect a claim of fatherhood after rape or coercive intercourse.

My article considers two scenarios: one easy and one hard. The easy case is "rape": the man is a stranger to the woman before the intercourse, he is convicted of rape or other sexual offense, and he never develops a relationship with the child. All but a few states recognize paternity even in these circumstances, although most empower the woman to seek termination or some limitation on parental rights on the basis of the rape or on proof at a high standard of conduct constituting rape.<sup>3</sup> The hard one is the much more common situation where the child's birth results from the kind of sexual and reproductive coercion that characterizes many abusive intimate relationships and where convictions are even less common than in stranger rapes. In both scenarios, treating the genetic father as having the same parental rights as the birth mother constrains the birth mother's reproductive and parental autonomy. Rather than enjoying the freedom to decide when to have children and with whom, if anyone, to share parenthood, she is subject to continuing control by a man who is willing to override her decision whenever it suits his will.

Enslaved people as well as first-generation feminists understood reproductive and parental autonomy as essential to women's citizenship. Enslaved women were subject to the sexual demands not only of men who enslaved them but of any other man allowed by the enslaver to have sexual access.<sup>4</sup> A child born to an enslaved woman shared her legal status as enslaved.<sup>5</sup> She

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<sup>3</sup> See National Conference of State Legislators, *Parental Rights and Sexual Assault* (Mar. 9, 2020), <https://www.ncsl.org/research/human-services/parental-rights-and-sexual-assault.aspx>.

<sup>4</sup> See RACHEL A. FEINSTEIN, *WHEN RAPE WAS LEGAL: THE UNTOLD HISTORY OF SEXUAL VIOLENCE DURING SLAVERY* (2018); ANNETTE GORDON-REED, *THE HEMINGSSES OF MONTICELLO: AN AMERICAN FAMILY* (2008) (explaining the complexities of family and sexual experiences involving enslaved black women and enslaving white men in the United States).

<sup>5</sup> See PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 375, 338-49 (1997); Camille A. Nelson, *American Husbandry: Legal Norms Impacting the Production of (Re)productivity*, 19 *YALE*

had no control over the child's care or upbringing and the enslaver could separate them at will. As enslaved people freed themselves before and during the Civil War, they demanded the right to control the fates of their children as essential to their own freedom.<sup>6</sup> First-generation feminists understood that the law gave control over their reproduction and parental autonomy to their husbands through a trio of provisions. First, their husbands could rape them without fear of criminal consequences.<sup>7</sup> Second, divorce was only available in limited circumstances. Third, married women were not legal guardians of their children during marriage and could be deprived of custody upon divorce. Their lack of control over reproduction and parenthood, feminists argued, meant they could not control other key aspects of their lives, including participating in public life.

In 2022, men enjoy less legal control over the reproductive autonomy of women in their lives, although they have more control over a woman's parental autonomy in many situations. Here is a brief list of changes: slavery was abolished; the scope of the marital rape exemption has been limited;<sup>8</sup> grounds for divorce have expanded; men and women share parental rights over their children; most women have access to birth control and some to abortion; husbands (at least at the moment) cannot interfere with a wife's decision to use birth control or have an abortion; civil protection orders are available against abusers within families; and women have the right to vote. At the same time, single women, who gained parental rights over their children only in the nineteenth century,<sup>9</sup> have seen those rights erode as the parental rights of single fathers have expanded to be equal to those of the

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J.L. & FEMINISM 1, 17-20 (2007); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1437-40 (1991) Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 8 (1993).

<sup>6</sup> See COOPER DAVIS, *supra* note 5, at 354-58.

<sup>7</sup> Michael D.A. Freeman, *But If You Can't Rape Your Wife, Whom Can You Rape: The Marital Rape Exemption Reexamined*, 15 FAM. L.Q. 1, 8-9, 16 (1981).

<sup>8</sup> *Id.*

<sup>9</sup> MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (1984).

single mother.<sup>10</sup> What has not changed in all cases is paternity: regardless of the circumstances of conception, men who claim parenthood through the marital presumption, acknowledgement of parenthood, genetic connection, or relationship with the child are usually recognized as the child's father and, for most of the last century, share with the mother all of the rights and responsibilities of parenthood.<sup>11</sup>

In this article, I argue that recognizing paternity in men who rape or otherwise coerce intercourse with a woman reinforces a man's power over the woman's reproductive autonomy with concomitant restrictions on the woman's exercise of her rights as a citizen. Honoring rather than sanctioning the man's behavior by not denying him paternal recognition may encourage further coercive behavior. When rape or coercive intercourse results in a pregnancy that is not terminated by abortion, the woman loses control over whether, when, and with whom she wants a child. If the man's paternity is recognized regardless of the circumstances of conception, the woman's autonomy is restricted even more because she usually can be required to share with him all the usual rights of guardianship. That means that the mother can be required to share physical and legal custody and to facilitate the child's relationship with a man who impregnated her just because he wanted to, and regardless of her views. She may even lose custody to him.<sup>12</sup> She may be unable to place the child for adoption without his consent.<sup>13</sup> If she seeks to terminate the man's paternal rights, a judge may conclude he has raped her but still deny her termination petition on the grounds that it is in the best interests of the child not to terminate the man's rights.<sup>14</sup> If the mother has little or no income, she may be required to help the state establish the man's paternity as a condition of eligibility for health insurance and cash assistance, among other public benefits.<sup>15</sup> If the woman and child are connected to the man by mar-

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<sup>10</sup> See Marygold S. Melli, *The Changing Legal Status of the Single Parent*, 35 *FAM. RELATIONS* 31 (1986); see also IRA MARK ELLMAN, PAUL M. KURTZ, LOIS A. WEITHORN, BRIAN H. BIX, KAREN CZAPANSKIY & MAXINE EICHNER, *FAMILY LAW: CASES, TEXT, PROBLEMS* 623-25 (5th ed. 2010).

<sup>11</sup> *Id.*

<sup>12</sup> See *infra* notes 56-58 and 111.

<sup>13</sup> See *infra* notes 55 and 74.

<sup>14</sup> See *infra* note 142.

<sup>15</sup> See *infra* notes 114-119, 149-150.

riage, genetic tie, an acknowledgement of parenthood, or the man's relationship with the child, the man can demonstrate paternal entitlement by a preponderance of the evidence, and the circumstances of conception are irrelevant.<sup>16</sup> The woman can terminate his paternal rights on the basis of the circumstances of the conception only if she can demonstrate rape or sexual offense by clear and convincing evidence, or, in some states, only if he has been convicted of a sexual offense.<sup>17</sup>

My argument attacks the rarely examined assumption that states are constitutionally required to recognize a man's claim of paternity and to provide his claim with robust due process protection regardless of the circumstances of conception. I explore two arguments. First, I argue that states can constitutionally deny paternal recognition when the coerced intercourse constitutes a sexual offense. Second, regardless of whether the conduct was criminal or a conviction was obtained, the Constitution requires only minimal due process to determine whether the man is entitled to be recognized as a parent over the mother's objection. Minimal means that, unless the man has established a relationship with the child early in the child's life or has come forward to claim a relationship, notice is not required in any action involving the custody or adoption of the child. If the man sues to establish parenthood or assert parental rights, the woman is entitled to defeat his claim by showing reasonable grounds to believe that the child's birth was the result of a rape. Entitlement to paternity then turns on whether the man establishes, by a preponderance of the evidence, that the intercourse was not a rape or otherwise coerced.

Part II of the article examines what is known about rape-related or coerced intercourse and the experience of being the mother of the resulting child. Part III considers the common but highly questionable claims that states are subject to a constitutional mandate to recognize paternity in a man regardless of the circumstances of conception and that the man's claim of paternity is entitled to robust due process protections. Part IV concludes with the argument that women are denied equal protection when states impose a higher procedural burden on

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<sup>16</sup> See UNIF. PARENTAGE ACT §§ 607-614.

<sup>17</sup> See UNIF. PARENTAGE ACT § 614; *infra* text at notes 74-75.

them to preclude the paternity claim of a man who coerced intercourse than on the man who seeks to claim paternity.

## II. Motherhood and Coerced Intercourse

Women who experience pregnancy after coercive intercourse may be described as “raped.” The term is limiting and inappropriate when the question is whether a man has a constitutional right to paternity of a child conceived by means of coercion. Better terms are “rape-related” or “coerced intercourse.”

Using the word “rape” creates a misleading and distracting framing of the paternity question as if it were an issue of the criminal law. The crime of rape comes with a definition that includes some types of coercive conduct and excludes others. As a crime, rape comes with a set of procedural protections for the accused. Recognition of a man as a father is a civil issue, however, and civil liability can be broader as well as easier to prove. Further, identifying the conduct as rape rhetorically appears to limit the category of women who experience coerced pregnancy to those who have experienced a specific criminal act. Women who experience coerced pregnancy may have been raped in the technical sense, but they also experience behaviors sanctioned civilly but which criminal law does not yet reach.

Rather than identify the experience as rape, therefore, I use the term “coercive intercourse.” Coercive intercourse includes conduct that is subject to criminal sanctions, such as rape, sexual assault, and statutory rape. It also covers conduct that may be criminally sanctioned as a formal matter but which is punished infrequently. Further, coercive intercourse includes conduct that is not subject to a criminal sanction, such as some kinds of marital rape, sexual coercion, and reproductive coercion.<sup>18</sup> Coercive intercourse is distinguished from other forms of intercourse by the power relationship between the parties: the person imposing the sexual contact can impose sexual contact on a partner who does not welcome the contact because gender-based and other

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<sup>18</sup> See Kathleen C. Basile, Sharon G. Smith, Yang Liu, Marci-jo Kresnow, Amy M. Fasula, Leah Gilbert & Jieru Chen, *Rape-Related Pregnancy and Association with Reproductive Coercion in the U.S.*, 55 AM. J. PREV. MED. 770, 774 (2018) (“women may not identify with the term rape in the context of forced sex by an [intimate partner], particularly in the context of other violence.”) (citations omitted).

discriminatory contexts make the woman vulnerable to the man's power.<sup>19</sup>

While the criminal law, unfortunately, does not yet recognize the full range of discriminatory sexual imposition as a form of rape or sexual assault,<sup>20</sup> criminal law is also not designed to do the same things as the civil law. The civil law is about the relationships of individuals to each other, including questions such as whether a woman whose pregnancy is coerced should have to parent with the man who coerced the pregnancy.<sup>21</sup> For the civil law, the paternity question should take into account the impact of the intercourse on the survivor. Does she experience the intercourse as something she welcomed, which is the standard for acceptable conduct in the context of sexual harassment law?<sup>22</sup> Alternatively, does she experience the intercourse as something imposed on her regardless of her reproductive autonomy and personal dignity?<sup>23</sup> When it is the latter, recognizing the man who imposed the intercourse as the legal father of the child is a way to convince the man and the society that sexual imposition is good or at least acceptable conduct.<sup>24</sup> Refusing legal recognition of his paternity, despite the genetic tie to the child, is at least a

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<sup>19</sup> Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431, 432-35 (2016).

<sup>20</sup> *Id.* (critiquing the criminal law of rape and sexual assault for failing to adhere to equality principles); Timothy W. Murphy, *A Matter of Force: The Redefinition of Rape*, 39 AIR FORCE L. REV. 19, 20-21 (1996)(describing changes in rape law to reduce or eliminate a problematic focus on whether the woman consented); Ashley Van Fleet, *The Rapist's Second Attack: Terminating Rapists' Parental Rights*, 35 W. MICH. U. COOLEY L. REV. 243 (2019)(describing an expanding definition of rape in legal and political contexts to include "forced sexual intercourse including both psychological as well as physical force").

<sup>21</sup> See also MARTHA C. NUSSBAUM, *CITADELS OF PRIDE: SEXUAL ASSAULT, ACCOUNTABILITY, AND RECONCILIATION* (2021).

<sup>22</sup> See MacKinnon, *supra* note 19, at 450-51 (distinguishing the inequality issue associated with the consent standard in rape law with the welcomeness standard in the law of sexual harassment).

<sup>23</sup> See Robin West, *Equality Theory, Marital Rape and the Promise of the Fourteenth Amendment*, 42 U. FLA. L. REV. 45, 69 (1990) (describing sacrifice of "self-sovereignty" of married woman in the face of routinized rape within the marriage).

<sup>24</sup> MacKinnon argues that rape should be redefined to take inequality into account as follows: "a physical invasion of a sexual nature under circumstances of threat or use of force, coercion, abduction, or of the abuse of power,

symbolic expression that the conduct is an unacceptable exploitation of gendered hierarchical power.

In taking this path, I am following the lead of multiple scholars who have produced both theoretical and empirical research about gender relationships and about women's varied experiences of intercourse and pregnancy. For these scholars, the key is whether the man used the power of gender hierarchy (with or without additional sources of social power, such as economic status and/or race) to coerce sex from a woman who did not welcome the sexual contact.

How law and society empower men to exploit and control women's sexuality, reproduction, and caregiving has long been a central question for feminist legal theoreticians from many perspectives.<sup>25</sup> Numerous legal reforms inspired by feminist theory have focused on empowering women's control over their reproduction in terms of contraception and abortion, of enhancing criminal remedies against sexual imposition by intimate partners and spouses,<sup>26</sup> and advancing equality in the labor force by addressing sexual harassment as a civil rights violation. Denying paternal recognition to men who coerce a pregnancy is consistent with these theoretical claims and legal changes.

Rather than importing the criminal law of rape into the question of paternity, the better route is importing the civil standard of welcomeness from sexual harassment law.<sup>27</sup> Sexual harassment, like rape, is an expression of gender inequality.<sup>28</sup> Unlike the crime of rape, however, sexual harassment law is not restricted by a history of privileging the perspective of men over the experience of women.<sup>29</sup> Instead, in sexual harassment law, the woman's experience of sexual imposition is central to the question of whether sex discrimination occurred. In the context

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trust, or a position of dependency or vulnerability." MacKinnon, *supra* note 19, at 474.

<sup>25</sup> See Robin West, *Introduction*, RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE (Robin West & Cynthia Grant Bowman, eds. 2019).

<sup>26</sup> Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399 (2019).

<sup>27</sup> See generally CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979); NUSSBAUM, *supra* note 21.

<sup>28</sup> See MacKinnon, *supra* note 19, at 474.

<sup>29</sup> *Id.*



of sexual harassment, the right of a woman to be free of sex discrimination in the workplace is violated when her employment is conditioned on acceding to the unwelcome sexual demands of a supervisor, including rape.<sup>30</sup> Liability turns on whether the supervisor's conduct was "unwelcome," not whether the employee's conduct was "voluntary."<sup>31</sup>

How many mothers are raising children who were conceived coercively is not known. Nearly 2.9 million women in the United States have experienced a "rape-related pregnancy."<sup>32</sup> The statistics are blurry, in part because researchers may include conduct that would not satisfy the definition of rape of any degree in the state where the conduct occurred. The Centers for Disease Control divides sexual violence against women that could result in a pregnancy into two categories, both of which should be viewed as coercive intercourse. The first category, rape, includes completed forced penetration and has been experienced by approximately 13.5% of women.<sup>33</sup> The category also includes completed alcohol/drug-facilitated penetration, which has been experienced by approximately 11% of women.<sup>34</sup> The second category is sexual coercion, which includes behaviors such as "being worn down by someone who repeatedly asked for sex, sexual pressure due to someone using their influence or authority."<sup>35</sup> Approximately 16% of women report experiencing sexual coercion.<sup>36</sup> Reproductive coercion occurs when an intimate partner exerts "power and control over reproduction through interference with contraception, pregnancy pressure, and pregnancy coercion."<sup>37</sup> As

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<sup>30</sup> See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

<sup>31</sup> *Id.* at 68; see NUSSBAUM, *supra* note 21, at 99 (describing sexual harassment as the "extortionate use of power").

<sup>32</sup> Basile et al., *supra* note 18, at 772.

<sup>33</sup> SHARON G. SMITH, XINJIAN ZHANG, KATHLEEN C. BASILE, MELISSA T. MERRICK, JING WANG, MARCIE-JO KRESNOW & JIERU CHEN, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF – UPDATED RELEASE 2 (Centers for Disease Control, 2018).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Basile, et al., *supra* note 18, at 771; see Jeanna Park, Sherry K. Nordstrom, Kathleen M. Weber & Tracy Irwin, *Reproductive Coercion: Uncloaking an Imbalance of Social Power*, 214 AM. J. OBSTETRICS & GYNECOLOGY (Aug. 24, 2015), [https://www.ajog-org/article/s0002-9378\(15\)00927-8/pdf](https://www.ajog-org/article/s0002-9378(15)00927-8/pdf).

many as a quarter of women may experience reproductive coercion,<sup>38</sup> and it “commonly occurs” in abusive relationships.<sup>39</sup>

A much-cited study published in 1996 concluded that more than 30,000 rape-related pregnancies may occur each year.<sup>40</sup> Approximately a third of the women in the study who experienced a rape-related pregnancy gave birth to a baby which they kept.<sup>41</sup> Other studies indicate that the percentage may be much higher – as much as 64%.<sup>42</sup>

Rape-related and other coercive intercourse resulting in pregnancy is not random. As one author put it, “gender-based violence frequently encompasses women’s reproductive functions; men’s control over this dimension is an essential corollary to intimate partner abuse and sexual assault.”<sup>43</sup> A study from 2010 to 2012 found that more than 75% of women who experienced rape-related pregnancy reported that the perpetrator was a current or former intimate partner.<sup>44</sup> A more recent study

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<sup>38</sup> Basile et al., *supra* note 18, at 771 n.15; Lindsay E. Clark, Rebecca H. Allen, Vinita Goyal, Christina Raker & Amy S. Gottlieb, *Reproductive Coercion and Co-Occurring Intimate Partner Violence in Obstetrics and Gynecology Patients*, 210 AM. J. OBSTETRICS & GYNECOLOGY 42.e1, e5-e6 (2014) (noting that 16% of respondents reported reproductive coercion and a third of those also experienced intimate partner violence).

<sup>39</sup> Fuqin Liu, Judith McFarlane, John A. Maddoux, Sandra Cesario, Heidi Gilroy & Angeles Nava, *Perceived Fertility Control and Pregnancy Outcomes Among Abused Women*, 45 J. OBSTETRIC, GYNECOLOGIC, & NEONATAL NURSING 592, 593 (2016).

<sup>40</sup> Melisa M. Holmes, Heidi S. Resnick, Dean G. Kilpatrick, & Connie L. Best, *Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women*, 175 AM. J. OBSTETRICS & GYNECOLOGY 320, 322 (1996).

<sup>41</sup> *Id.* Another 50% underwent an abortion and about 6% placed the infant for adoption. *Id.* The remaining pregnancies ended in spontaneous abortion. *Id.*

<sup>42</sup> Connie J. Beck, Laila Alshami, Melissa M. de la Luz, Andrea N. Camacho de Anda, Heather J. Kendall & Elizabeth S. Rosati, *Children Conceived from Rape: Legislation, Parental Rights and Outcomes for Victims*, 15 J. CHILD CUSTODY 193 (2019).

<sup>43</sup> Laura A. McCloskey, *The Effects of Gender-based Violence on Women’s Unwanted Pregnancy and Abortion*, 89 YALE J. BIO. & MED. 153, 165 (2016).

<sup>44</sup> Basile et al., *supra* note 18, at 772. Nearly half of the respondents in the 1996 study on rape-related pregnancy identified the rapist as their boyfriend or husband. Holmes et al., *supra* note 40, at 322 Tabl. III.

found that rape-related pregnancy involving an intimate partner has been experienced by approximately 2 million women.<sup>45</sup> Another study found that nearly 70% of the women who reported physical abuse by an intimate partner also experienced “some form of sexual assault” by that partner, and about a fifth experienced a rape-related pregnancy.<sup>46</sup> About one-third of the women experienced reproductive coercion by the same partner, such as interfering with birth control or refusing to use a condom.<sup>47</sup> The frequency of reproductive coercion by an intimate partner may explain the significantly higher incidence of pregnancy following a rape by an intimate partner as compared to rape by an acquaintance or a stranger.<sup>48</sup>

By definition, a pregnancy begun in coerced intercourse is unintended from the mother’s perspective.<sup>49</sup> In the context of intimate partner violence, the pregnancy may be the result of the woman trying to avoid another physical assault. The man may threaten murder if she leaves him after she bears a child.<sup>50</sup> The man may demonstrate through his behavior that his is the only opinion that counts about whether she should have a child.<sup>51</sup>

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<sup>45</sup> Basile et al., *supra* note 18, at 773.

<sup>46</sup> *Id.* at 773; Judith McFarlane, *Pregnancy Following Partner Rape: What We Know and What We Need to Know*, 8 TRAUMA, VIOLENCE & ABUSE 127 (2007).

<sup>47</sup> Basile et al., *supra* note 18, at 773; *see also* Charvonne N. Holliday, Elizabeth Miller, Michele Decker, Jessica G. Burke, Patricia I. Documet, Sonya B. Borrero, Jay G. Silverman, Daniel J. Tancredi, Edmund Ricci and Heather L. McCauley, *Racial Differences in Pregnancy Intention, Reproductive Coercion, and Partner Violence Among Family Planning Clients: A Qualitative Exploration*, 28 WOMEN’S HEALTH ISSUES 205 (2018); Liu et al., *supra* note 39.

<sup>48</sup> Basile et al., *supra* note 18, at 773.

<sup>49</sup> *See generally* Christina C. Pallitto, Jacquelyn C. Campbell & Patricia O’Campo, *Is Intimate Partner Violence Associated with Unintended Pregnancy? A Review of the Literature*, 6 TRAUMA, VIOLENCE & ABUSE 217 (2005); McFarlane, *supra* note 46.

<sup>50</sup> Jacquelyn Campbell, Sabrina Matoff-Stepp, Martha L. Velez, Helen Hunter Cox & Kathryn Laughon, *Pregnancy-Associated Deaths from Homicide, Suicide, and Drug Overdose: Review of Research and the Intersection with Intimate Partner Violence*, 30 J. WOMEN’S HEALTH 236, 238 (2021) (“When the perpetrator is known, the largest proportion of homicide cases during or around pregnancy occurs at the hands of an intimate partner”); Holliday et al., *supra* note 47, at 208.

<sup>51</sup> Holliday, et al., *supra* note 47, at 208.

Where coercive intercourse results in the birth of a child, a birth mother may attempt to place the child for adoption or the birth mother may decide to raise the child. The birth father may be involved in both situations. When the mother seeks to have the child adopted, the consent of the biological father may be required under state law. The child may be born when the mother is living with or married to the biological father. He may be in a position to coerce her into remaining in the household with the child. If the mother is living separately from the biological father, she may still be subject to his control because the biological father may be empowered to exercise parental rights equivalent to those of the mother.

Detailed accounts of the experience of mothering a child when the coercive biological father is or may become involved are not abundant, but they are telling. Some women report significant problems around being a good mother to a child that reminds them of the abuse and coercion they suffered.<sup>52</sup> Others, and it may be a majority, report having a positive experience of mothering the child, regardless of the circumstances of conception,<sup>53</sup> although achieving a good relationship may pose a challenge.<sup>54</sup>

Dealing with the man is another story, however. Women report being pressured into dropping criminal charges related to the rape or sexual assault in exchange for the man's consent to the child's adoption.<sup>55</sup> When the biological father is awarded custody or visitation rights, the mother must interact with him frequently, allow him to make decisions about the child, and turn the child over to him for periods of visitation.<sup>56</sup> He may threaten to take full custody of the child, and he may succeed.<sup>57</sup> He may

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<sup>52</sup> Shauna R. Prewitt, *Giving Birth to a "Rapist's Child": A Discussion and Analysis of the Limited Legal Protections Afforded to Women Who Become Mothers Through Rape*, 98 GEO. L.J. 827, 849 (2010).

<sup>53</sup> ANDREW SOLOMON, FAR FROM THE TREE 497-99 (2012); Prewitt, *supra* note 52, at 849-50.

<sup>54</sup> SOLOMON, *supra* note 53, at 524-26.

<sup>55</sup> Kara N. Bitar, *The Parental Rights of Rapists*, 19 DUKE J. GENDER L & POL'Y 275, 275-76 (2012).

<sup>56</sup> Prewitt, *supra* note 52, at 831-32.

<sup>57</sup> See Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Exper-*

be empowered to deny her opportunities to move to a new location with the child.<sup>58</sup>

Since intimate partner violence and coercive intercourse are frequently associated with one another,<sup>59</sup> it is not surprising to find women describing their experiences of dealing with the father of a child conceived coercively as reflecting abuse. Mothers describe experiencing the involvement of the biological father as a “second rape,”<sup>60</sup> a “torment,”<sup>61</sup> a “loss of control,” and a continuing reminder of the rape which may interfere with their capacity to move on and recover.<sup>62</sup> For some women, the sexual abuse they experience is part of the man’s system of control. If he kept her “pregnant all the time,” he was confident she wouldn’t leave him because “he knew I wouldn’t leave the kids.”<sup>63</sup>

After learning they are pregnant or after delivering the child, some women conclude that what is best for the child and, perhaps, for them is to treat the man as a father to the child despite the coerced intercourse. Other women come to the opposite conclusion. In either case, the decision may be influenced by the legal reality that, if the man is entitled to paternal recognition, he is likely to have the legal right to be equally involved as the woman in decisions about the child. I now turn to what the Constitution has to say about three interrelated issues affecting the woman’s reproductive and parental autonomy:

1) whether states must recognize paternal claims based solely on the genetic tie between the man and the child;

2) whether minimal process is sufficient protection for paternity claims in cases involving coercive intercourse where the man has not developed a relationship with the child, and

3) whether states that provide additional procedural protections to a man’s claim of paternity are denying the woman equal protection.

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*iences*, 167 U. PA. L. REV. 399, 431-32 (2019) (“[S]urvivor-mothers often leave family court having been wrongly denied custody of their children”).

<sup>58</sup> ELLMAN ET AL., *supra* note 10, at 708-23.

<sup>59</sup> See Freeman, *supra* note 7, at 4-8, 29.

<sup>60</sup> Moriah Silver, *The Second Rape: Legal Options for Rape Survivors to Terminate Parental Rights*, 48 FAM. L.Q. 515, 516 (2014).

<sup>61</sup> Bitar, *supra* note 55, at 282.

<sup>62</sup> Prewitt, *supra* note 52, at 833-35.

<sup>63</sup> SOLOMON, *supra* note 53, at 516.

### **III. The Constitution Requires Little to No Protection for Paternity Claims Following Coerced Intercourse**

Most states provide ample procedural protection to the paternity claim of a man who coerced the intercourse that resulted in the birth of the child. In this section, I argue that recognition of the claim is not required in every case and that the customary robust procedural protection of paternity claims is more than what is due.

The state decides who is a legal parent.<sup>64</sup> Generally, once a person is entitled to be recognized as a parent, the status can be terminated only with the process which is due.<sup>65</sup> These two rules mean that a person who coerces intercourse can be denied parenthood in either of two ways: deny that person parental recognition or recognize the person's parental status and terminate that status.

Eligibility for parental status in a person other than the birth mother usually arises out of the marital connection of the child's birth mother to the claimant, the acknowledgement of parenthood by a claimant who is accepted as such by the child's mother, a parental relationship between a claimant and the child, or proof of a genetic connection of a claimant with the child.<sup>66</sup> Where the coercive intercourse constitutes criminal conduct, the Uniform Parentage Act of 2017, some state laws, and a small line of cases conclude that parental recognition may be denied in some circumstances.<sup>67</sup> Most states, however, provide for recognition of paternity regardless of whether the pregnancy was coerced, which means that a woman who gives birth after coerced intercourse usually must share parental rights unless she prevails in a termination proceeding. The U.S. Supreme Court has never determined, however, that parental recognition is constitutionally required when the pregnancy is coerced or what process a paternity claimant is due under these circumstances.

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<sup>64</sup> Douglas NeJaime, *The Constitution of Parenthood*, 72 *STAN. L. REV.* 261 (2020).

<sup>65</sup> See *Santosky v. Kramer*, 455 U.S. 745 (1982); see also *infra* text at notes 172-73.

<sup>66</sup> UNIF. PARENTAGE ACT §201 (UNIF. L. COMM'N 2017).

<sup>67</sup> See *infra* notes 73-81 and 122.

A. *No Paternal Recognition Is Required Where the Sole Connection Is Genetic*

Contrary to increasing reliance on genetics to establish paternity, particularly in the realm of child support enforcement,<sup>68</sup> the Constitution does not require states to recognize paternity in the genetic father of a child over the mother's objection in every case. Three situations are well-established: where the birth mother is married to someone else when the child is born, where the man never steps forward to establish a relationship with the child, and where conception resulted from a sexual offense for which the man was convicted. While these three situations address some situations where coercive intercourse has occurred, the protection they offer covers only a minority of cases.

The Supreme Court addressed the first situation in *Michael H. v. Gerald D.*, where it held that the Constitution did not require California to recognize paternity in a man whose genetic tie to the child was beyond dispute so long as the child was born to a married woman.<sup>69</sup> Where the woman and her husband both wanted the child's father to be the woman's husband, according to the Court, the paramour, who was the biological father, had no claim which the state must enforce.

A second situation in which a man's genetic tie to a child provides no basis for the state to be required to recognize his paternity is found in *Lehr v. Robertson*.<sup>70</sup> There, the Court pointed to the man's failure to establish a parent-child relationship with the child of any kind, including the minimal effort of registering himself as the child's father with the state. In *Quilloin v. Walcott*, the Court similarly rejected the claim of the child's genetic father to a constitutionally protected right to be heard on the question of whether the child should be adopted by a stepfather.<sup>71</sup>

*Michael H.*, *Lehr*, and *Quilloin* support a degree of reproductive and parental autonomy in that the decision of the mother about who to parent with is respected over that of the genetic father, but only in the situation where the mother has a substitute

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<sup>68</sup> Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. REV. 2037 (2016).

<sup>69</sup> *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

<sup>70</sup> *Lehr v. Robertson*, 463 U.S. 248 (1983).

<sup>71</sup> *Quilloin v. Walcott*, 434 U.S. 246 (1978).

partner, that is, her husband. If she were parenting alone, nothing in the three cases would protect her from having to share parenthood with a man who coerced the intercourse that resulted in the child's birth.<sup>72</sup>

A more direct route to protecting the mother's reproductive and parental autonomy in some cases is found in *Peña v. Maddox*,<sup>73</sup> a decision by Judge Richard Posner in a case where the father was convicted of a sexual offense against the mother. To recognize the man's paternal rights, Judge Posner wrote, would allow the criminal to "profit" from his crime while imposing a burden on the mother if the man chooses to use his legal status to demand that she drop the criminal case, to obstruct an adoption or to "simply enjoy the fruit of his crime."<sup>74</sup> By denying paternity after the conviction, Judge Posner concludes, the state is making a constitutionally acceptable decision to discourage criminal conduct. As the judge explains,

[N]o court has gone so far as to hold that the mere fact of fatherhood, consequent upon a criminal act that our society does take seriously and that is not cemented (whoever's fault that is) by association with the child, creates an interest that the Constitution protects in the name of liberty. . . . The criminal does not acquire constitutional rights by his crime other than the procedural rights that the Constitution confers on criminal defendants. Pregnancy is an aggravating circumstance of a sexual offense, not a mitigating circumstance. The criminal should not be rewarded for having committed the aggravated form of the offense by receiving parental rights . . . .<sup>75</sup>

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<sup>72</sup> See Judith Lewis, *The Stability Paradox: The Two-Parent Paradigm and the Perpetuation of Violence Against Women in Termination of Parental Rights and Custody Cases*, 27 MICH. J. GENDER & L. 311 (2021).

<sup>73</sup> *Peña v. Maddox*, 84 F.3d 894 (7th Cir. 1996). In this case, it was actually the mother's family that thwarted the father, rather than the mother, who was 16 when she gave birth and was apparently persuaded to immediately have the child adopted without notifying the father of the birth or the adoption. The decision has been criticized because the alleged offense was statutory rape rather than a sexual offense involving violence or manipulation. See, e.g., Anna K. Martin, *Making Pro-Abortion Laws Pro-Choice for Female Rape Victims*, 33 WIS. J. L., GENDER & SOC'Y. 63, 79 (2018). In this article, I am not addressing possible distinctions between statutory rape and other forms of criminal sexual assault.

<sup>74</sup> *Peña*, 84 F.3d at 899-901.

<sup>75</sup> *Id.* at 902.



Judge Posner's argument that parental claims arising out of criminal conduct should be denied has found some support rhetorically and otherwise. In *Michael H.*, for example, Justice Scalia argued that recognizing the parental claim of the married mother's paramour because of his genetic connection to the child would open the door to claims by all biological fathers, regardless of whether the conception resulted from rape.<sup>76</sup> A similar parental claim by the paramour of a married woman was rejected by a Michigan appellate court. There, a concurring judge asserted that "[n]o one could seriously argue that the perpetrator of a rape has any protected liberty interest in a relationship with the child."<sup>77</sup> In a California case, a man's biological connection with a child was an insufficient basis for requiring that the child welfare office provide the man with reunification services after the child was taken into care. Otherwise, the court asserted, reunification services could be demanded by a rapist simply based on the biological connection to the child.<sup>78</sup> Under the Uniform Parentage Act of 2017, paternal recognition can be denied when a man is convicted of a sexual assault or comparable crime or the criminal conduct is established by clear and convincing evidence.<sup>79</sup>

Despite Judge Posner's confidence in the broad acceptance of the outcome in *Peña*, however, denial of paternal recognition for rapists is not a common outcome under either statutes or caselaw. Instead, many states authorize the mother to seek the termination of the paternal rights of rapists in some, but not all, circumstances.<sup>80</sup> An action for termination is unnecessary, of

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<sup>76</sup> *Michael H.*, 491 U.S. at 124.

<sup>77</sup> *Hauser v. Riley*, 536 N.W.2d 865, 188-89 (Mich. Ct. App. 1995) (Kavanaugh, J., concurring in part and dissenting in part). *See also* *Shepherd v. Clemens*, 752 A.2d 533, 542 (Del. 2000) ("A biological father who commits a criminal act that meets the elements of statutory rape and has managed somehow to establish a relationship with his child *may* have a constitutionally protected claim to parental rights . . . . No court has held that the mere fact of biological fatherhood, that was the result of a conception during a criminal act and that is unaccompanied by a relationship with the child, creates an interest that the United States Constitution protects in the name of liberty.").

<sup>78</sup> *In re Sarah C.*, 11 Cal. Rptr. 2d 414, 419-20 (1992).

<sup>79</sup> UNIF. PARENTAGE ACT § 614 (UNIF. L. COMM'N 2017).

<sup>80</sup> *See, e.g.*, MD. CODE ANN., FAM. LAW § 5-1402 (2020); MASS. GEN. LAWS ANN. 209C § 3(a) (2021).

course, if the man has no right to recognition of paternity in the first place.

The *Peña* case involved a conviction for a misdemeanor sexual offense involving two young people who were apparently in an ongoing non-coercive relationship of which the young woman's parents disapproved. If the *Peña* doctrine were followed literally, therefore, it would hold constitutional the denial of parenthood to anyone who is convicted of a sexual offense of any degree. A major limitation to *Peña*, however, is that most coercive intercourse does not result in a conviction, especially in the largest category of cases, which is where the offender is known to the woman.<sup>81</sup> Many women decline to involve the carceral system in their relationships.<sup>82</sup> Where the woman seeks a criminal remedy, the most likely reason for the offender not to be convicted is the failure of police or the prosecutor to believe the woman or to pursue the offender.<sup>83</sup> In some instances, conviction may be precluded by the remaining instances of insulation for a married offender or by definitions of sexual offense which turn on traditional concepts of consent.<sup>84</sup> Further, some types of sexual imposition may be prosecuted as offenses that are not sexual, such as assault or even slavery.<sup>85</sup>

<sup>81</sup> See *supra* notes 31-48, and *infra* 83-85 and accompanying text.

<sup>82</sup> See, LEIGH S. GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* (2018); Leigh Goodmark, *Restorative Justice as Feminist Practice*, 1 INT'L J. RESTORATIVE JUST. 372, 378-79 (2018).

<sup>83</sup> Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 297-302 (2007) (examining roles of race and gender on prosecutorial charging decisions, particularly in cases of rape and sexual assault); Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1 (2007) See *Foreword*, MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES 4 (AM. L. INST. May 4, 2021) (Tentative Draft No. 5) (reporting that despite the failure of police and prosecutors to believe reports of sexual offenses, "recent research suggests that complaints judged incredible or dismissed by law enforcement in fact often later prove to be well-founded" including through analyses of previously untested rape kits).

<sup>84</sup> See Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 MINN. J. L. & INEQUALITY 335, 342-48 (2017).

<sup>85</sup> An example of how coercive sexual imposition might be prosecuted as something non-sexual is found in an article written by then Professor (now President) Joyce McConnell, in which she argues that, at least in some extreme cases, violent and sexual domination by husbands and partners in violent rela-

Limitations of the criminal system would be less of a problem if paternity were denied to men whose conduct is punishable criminally regardless of conviction and to expand the definitions of criminal offenses to cover more kinds of sexual imposition which occur in intimate partner relationships. While promising, these changes do not address other problems with *Peña* from the perspective of a woman who experiences pregnancy because of coercive intercourse. First, the focus is on criminal conduct, and criminalizing conduct in intimate relationships is not always what the woman is seeking.<sup>86</sup> Second, not allowing a rapist to “profit” from his crime is a dreadful metaphor because of the suggestion that a child is property and recognizing parenthood is acknowledging the right to that property.<sup>87</sup>

The metaphor brings to mind two parts of the history of the exclusive power of men in cases of rape-related pregnancy: chattel slavery and marital rape. The law governing both provided that the child born as the result of coerced intercourse was property in fact or property in practice. The property was owned by the man – literally in the case of the enslaver and figuratively but effectively in the case of the husband<sup>88</sup> – and the woman had no say in the child’s future. A rape by an enslaver or by someone he permitted to rape an enslaved woman was not punishable as criminal conduct.<sup>89</sup> The child born to the raped woman inherited their mother’s status as enslaved, regardless of the father’s iden-

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tionships may be prosecuted under the Thirteenth Amendment as slavery. Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J. LAW & FEMINISM 207 (1992).

<sup>86</sup> See GOODMARK, *supra* note 82, Goodmark, *supra* note 82.

<sup>87</sup> See Margaret Jane Radin, *Cloning and Commodification*, 53 HASTINGS L.J. 1123, 1126–27 (2002)(advocating stubborn resistance to “ever thinking about kids as market commodities”); Barbara Bennett Woodhouse, “*Who Owns the Child?*”: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992)(arguing that “our attachment to this property-based notion of the private child cuts off a more fruitful consideration of the rights of all children to safety, nurture, and stability, to a voice, and to membership in the national family”).

<sup>88</sup> Barbara Bennett Woodhouse, *Child Custody in the Age of Children’s Rights: The Search for a Just and Workable Standard*, 33 FAM. L.Q. 815, 815 (1999) (“[C]ustody laws have their root in a social order that established hierarchies of domestic status, treating women, children, and slaves as property of the patriarch.”).

<sup>89</sup> See *supra* text at note 4.

tity or status and regardless of the circumstances of conception.<sup>90</sup> Marital rape meant that the husband controlled the wife's fertility because she was without remedy in the criminal or the civil law when he had sex with her that she did not want.<sup>91</sup> The husband also held full and exclusive rights of custody and guardianship to any child born to her during the marriage.<sup>92</sup>

While chattel slavery, marital rape, and the consequences of both practices with respect to power over a child, have been rejected in the names of justice, equality, and fairness, seeing paternity as a "prize" continues to feel familiar in modern times, even in a decision like *Peña* which rejects some aspects of those claims. The *Peña* court, for example, is willing to recognize paternity in a rapist if a man is financially supporting a child, because providing the money indicates to the court that the man experiences a sense of responsibility to the child. Connecting money and paternity, however, can disempower a woman who was coerced to have intercourse and does not want to be dependent financially on a man who treats her as an object. Further, the *Peña* court does not question the liberty interest of the husband of the child's mother in paternity, regardless of the circumstances of conception.

#### B. *The Minimal Process That Is Due*

While some men who coerce intercourse are not entitled to paternity regardless of genetics, a more robust doctrine would look to the civil system to insulate women from claims of paternity based on coerced intercourse by increasing the procedural barriers to establishing paternity. The case of *Lehr v. Robertson* lays the foundation for this approach in both of the pertinent contexts: litigation between the woman and the man over sharing the rights and responsibilities of legal parenthood and a demand by the state that the woman cooperate in the establishment of paternity so that a child support obligation could be imposed on the man.

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<sup>90</sup> See *supra* text at note 5.

<sup>91</sup> See Freeman, *supra* note 7.

<sup>92</sup> COOPER DAVIS, *supra* note 5, at 330-31 (connecting anti-slavery and women's equality arguments about women's freedom and autonomy); *Michael H.*, 491 U.S. 110.

In 1976, Lorraine Robertson gave birth to Jessica. Jessica's biological father was Jonathan Lehr, to whom Lorraine was not married.<sup>93</sup> The couple lived together before Lorraine delivered the baby, but Lorraine hid herself and the baby after they left the hospital.<sup>94</sup> Lehr's name did not appear on the child's birth certificate.<sup>95</sup> Before the baby's first birthday, Lorraine married Richard Robertson.<sup>96</sup> Together with Robertson, she filed an adoption petition in 1978.<sup>97</sup> On the rare occasions in 1976 and 1977 when he located her, Jonathan visited with Lorraine, Jessica, and Lorraine's other children.<sup>98</sup> In 1978, when a detective agency located Lorraine, Lehr offered financial support for the child, which Lorraine refused.<sup>99</sup> She also threatened arrest unless he stayed away.<sup>100</sup> Lehr's lawyer wrote to Lorraine threatening legal action,<sup>101</sup> and a petition to establish paternity and for visitation was filed in January of 1979.<sup>102</sup> Before the petition was heard, and although the adoption court was aware that the petition had been filed, the adoption was granted without any input from Lehr.<sup>103</sup>

Over a vigorous dissent, the Court concluded that Lehr had not been denied a liberty interest when he was denied a notice and an opportunity to be heard on whether the adoption petition should be granted. According to the Court,

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," his interest in personal contact with his child acquires substantial protection under the due process clause. . . . But the mere existence of a biological link does not merit equivalent constitutional protection. . . .

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and ac-

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<sup>93</sup> *Lehr*, 463 U.S. at 250.

<sup>94</sup> *Id.* at 250, 252; *id.* at 269 (White, J., dissenting).

<sup>95</sup> *Id.* at 252.

<sup>96</sup> *Id.* at 250.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 252.

<sup>103</sup> *Id.* at 253.

cepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.<sup>104</sup>

The Court distinguished between protection for the developed paternal relationship, which is a protected liberty interest, and the opportunity to form a relationship, which the state must "adequately" protect.<sup>105</sup> New York's statute provided that notice of an adoption is required for involved fathers, which *Lehr* was not,<sup>106</sup> and for those who register with the putative father registry, which *Lehr* had not done. Since the registry was available regardless of the degree of the man's involvement and without the mother's agreement, the Court found that the statutory provision did not arbitrarily exclude from notice many responsible fathers.<sup>107</sup>

The *Lehr* Court posits that whether a particular person enjoys a liberty interest in parenthood turns on whether the "intangible fibers that connect parent and child" are "sufficiently vital to merit constitutional protection."<sup>108</sup> The dissent criticizes this formulation because it wrongly imposes a balancing test in the place of a due process analysis.<sup>109</sup> If the majority is right, coercive intercourse may give rise to a liberty interest only if sufficiently vital "intangible fibers" are developed later between the man and the child. If the dissent is right, coercive intercourse may give rise to a liberty interest in the biological father to claim paternity, but the degree of process that is due must be addressed in a context that includes the mother and the child as well as the biological father.

Under either the majority opinion or the dissent, a person who coerced intercourse and who failed to develop a relationship with the child has, at best, a minimal liberty interest in paternal

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<sup>104</sup> 463 U.S. at 261 (quoting *Caban v. Mohammed*, 441 U.S. 380, 392 (1979)).

<sup>105</sup> *Lehr*, 463 U.S. at 263.

<sup>106</sup> *Id.* at 263-64.

<sup>107</sup> *Id.* at 256.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 270-73 (White, J., dissenting).

recognition.<sup>110</sup> In the relatively less common experience of stranger rape, the *Lehr* case should mean that the mother has nothing to fear in terms of a paternity claim by the rapist. By definition, the mother has no relationship with a stranger who rapes her prior to or following the sexual offense, so he cannot use contact with the mother to establish a relationship with the child. As a practical matter, a rapist is unlikely to register or otherwise demand paternal recognition, because his claim of a genetic connection to the child supplies the evidence of sexual contact with the woman that is needed for the rape conviction. Nonetheless, some convicted rapists have not only asserted paternal rights but were awarded custody or visitation with the child.<sup>111</sup> Their procedural opportunity is provided by states that go beyond the procedural minimums required by *Lehr*. Numerous states, for example, do not require registration for a person to be entitled to notice of a proposed adoption; instead, notice must be given to anyone who can assert paternity on the basis of a genetic connection.<sup>112</sup> Similarly, his entitlement to seek custody and guardianship usually turns on a genetic connection standing alone rather than on a parent-child relationship with the child.<sup>113</sup>

Given that most states do not deny paternal recognition to convicted rapists, it is not surprising that states provide more than minimal due process in the more common situation of coerced intercourse that occurs during a time when the parents are married, living together, or otherwise engaged in an intimate relationship. The issue appears not to have been raised in *Lehr*, although abuse is a plausible explanation for why Lorraine Rob-

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<sup>110</sup> See, e.g., Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 482-83 (2017) (reviewing standard interpretations of *Lehr* as requiring the state to provide some due process at some level to the genetic father who has only an inchoate interest in a relationship with the child but not at the same level as the fundamental rights that characterize “full-blown” parenthood)

<sup>111</sup> See, e.g., Emily Wax-Thibodeau, Alice Crites & Julie Tate, *Rape Survivor Fighting Rapist for Custody of Child in Alabama*, INDEPENDENT (UK) (June 11, 2019), <https://www.independent.co.uk/news/world/americas/alabama-abortion-ban-rape-victims-rapists-parental-rights-a8951751.html>.

<sup>112</sup> Cecily L. Helms & Phyllis C. Spence, *Take Notice Unwed Fathers: An Unwed Mother's Right to Privacy in Adoption Proceedings*, 20 WIS. WOMEN'S L.J. 1 (2005)

<sup>113</sup> Baker, *supra* note 68.

Robertson hid herself and the baby from Jonathan Lehr. As often happens in these situations, however, leaving the shared home may not free Robertson of Lehr as a co-parent. In addition to the requirement in many states that the mother inform the man of an adoption action, she may also be subject to a requirement by the state that she cooperate in the establishment of his paternity and child support obligation. Most mothers who need public benefits to provide for the child are required to assign their right to child support from the child's father.<sup>114</sup> To qualify for benefits, the mother is usually required to inform the government of the man's identity even if he has never registered, done anything to establish a relationship with the child, or otherwise identified himself as the child's father.<sup>115</sup> The state then uses the woman's mandatory assignment of child support as the basis for suing the man to establish his paternity and child support obligation. The mother can prevent the suit only if she qualifies for a "good cause" exemption.<sup>116</sup> While rape would seem an obvious basis for a good cause exemption, not every state recognizes it as such.<sup>117</sup> Even in states that recognize rape as good cause, the proof requirements may be insurmountable.<sup>118</sup> Coerced intercourse may constitute good cause in those states that recognize domestic violence as a basis for exempting applicants from the cooperation requirement, but few applicants appear to know about the exemption and exemptions are rarely granted.<sup>119</sup> In other words, the limited due process required under *Lehr* has not resulted in

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<sup>114</sup> 42 U.S.C. § 654.

<sup>115</sup> ELLMAN ET AL., *supra* note 10, at 576-80

<sup>116</sup> 42 U.S.C. § 654(29).

<sup>117</sup> Aviva Nusbaum, *The High Cost of Child Support in Rape Cases*, 82 *FORDHAM L. REV.* 1331 (2013).

<sup>118</sup> *Id.*; June Gibbs Brown, *Client Cooperation with Child Support Enforcement: Use of Good Cause Exceptions* 4 (Health & Human Services Office of Inspector General Mar. 2000), <https://oig.hhs.gov/oei/reports/oei-06-98-00043.pdf> (despite general agreement that "most, if not all" client requests for good cause exceptions are legitimate, requests for exceptions are rarely made).

<sup>119</sup> Rachel J. Gallagher, *Welfare Reform's Inadequate Implementation of the Family Violence Option: Exploring the Dual Oppression of Poor Domestic Violence Victims*, 19 *AM. U. J. GENDER SOC. POL'Y & L.* 987 (2011); Daniel L. Hatcher, *Remembering Anti-Essentialism: Relationship Dynamics Study and Resulting Policy Considerations Impacting Low-Income Mothers, Fathers, and Children*, 35 *L. & INEQUALITY* 239 (2017) States have financial incentives to minimize the number of exceptions that are granted. See Candice Hoke, *State*



limited due process in practice when the government wants the man to pay child support.

If Lorraine had been married to Jonathan or if she had returned with the baby to their common home, the *Lehr* case offers less protection by its own terms. The intimate partner or spouse is likely to be cohabiting with the woman before and after the child's birth, so he can claim a relationship with the child, unlike *Lehr*. In the hospital, she may be too intimidated by the couple's power dynamic or by fear of impoverishment to keep the man's name off the child's birth certificate or an acknowledgment of parenthood. In contrast to *Lehr*, therefore, the man will have more evidence of his intent to participate in the child's upbringing.

The question, then, is what process is due to a man when the child is the result of coerced intercourse and the mother does not want the man's participation in parenthood. My argument is that the Constitution requires minimal procedural protection. Where the mother shows reasonable grounds to believe that the intercourse was coerced, the man's paternity claim can be denied unless he demonstrates that the intercourse was not coerced or that he has developed a significant parental relationship with the child.<sup>120</sup> Anything more gives the man an undue advantage in terms of controlling the woman's reproductive and parental autonomy, regardless of whether the paternity claim is based on the genetic tie, a marital presumption, an acknowledgement of paternity, or some minimal relationship with the child, and regardless of whether the coerced intercourse was criminal. The minimal process should protect the woman's reproductive and parental autonomy regardless of whether the litigation involves adoption or custody, or whether the state is demanding the woman's cooperation in establishing a man's parental obligation to support the child.

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*Discretion Under New Federal Welfare Legislation: Illusion, Reality and a Federalism-Based Constitutional Challenge*, 9 STAN. L. & POL'Y REV. 115 (1998).

<sup>120</sup> Under the minimum due process regime, a man's paternity can be recognized if he acts as a parent to the child for a minimum period of time. The UPA of 2017 suggests two years. UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM'N 2017); see Courtney G. Joslin, *Nurturing Parenthood Through the UPA*, 127 YALE L.J. FORUM 589 (2018) (recognizing parenthood in a person who resides with and holds out a child as their own for a minimum of two years regardless of any genetic connection between the adult and the child).

Minimal process means that the man is not entitled to notice in an action involving the custody or adoption of the child unless he has sought to be notified by registering or otherwise making himself known as a paternal claimant before the adoption petition is filed. Also, unless the man has come forward, the state should not be permitted to require child support cooperation when a woman has shown reason to believe that the intercourse was coerced. In the case of a man who has never established a relationship with the child and who sues to establish fatherhood based on a formal connection, such as marriage or an acknowledgment of parenthood, the woman can put his claim in doubt by demonstrating reason to believe that the intercourse was coerced. The burden then shifts to the man to demonstrate, by a preponderance of the evidence, that the child's birth was not the result of coerced intercourse or that he has established a parental relationship with the child. Since his paternity is not established unless he makes the required showing, there is no need to terminate his rights through an action initiated by the mother, as is required under the UPA and multiple state statutes.<sup>121</sup>

The classic test for how much process is due comes from *Mathews v. Eldridge*, which identified three factors that must be considered.<sup>122</sup> As applied in *Turner v. Rogers*, a civil proceeding in which the mother sought child support from the father, the Court identified the three factors as:

- (1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement[s]."<sup>123</sup>

The "private interest" of the man at issue here is to be recognized as the legal parent of a child born to a person with whom he had sex. As discussed earlier, the key facts are that the man

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<sup>121</sup> UNIF. PARENTAGE ACT § 614; see Connie J.A. Beck, Laila Alshami, Melissa de la Luz, Andrea N. Camacho de Anda, Heather J. Kendall, Elizabeth S. Rosati, Margaret C. Rowe, *Children Conceived from Rape: Legislation, Parental Rights and Outcomes for Victims*, 15 J. CHILD CUSTODY 193 (2019) (survey of state statutes on termination of the parental rights of rapist); Courtney G. Joslin, *Preface to the UPA*, 52 FAM. L.Q. 437, 461-63 (2018); Prewitt, *supra* note 52.

<sup>122</sup> 424 U.S. 319 (1976).

<sup>123</sup> *Turner v. Rogers*, 564 U.S. 431 (2011).

coerced the intercourse which resulted in the birth of the child and the man has not established a relationship with the child. In *Lehr*, a case where the issue of coercive intercourse was not raised, the Court found no fault with New York law, which required the biological father who had no relationship with the child to take affirmative acts before his paternity claim was recognized. The Court's analysis of the private interest in *Smith v. Organization of Foster Families*<sup>124</sup> helps to understand why. In *Smith*, foster parents who had cared for a child for more than eighteen months demanded a hearing prior to the removal of the child when the child was not being returned to their legal parents but was instead being placed with another foster family. The Court, without deciding on whether the families had a cognizable liberty interest in continuing their family relationship with the child, said that the asserted interest had to be addressed in the context of other interests affecting the decision.<sup>125</sup> Those interests included two competing claims, both of which are pertinent to this analysis. First is the interest of a legal parent to care for their child.<sup>126</sup> That interest might be impeded if foster parents are recognized as having a parent-like liberty interest in continuing their relationship with the child. In a competition with a foster parent, a legal parent is likely to be at a disadvantage in terms of social and economic privilege; adding what amounts to procedural equality could result in legal parents being excluded more readily from their child's life.<sup>127</sup>

The second competing claim is the interests of the government in maintaining and managing the foster care system.<sup>128</sup> The Court emphasized that the relationship between the foster parent and the child originated in a contract with the government, so foster parents know from the beginning that the relationship can be terminated by the government as well.<sup>129</sup> Foster parents, therefore, are not the kind of parents who have the constitutional right to be insulated from governmental interference in most situations. Parents who enjoy that insulation include those whose

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<sup>124</sup> 431 U.S. 816 (1977).

<sup>125</sup> *Id.* at 838.

<sup>126</sup> *Id.* at 839–40.

<sup>127</sup> *Id.* at 846–47.

<sup>128</sup> *Id.* at 845–46.

<sup>129</sup> *Id.*

parental claims rest in the usual sources of parental rights such as marriage and where biology is coupled with caring for a child.<sup>130</sup>

The origin story that the Court tells in *Smith* can be criticized, of course, because those foster parents entered into the relationship for the purpose of becoming a caring family environment for a child who had no parent able to provide care, and they had done exactly that.<sup>131</sup> Not according caring and nurturing foster parents an opportunity to fully contest a decision to remove a child from their care before that removal could mean that the child is harmed for no good reason. The origin story nonetheless helped to move the Court toward a conclusion that the private interest of the foster families was less than robust.<sup>132</sup>

The private interest of a man asserting a claim of parenthood of a child with whom he has no relationship and who was conceived coercively falls short when compared with the claims of the foster parents in *Smith*. First, giving weight to his claim imposes a burden on the child's other parent, who must either endure sharing parenthood with him or undertake the unpredictable and difficult process of satisfying a high standard of proof to terminate his parenthood. Second, any plausible liberty claim that arises out of his biological tie to the child should be defeated, as it was in *Smith*, by the origin story. Just as the foster parents in *Smith* should not expect to be treated as parents after entering into a contract that denies those expectations, a man who coerces sex should not expect to be treated as a parent of any resulting child unless he persuades the child's mother to allow a relationship to develop after the child is born.

The second *Turner v. Rogers* factor is “the comparative ‘risk’ of an ‘erroneous deprivation’ of that interest with and without ‘additional or substitute procedural safeguards.’”<sup>133</sup> Some accusations of coerced intercourse are invalid.<sup>134</sup> Given the importance of a person's right to raise their children, a man must have

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<sup>130</sup> *Id.* at 843–44.

<sup>131</sup> *Id.* at 844.

<sup>132</sup> *Id.* at 845.

<sup>133</sup> *Turner*, 564 U.S. at 444–45.

<sup>134</sup> The claim of coerced intercourse may be found invalid because of insufficient proof, as discussed below. Alternatively, the claim may be found invalid because the evidence demonstrates that the participants agreed to participate in a sexual act that could be viewed as coercive to others but which the participants viewed in a different light. See Janet Halley, *The Politics of*

sufficient opportunity to contest the denial of parental recognition. That opportunity need not exceed what is proposed, however, because additional process does not decrease the likelihood of an erroneous deprivation.

One common way to protect a man from losing parental rights in cases involving rape is to impose a heightened standard of proof such as clear and convincing evidence. In my proposal, by contrast, the standard of proof imposed on the woman is lower; she needs to show only “reasonable grounds” that the intercourse occurred because of coercion. The burden then shifts to the man to demonstrate, by a preponderance of the evidence, that intercourse was not coerced. Imposing a higher standard of proof on the woman to demonstrate coerced intercourse increases the likelihood that the man’s paternity claim will succeed, but there is no reason to believe that the heightened standard increases the accuracy of the outcome.

The heightened burden of proof found in many termination statutes reinforces old unproven stereotypes that women lie about rape. Skepticism about women’s credibility around sexual imposition may be in decline since the inception of the Me Too Movement.<sup>135</sup> No evidence of waning shows up in state laws which address termination of paternity in the case of rape, however. Maryland provides a relatively recent example of the durability of a man’s legal parenthood in the face of credible allegations of rape and other sexual offenses. In 2018, which was ten years after the legislation was first proposed by advocates, the legislature passed a bill allowing for the termination of parental rights in some cases where coerced intercourse resulted in the birth of a child.<sup>136</sup> The statute applies regardless of marital status if the man was convicted of an act of nonconsensual sexual conduct.<sup>137</sup> When the parents were not married at the time of conception, the statute applies to nonconsensual sexual conduct which is evidenced by clear and convincing evidence.<sup>138</sup> In the

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*Injury: A Review of Robin West’s Caring for Justice*, 1 UNBOUND: HARV. J. LEGAL LEFT 65, 69-71 (2005).

<sup>135</sup> Joanna L. Grossman, *Sexual Harassment in the Post-Weinstein World*, 11 U.C. IRVINE L. REV. 943, 990 (2021).

<sup>136</sup> MD. CODE ANN., FAM. LAW § 5-1402.

<sup>137</sup> *Id.* § 5-1402(b).

<sup>138</sup> *Id.* § 5-1402(a)(2).

absence of a conviction, the statute applies to a married parent only upon conviction or when the parents separated under a protective order and have remained apart since the conception.<sup>139</sup> Even where the nonconsensual sexual conduct is proved, the court must find, by clear and convincing evidence, that it is in the best interest of the child to terminate the paternal rights of an unmarried partner.<sup>140</sup> Further, termination of paternal rights also terminates paternal responsibility, most notably child support.<sup>141</sup> In the absence of a termination order, a woman whose pregnancy resulted from coerced intercourse can be required to share legal and physical custody with the man who coerced the intercourse, and she cannot place the child for adoption without notifying him and obtaining his consent.<sup>142</sup>

Maryland goes to great lengths to test a woman's claim that the child's birth was the result of sexual imposition and to protect men accused of nonconsensual sexual conduct from losing paternal rights. Termination can be denied if the woman cannot get a conviction or produce clear and convincing proof of the conduct, or if she was not prescient enough to obtain a protection order before she was coerced by her husband. It is fair to ask whether the statute reflects the long discredited assertion of two long dead British jurists – Blackstone and Hale – that rape “is an accusation easy to be made, hard to be proved, but ‘harder to be defended by the party accused, though innocent.’”<sup>143</sup>

The third *Turner v. Rogers* factor is the nature and magnitude of any countervailing interest in not providing ‘additional or substitute procedural requirement[s].’<sup>144</sup> At least three countervailing interests should be considered: the birth mother's repro-

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<sup>139</sup> *Id.* § 5-1402(b).

<sup>140</sup> *Id.* § 5-1402(a)(3).

<sup>141</sup> *Id.* § 5-1402(c), Prewitt, *supra* note 52, at 856-57; Bitar, *supra* note 55, at 289-90.

<sup>142</sup> *Id.* § 5-3B-05. The UPA of 2017 comes to the opposite conclusion about the responsibility for child support; the man can be denied paternity but remains responsible for support unless the woman requests otherwise, and the court concludes that her decision is in the best interests of the child. UNIF. PARENTAGE ACT § 614(f)(3)(UNIF. L. COMM'N 2017); see Joslin, *supra* note 121, at 463.

<sup>143</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES Ch. 15; 1 M. HALE, PLEAS OF THE CROWN 635 (1680).

<sup>144</sup> *Turner*, 564 U.S. 431.

ductive and parental autonomy, the child's well-being and the state's concerns about getting the cooperation of mothers for the purpose of establishing and collecting child support.

The child's well-being may be implicated in two ways. First, if the birth mother decides to place the child for adoption, possible adoptive parents may be deterred from pursuing adoption when the child's other parent enjoys substantial due process protections.<sup>145</sup> Second, if the birth mother decides to raise the child, she has to contend with sharing parental rights with a man who coerced intercourse and who may use the legal relationship with the child to maintain control over the woman's reproductive and childrearing decisions. Generally, children who are raised in non-conflictual families have an easier time of it, and this situation is no exception.<sup>146</sup> Insulating the mother from sharing parenthood in these circumstances should be beneficial for most children.

The state has an interest in making the establishment of paternity easier rather than harder because legal parents owe child support, and child support may keep some children from needing public benefits. Where a child needs public benefits, further, child support may reimburse the state for providing support. The state's purely financial interest in child support is entitled to a full measure of respect when the risk to the woman and child are insubstantial, but it must yield where a woman can show reasonable grounds to believe that she was subjected to coerced intercourse.

The state's interest in collecting child support from as many men as possible is also an inadequate justification for preferring the man over the woman in a dispute over parentage after a rape-related pregnancy. Over the last half-century, states have been subject to increasing pressure from the federal government to vigorously enforce child support obligations.<sup>147</sup> Child support

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<sup>145</sup> This concern surfaced early in the history of Supreme Court cases expanding rights of unwed fathers. See *Caban*, 441 U.S. at 408 (Stevens, J., dissenting); *Lehr*, 463 U.S. at 264.

<sup>146</sup> See Paul R. Amato & Bruce Keith, *Parental Divorce and the Well-Being of Children: A Meta-Analysis*, 110 *PSYCHOL. BULL.* 26, 38 (1991); Janet R. Johnston, *High Conflict Divorce*, 4 *FUTURE OF CHILDREN* 165 (1994); Pamela Laufer-Ukeles, *The Children of Nonmarriage: Towards a Child-First Family Law*, 40 *YALE L. & POL'Y REV.* 384, 426-30 (2022).

<sup>147</sup> The child support reimbursement policy has been subject to criticism by many scholars who argue that it produces little financial benefit for the state

is owed by a child's legal parents, which usually include the child's mother and the child's father or other second parent.<sup>148</sup> Most often, the second parent is a marital partner of the mother, a person who acknowledges parenthood or a person who is proven genetically to be the child's parent. If coercive intercourse means that the second parent is not recognized as a legal parent to a child, the state may not be able to collect child support from him, contrary to federal policy and, in some cases, the state's fiscal interest. Making the circumstances of conception relevant to the child support decision would complicate what has become a highly routinized system for imposing and enforcing child support obligations. Elevating the state's fiscal interest over a woman's reproductive and parental autonomy, however, imposes intolerable costs on her citizenship and bodily and emotional integrity.

The child support enforcement system imposes limits on the parental autonomy of women in poverty because they are often required to assign or cooperate in establishing child support as a condition of eligibility for public benefits for a child such as TANF, Medicaid, and SNAP.<sup>149</sup> While exceptions to the requirement may be allowed in some cases of rape and family violence, those exceptions may not be made available in cases of coerced intercourse, either as a matter of policy or as a matter of caseworker discretion.<sup>150</sup> Where a woman has income or wealth sufficient to support a child without child support and public benefits, however, the state cannot impinge on a woman's decision

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or the child's family and can result in significant detriment to the parent-parent and the parent-child relationships. *See, e.g.*, Margaret F. Brinig & Marsha Garrison, *Getting Blood from Stones: Results and Policy Implications of an Empirical Investigation of Child Support Practice in St. Joseph County, Indiana Paternity Actions*, 56 FAM. CT. REV. 521 (2018); Linda Elrod, *Child Support Reassessed: Federalization of Enforcement Nears Completion*, 1997 U. ILL. L. REV. 695; Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029 (2007).

<sup>148</sup> ELLMAN ET AL., *supra* note 10, at 503-04.

<sup>149</sup> *Id.* at 576-80; *see* Katharine K. Baker, *Procreation and Parenting*, OXFORD HANDBOOK CHILDREN & L. 10 (Nov. 2018); Nusbaum, *supra* note 118.

<sup>150</sup> *See* Susan Notar & Vicki Turetsky, *Models for Safe Child Support Enforcement*, 8 AM. U. J. GENDER SOC. POL'Y & L. 657 (2000); Nusbaum, *supra* note 118; *supra* notes 117-120.



not to establish a child's paternity. Such women, who usually enjoy racial, educational or other social advantages along with some degree of financial security, may be less likely to confront paternal claims after coercive intercourse or may have incentives to litigate the issue in fewer situations.

Where the countervailing interests of the mother are considered, the Court has provided guidance about balancing the interests of a man and a woman in terms of reproductive autonomy in *Planned Parenthood v. Danforth*<sup>151</sup> and in *Planned Parenthood v. Casey*.<sup>152</sup> In both cases, the autonomy of the woman is accorded greater weight than that of the man. In *Danforth*, the Court held that the state cannot require the consent of the husband of a pregnant woman before she gets an abortion during the first trimester.<sup>153</sup> The Court reasoned that, since the state cannot prohibit an abortion during the first trimester, the state cannot delegate that power to a husband.<sup>154</sup> That rationale may be a fragile reed at the moment, however, given the Court's receptivity to attacks on abortion rights.<sup>155</sup> The second part of the Court's reasoning may be more durable. While acknowledging that the abortion decision affects both partners to a marriage, the Court said,

The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the women who physically bears the child and who is more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.<sup>156</sup>

When balanced against that of the husband, the liberty interest of the wife is also found to be of greater moment in *Planned Parenthood v. Casey*, where the Court concludes that a state cannot require the wife to inform her husband of her decision to have an abortion.<sup>157</sup> The Court is concerned about the vulnerability of a wife to reproductive coercion, rape, and physical and

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<sup>151</sup> 428 U.S. 52 (1976).

<sup>152</sup> 505 U.S. 803 (1992).

<sup>153</sup> *Danforth*, 428 U.S. at 69.

<sup>154</sup> *Id.*

<sup>155</sup> See *Jackson Women's Health Organization v. Dobbs*, 945 F.3d 265 (5th Cir. 2019), *cert. granted in part*, *Dobbs v. Jackson Women's Health Organization*, 141 S. Ct. 2619 (2021).

<sup>156</sup> *Danforth*, 428 U.S. at 71.

<sup>157</sup> *Casey*, 505 U.S. 803.

emotional abuse and threats at the hands of a husband.<sup>158</sup> The Court also echoes the *Danforth* argument that the experience of the woman of pregnancy, childbirth, and parenthood is different from that of the husband and entitles her to autonomy in respect of her reproductive decisions.<sup>159</sup> To do otherwise, according to Justice O'Connor, unduly burdens her liberty interest in ways that are reminiscent of the now-rejected common law doctrines such as coverture under which the husband controlled the wife's reproductive and parenting decisions.<sup>160</sup>

The *Casey* Court does not assert that the greater authority of wives over parenthood continues indefinitely. Instead, wives and husbands are found to have equivalent liberty interests after a child is born *and* the husband has joined the wife in raising the child.<sup>161</sup> Once the child is born and is being raised by both spouses, the father's interest equals that of the mother, and the state can require that she notify the father about her plans for a child.<sup>162</sup>

Because the Court ties the relative liberty interests to parental conduct before and after the child's birth, reliance is placed both on *Danforth* and on the four early cases in which the Court considered the interests of unmarried men in legal recognition of parenthood of their offspring. The Court concluded that states must recognize the interest when the man is both the genetic father of the child *and* involved in raising the child.<sup>163</sup> States can deny the interest, however, when the genetic father is not involved in raising the child.<sup>164</sup> In the former situation, the Court says that states cannot draw a gender-based distinction under which the mother has greater authority than the father to determine who is recognized as the parent of a child.<sup>165</sup> In the latter situation, the state can treat the parents differently and authorize

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<sup>158</sup> *Id.* at 893.

<sup>159</sup> *Id.* at 895-96.

<sup>160</sup> *Id.* at 896-97.

<sup>161</sup> *Id.* at 895-96.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 895; *see Stanley v. Illinois*, 405 U.S. 645 (1972); *Caban*, 441 U.S. 380.

<sup>164</sup> *Casey*, 505 U.S. at 895; *see Quilloin*, 434 U.S. 246; *Lehr*, 463 U.S. 248.

<sup>165</sup> *Caban*, 441 U.S. at 394.

the mother to decide whether the child is adopted without consulting the father.<sup>166</sup>

While the Court recognizes that, on balance, the liberty interests of a woman in abortion and parenthood are weightier than those of a man whose only connection to the child is genetic or marital, most states do not follow that path. Instead, most recognize equivalent parental interests in two parents from the moment of the child's birth. According equal weight to the interests of the parents means that the woman cannot determine who she wants to parent with, if anyone. Denying her that autonomy in the context of coerced intercourse is an unacceptable and unfair restriction of her liberty.

In most circumstances, treating the parents equally recognizes and affirms their equal potential to provide a child with support and nurturance.<sup>167</sup> In the case of coerced intercourse, however, recognizing equal liberty interests at the time of birth in effect rewards the coercion by automatically according the rapist the legal status of fatherhood. Equal recognition denies the weightier interest of a woman who bore the child when she wants to parent separately from the rapist; equal recognition means she is subject to his continued control and coercion through his equal parental status. She may even be subject to continued coerced intercourse.

Reproductive and parental autonomy is essential to women's full participation in society, economic activity, and parenthood.<sup>168</sup> Legal recognition of a parental partner does not, in general, interfere with a woman's exercise of reproductive autonomy. Coerced intercourse is the opposite of reproductive and parental autonomy. Instead, the man has control over whether a woman will get pregnant, whether she will bear the child,

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<sup>166</sup> *Quilloin*, 434 U.S. 246; *Lehr*, 463 U.S. 248.

<sup>167</sup> See *Caban*, 441 U.S. 380. Feminists are far from taking a uniform position on this issue. See Susan Frelich Appleton, *Gender and Parentage: Family Law's Equality Project in Our Empirical Age*, in *WHAT IS PARENTHOOD? CONTEMPORARY DEBATES ABOUT THE FAMILY* 237, 237-38 (Linda C. McClain & Daniel Cere eds., 2013); Hendricks, *supra* note 110; Serena Mayeri, *Foundling Fathers: (Non)Marriage and Parental Rights in the Age of Equality*, 126 *YALE L.J.* 2292 (2016); NeJaime *supra* note 64, at 290.

<sup>168</sup> See, e.g., *Casey*, 505 U.S. at 860; ("An entire generation has come of age free to assume Roe's concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions . . .").

whether she will raise the child or place the child for adoption, whether he will be part of the child's life, and so forth. If the perpetrator suffers no sanction, he has no incentive to respect the woman's reproductive or parental autonomy.

Criminal sanctioning would, of course, be welcome in many cases. In the absence of criminal sanction or in addition to it, the state can also give the perpetrator an incentive to respect the woman's reproductive autonomy by denying him recognition of a legal connection to the child. From a legal perspective, and hopefully from a functional perspective as well, denying recognition is an effective sanction because it interrupts the exercise of the power of the perpetrator over the woman's reproductive autonomy. When her liberty interest is recognized as weightier than his, she gains the possibility of parenting the child without his control or placing the child for adoption without his veto; she can exercise exclusive parental authority.

### *C. Equal Protection Requires Minimal Due Process*

When state law provides more process than is due to men who coerce intercourse and then claim parenthood, the result is that women are denied equal protection in terms of reproductive and parental autonomy. The man's interests are elevated unequally over those of the woman. Although states are not mandated to provide robust procedural protections to a man's claim of paternity, the usual procedures give the man an advantage when he seeks to establish paternity as compared to a woman who is seeking to deny or terminate paternity. A man must meet the usual civil standard of preponderance of the evidence; if his evidence of presumed or genetic parentage meets that standard, his paternity is recognized regardless of whether an allegation of coerced intercourse is made. A woman must meet a heightened standard before she can deny or terminate a man's paternity claim on the basis of coerced intercourse: beyond a reasonable doubt if the state requires conviction of a sexual offense, or clear and convincing evidence if the state allows denial or termination without a conviction.

The gendered procedural differences cannot be sustained unless the classification serves important governmental objectives and is substantially related to the achievement of those

objectives.<sup>169</sup> Three possible interests may be involved. First is protecting parents from state intervention. Second is facilitating the collection of child support. Third is historical skepticism about the validity of women's claims about sexual imposition. None of the three is sufficient to support the imposition of heavier procedural burdens on mothers who want to deny paternity to a man who coerced the intercourse that resulted in the birth of the child.

The first interest, protecting parents from state intervention, is based in the long tradition in the United States of entrusting the care and raising of children to parents rather than the state.<sup>170</sup> The state is constrained from intervening in parental decision-making because of the presumption that parents act in the best interests of their children and because constraint supports parental incentives to do so.<sup>171</sup>

The state is not required to recognize every claim of paternity.<sup>172</sup> Once a person is recognized as a legal parent, however, the state cannot use its greater power and resources to terminate parental status without showing by clear and convincing evidence that termination is required.<sup>173</sup> A man seeking to establish paternity needs to meet the lower standard of preponderance of the evidence. The difference between the state's burden for termination of paternity and the man's burden for establishment of paternity is the same as the difference between the woman's burden for termination of paternity and the man's burden for establishment of paternity. Carrying the standard from one context to the other may seem appropriate in a formal sense, but placing the same burden on the mother as on the state does not advance the objective of restricting the state's capacity to intervene in parental authority.

The power the state can exert over parents is the opposite of the experience of a woman who gives birth as the result of co-

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<sup>169</sup> *United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976); Reva Siegel, *Gender and the United States Constitution: Equal Protection, Privacy, and Federalism*, in *THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* 313-14, 316-17 (Beverly Baines & Ruth Rubio-Marín, eds. 2004).

<sup>170</sup> See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000); NeJaime, *supra* note 64.

<sup>171</sup> *Troxel*, 530 U.S. 57.

<sup>172</sup> *Michael H.*, 491 U.S. 110; *Lehr*, 463 U.S. 248.

<sup>173</sup> *Santosky*, 455 U.S. 745.

erced intercourse.<sup>174</sup> A man used social, physical, and emotional power to accomplish his goals about sex and reproduction and to deny the woman the right to decide about whether, when, and with whom she wanted to reproduce and parent. The imbalance of power does not evaporate when the child is born, and it is reinforced by the heightened standard of proof which protects his parental status. Assuming that she could make her case if the standard of proof were the usual standard of preponderance of the evidence, the heightened standard gives him a relatively better chance to continue to control her reproductive and parental choices through his legal connection to the child. Unlike the mother who is subjected to coercive intercourse, the state can assert its power to deny a person autonomy with respect to reproduction and parenting in a variety of ways. Using procedural burdens to protect a person's parenthood against the power of the state helps to limit the exercise of the state's power. Using the same differentiated procedural burdens to protect a person's parenthood against the power of a subjugated partner only advances the private agenda of a man to control a woman with whom he has had sex and, in many cases, been in an abusive relationship.

The second and third interests — facilitating the collection of child support and skepticism about the validity of women's claims about sexual imposition — we discussed earlier in terms of terms of balancing the interests of men, women, children and the state when considering the process which is due to a man asserting paternity facing opposition by a woman on the basis of

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<sup>174</sup> Notice that, of course, I am not arguing here that the man is entitled to assert a constitutional claim against the woman, since the Fourteenth Amendment runs against the state, not against private parties. What the woman experiences, however, is a deprivation of her autonomy when the state supports the man's assertion of paternity over her interest in autonomy with respect to reproduction and parenthood. It has been argued that her parental autonomy is entitled to the same degree of constitutional protection under *Troxel* against an unmarried putative father as it is against any other third party. See Hendricks, *supra* note 111, at 512-13. That is different from the argument I am making here, but it leads to similar results where the man is married to the woman and uninvolved with the child. Hendricks does not appear to be making the *Troxel* argument to protect the parental autonomy of a married woman when her spouse is similarly uninvolved with the child.

coerced intercourse.<sup>175</sup> Collecting child support is undeniably an important government interest, but, as was explained earlier, that interest cannot be allowed to take precedence over the interests of the woman and child to be safe, or over the reproductive and parenting autonomy of the woman.<sup>176</sup> Reinforcing skepticism about women's truthfulness with respect to sexual conduct is not a valid governmental interest at all, because, as discussed earlier, the skepticism is grounded in historically unfounded stereotypes about women. Further, the skepticism serves to deny women protection against sexual imposition in ways that "create or perpetuate the legal, social, and economic inferiority of women,"<sup>177</sup> exactly the type of status inferiority that "offends the Equal Protection Clause."<sup>178</sup>

Decisions by the Court in a number of cases where it has upheld gender-based distinctions have been criticized for relying on stereotypes about mothers having stronger "natural" connections to their children. Upholding the differential treatment of men and women in terms of paternal recognition in the case of coerced intercourse does not reinforce a stereotype. Instead, it is a specific response to a particular harm inflicted by conduct: the subjection of a woman to a man's will about her reproductive life. The expressive message of cases that turn on stereotypes is that all women are mothers;<sup>179</sup> the expressive message of denying parenthood to a man after coercive intercourse is that a woman's freedom to control her reproductive and parental life matters.

## Conclusion

Sharing a pregnancy, giving birth and raising a child together with a partner can be one of life's peak experiences. When a man is willing to disregard a woman's reproductive and parental autonomy, however, and impose his will on her about when and whether she should bear a child and whether and how she should raise a child, her experience can be one of danger, fear, and depression. Paternal recognition provides the man with the force of

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<sup>175</sup> See *supra* notes 157-166.

<sup>176</sup> See *supra* notes 147-150.

<sup>177</sup> *United States v. Virginia*, 518 U.S. 515, 534 (1996).

<sup>178</sup> Siegel, *supra* note 170, at 317.

<sup>179</sup> *Id.*

law to continue to impose his will, regardless of the woman's vision for herself and the child.

People who are recognized as parents enjoy strong legal and Constitutional protection. The categories of people who are entitled to parenthood, however, need not include a man who commits rape or coerces intercourse. Indeed, as my incredulous friends are indicating, thinking of rapists and abusers as parents demeans a person who enters into parenthood by respectfully engaging in reproduction and parenthood with a partner who shares the same goals. As a factual matter, who belongs in which category may not be crystal clear in every case, but minimal due process is sufficient to sort out who belongs in one category and who belongs in the other.

Providing greater procedural protections for a man's claim of paternity over a woman's assertion of coerced intercourse means that he retains an unfair and unjustifiable advantage over a woman who has already been subject to gendered power and abuse. Denying a man paternal status when he has coerced intercourse is consistent with other trends in gender and family law toward greater equality of men and women in the realms of reproduction and parenthood. No husband can rape his wife without the possibility of criminal sanction. No "master" can own the child born to the enslaved woman whom he raped. And no parental privilege should come to a man who decides, without regard to the woman's will or wish, that it is time for her to get pregnant and to parent a child with him.



## When the Helping Hand Hurts: How Medical Child Abuse Charges Are Undermining Parents' Decision-Making Rights over Children's Medical Care

by  
Maxine Eichner<sup>1</sup>

More than forty years ago, in the pages of the *Yale Law Journal*, Joseph Goldstein, one of the leading scholars in the field of American family law,<sup>2</sup> cautioned against the misuse of “the vague and subjective language of neglect and abuse statutes” to “give the state unguided discretion to supervene parental decisions with regard to health care for their children.”<sup>3</sup> Professor Goldstein warned that such statutes could be misconstrued to “release[ ] the rescue fantasies of those it empowers to intrude” – those “well-intentioned people who ‘know’ what is ‘best’ and who wish to impose their personal health-care preferences on others.”<sup>4</sup> Professor Goldstein’s comments presciently describe the recent rise of so-called “medical child abuse” (MCA) charges now being leveled against parents by doctors. Proponents of this new “diagnosis”—mainly pediatricians who specialize in child abuse—argue that parents who seek medical care that a doctor deems unnecessary have committed abuse, and doctors should “diagnose” this abuse and report it to child protection authorities.

Unfortunately, the definition of MCA developed by its proponents, as well as the process that they use to determine

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<sup>1</sup> Graham Kenan Distinguished Professor of Law, University of North Carolina School of Law; J.D., Ph.D. I am grateful for the excellent work of my research assistants, Elise Jamison and Cassandra Zietlow.

<sup>2</sup> See JOSEPH GOLDSTEIN, ANNA FREUD, & ALFRED J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

<sup>3</sup> Joseph Goldstein, *Medical Care of the Child at Risk: On State Supervision of Parental Autonomy*, 86 *YALE L.J.* 645, 650-51 (1977).

<sup>4</sup> *Id.* at 651.

whether MCA has occurred, are so broad and vague that they allow pediatricians virtually unchecked discretion to target almost any medical care received by children as abusive. The fact that the child is legitimately sick or that the parent has sought medical care in good faith does not exclude an MCA “diagnosis.” Neither does the fact that a specialist ordered the challenged care, and often still believes it is necessary. The result is that increasing numbers of parents, particularly those with children who have complex or hard to diagnose medical issues, are being reported for child abuse. Once a report of suspected abuse is made, child protection officials and courts generally accept an MCA “diagnosis” as demonstrating child abuse,<sup>5</sup> despite the fact that MCA’s broad definition and vague diagnostic criteria allow pediatricians to target a far broader array of behavior than that which constitutes legal abuse. The result is that, when a health crisis arises, many parents with sick children, particularly those with complex medical conditions, are fighting in court to retain custody rather than making medical decisions in their children’s best interest.<sup>6</sup> In a rare but rising number of cases, states also prosecute these abuse charges criminally, so that parents must also fight to avoid prison.<sup>7</sup> Meanwhile their children are sometimes left in the hospital alone,<sup>8</sup> sometimes forced into foster care,<sup>9</sup> and

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<sup>5</sup> See Neil Swidey & Patricia Wen, *A Medical Collision with a Child in the Middle*, BOS. GLOBE (Dec. 15, 2013), <https://www.bostonglobe.com/metro/2013/12/15/justina/vnwzbbNdiodSD7WDTh6xZI/story.html>.

<sup>6</sup> See, e.g., the account of Justina Pelletier, *infra* notes 11-14 and accompanying text.

<sup>7</sup> For example, in 2015, Katie Ripstra was sentenced to two twenty-year sentences in prison by a Texas court for MCA on the testimony of doctors that the mother had induced symptoms in her child through poisoning with salt, over the testimony of two physicians — one a nationally-recognized mitochondrial disease specialist — that her daughter suffered from mitochondrial disease. See Meagan Flynn, *Jury Finds Former Nurse Guilty of Salt Poisoning Daughter*, HOUS. PRESS (Sept. 25, 2015, 5:30 PM), <http://www.houstonpress.com/news/jury-finds-former-nurse-guilty-of-salt-poisoningdaughter-7794723>. During this period, Katherine Parker was also charged criminally with MCA in Oregon for caring for her sick children. See Meg Wagner, *Oregon Mom Accused of Subjecting Three Kids to Unnecessary Surgery, Heavily Drugging Them Gets Probation*, N.Y. DAILY NEWS (Feb. 24, 2016), <https://www.nydailynews.com/news/national/ore-mom-accused-medical-child-abuse-probation-article-1.2542517>.

<sup>8</sup> This was the case for Justina Pelletier, whose parents were allowed to visit for an hour a week. See Neil Swidey & Patricia Wen, *Frustration on All*

often required to forgo medical treatment ordered by their own medical specialists and determined by their parents to be in their best interests.<sup>10</sup>

One of the first widely publicized MCA cases was that of Justina Pelletier. In February 2013, fourteen-year old Justina was admitted to Boston Children's Hospital (BCH) for gastrointestinal issues.<sup>11</sup> At that time, Justina was being treated by a well-respected Tufts University medical team for mitochondrial disease, a genetic disease that affects energy production, and which can cause gastrointestinal problems. The Tufts team had recommended to her parents that she be admitted to BCH because her long-time gastroenterologist had recently transferred there. That gastroenterologist never got the chance to treat her, however. Without consulting the Tufts doctors, BCH doctors, led by a neurologist just months out of medical training, swiftly decided that Justina did not have mitochondrial disease, an illness with complex, sometimes disputed, diagnostic criteria. Instead, BCH declared her issues psychiatric in nature, and prescribed in-patient psychiatric care.<sup>12</sup>

Faced by that conflict in physicians' medical opinions, Justina's parents should have been able to exercise their right as parents to decide between the two courses of treatment. However, when they asked BCH to transfer Justina to Tufts Hospital

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*Fronts in Struggle over Child's Future*, BOSTON GLOBE (Dec. 16, 2013), <https://www.bostonglobe.com/metro/2013/12/16/month-medical-ordeal-conclusion-still-uncertain/Y7qvYTGsq8QklkxUZvuUgP/story.html>.

<sup>9</sup> This was the case for teenager Isaiah Rider, who spent four months in foster care in Illinois after doctors at the Ann & Robert H. Lurie Children's Hospital in Chicago reported his mother for MCA. The report occurred during Isaiah's recovery from surgery to remove a tumor, when his mother considered transferring him to another hospital because she believed his pain was not being adequately managed. See Eric Adler, *Teen at Center of Medical Abuse Legal Wrangle Returns to KC, but Not to His Mom*, K. C. STAR (Sept. 20, 2014, 5:49 PM), <http://www.kansascity.com/news/local/article2184051.html>; see also Swidey & Wen, *supra* note 5 (describing Mannie Taimuty-Loomis and her husband losing custody of their three children for nine months before being cleared of MCA charges).

<sup>10</sup> See, e.g., Swidey & Wen, *supra* note 5 (describing several cases in which Boston Children's Hospital interfered with treatment ordered by specialists and accepted by parents).

<sup>11</sup> *Id.*; Swidey & Wen, *supra* note 8.

<sup>12</sup> Swidey & Wen, *supra* note 5.

because they were convinced that her issues were physical not psychiatric, the BCH child protection team “diagnosed” Justina with MCA and reported suspected abuse to child protection officials. Seeking mitochondrial disease treatment for Justina, BCH asserted, subjected the child to unnecessary medical care, and was therefore abusive. Over the objections of Justina’s mitochondrial disease specialist at Tufts, both child protection officials and the dependency court judge deferred to BCH’s expertise in diagnosing MCA, and Justina’s parents lost custody and the right to determine their child’s medical care.<sup>13</sup> After more than sixteen months and two birthdays out of her parents’ custody, much of it in BCH’s locked psychiatric ward where she was allowed to see her parents just one hour a week, Justina was finally returned to her parents in June 2014, sicker than when she entered.<sup>14</sup>

The Pelletier case was far from the only claim of MCA that BCH was pursuing at the time. In the 18-month period surrounding Justina’s MCA charges, BCH was involved in at least four other cases in which a disputed medical diagnosis led either to the parents losing custody or being threatened with losing custody.<sup>15</sup> At about the same time as Justina’s admission, a five-year-old girl who had been treated for a mitochondrial disorder at Massachusetts General was admitted to BCH. A few weeks later, her mother was escorted out of the hospital by security guards and the state took custody of the child, leaving the five-year-old without a family member by her bedside at the hospital. In two other cases, children diagnosed elsewhere with PANDAS (Pediatric Autoimmune Neuropsychiatric Disorders Associated with Streptococcal Infections), an autoimmune diagnosis accepted by some doctors but not others, and for which evidence is equivocal, were deemed victims of MCA on their admission to

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<sup>13</sup> *Id.*

<sup>14</sup> Neil Swidey & Patricia Wen, *Justina Pelletier Heads Home After Judge Ends State Custody*, BOSTON GLOBE (June 17, 2014), <http://www.bostonglobe.com/metro/2014/06/17/judge-orders-custody-justina-pelletier-returned-parents/mDWtuGURNawSuObO0pDX4J/story.html#>; see also Joshua Rhett Miller, *‘Awesome!’ Justina Pelletier Shouts on Way Home to Family After 16-Month Ordeal*, FOX NEWS (June 18, 2014), <https://www.foxnews.com/politics/awesome-justina-pelletier-shouts-on-way-home-to-family-after-16-month-ordeal> (quoting Justina Pelletier’s mother: “[a]nd hopefully she’ll walk again — I’m not sure.”).

<sup>15</sup> See Swidey & Wen, *supra* note 5.

BCH. In one of these cases, a teenager was placed in a locked psychiatric ward and custody was removed from her parents for seven months. In still another case involving a disputed diagnosis, after child protection officials refused to remove the child from his parents, the BCH child abuse team continued to pursue allegations of child abuse against the parents even after the child was moved to another hospital.<sup>16</sup>

Similar charges are being filed by pediatric teams at hospitals across the country. In fact, charging parents with MCA has become such a recognized practice among pediatricians who specialize in child abuse that, according to the former child abuse pediatrician (“CAP”) from BCH, they have given it a name: they call it a “parent-ectomy.”<sup>17</sup> It is not possible to get a firm count on how many U.S. parents are being reported for MCA to child protection officials. Most states lump such charges into their general child abuse or neglect statistics, and cannot break out MCA charges separately. Michigan is the exception. Its figures show that, on average, fifty-one reports of suspected MCA were made against caregivers each year.<sup>18</sup> If this rate is extrapolated to the general U.S. population, more than 1,600 U.S. parents are being reported each year.<sup>19</sup> And the rates appear to be rising.<sup>20</sup>

Probably far more parents are informally accused of MCA behavior and coerced into reversing their chosen course of medical care in order to avoid such reports being made.<sup>21</sup> One Boston

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<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> Maxine Eichner, *The New Child Abuse Panic*, N.Y. TIMES (July 11, 2015), <https://www.nytimes.com/2015/07/12/opinion/sunday/the-new-child-abuse-panic.html>; Email from Kelcy McArthur, Analyst, Children’s Protective Services, Mich. Dep’t Hum. Servs., to author (Jan. 5, 2015, 11:03:38 EST) (on file with author) (figures are for the years between 2010 and 2013).

<sup>19</sup> Eichner, *supra* note 18.

<sup>20</sup> This is based upon an estimate of reported medical child abuse cases between the years of 1999 and 2019. The first year in which the term “medical child abuse” was alleged in a court proceeding was in 1999. Throughout the early 2000s, there were only one or two medical child abuse cases per year. Since 2013, there has been a significant shift upward in the number of cases alleging medical child abuse against parents.

<sup>21</sup> MitoAction, a patient advocacy nonprofit for families with mitochondrial disease, which has been contacted by more than 100 parents with concerns about MCA, reports that most of the parents facing allegations of medical child abuse accede to at least some changes in their child’s medical care in an effort

attorney who represents parents reports that two local hospitals have a practice of presenting parents with a detailed treatment plan if the parents disagree with doctors at the hospital regarding their child's course of care. The attorney had spoken to six parents who reported being told that if they refused to sign a consent form adopting the hospital's treatment plan they would be reported to the Massachusetts Department of Children and Families for MCA, their parental rights would be terminated, and that the court-appointed guardian would consent to the treatment plan anyway. According to the lawyer:

Each family remembered being told in no uncertain terms that “there is no point in fighting this. We always win.” or some strikingly similar iteration thereof. In each case, the hospital was true to its word: when the parents consented, the hospitals did not report abuse; when consent was withheld, the hospital's Child-Protection Team filed a report of suspected abuse or neglect immediately, the hospital did win in court, and the guardian did implement the treatment plan anyway.<sup>22</sup>

Advocacy groups for families with rare diseases report a stark rise in MCA allegations being brought against parents of sick children during the last decade, despite the fact that the children had suspected or confirmed diagnoses of these diseases. MitoAction, which serves families with mitochondrial disease, formed a task force on Medical Child Abuse after receiving more than 100 reports from parents asserted to have committed MCA.<sup>23</sup> Advocacy organizations for families of other rare disorders also report a sharp increase in such allegations—including eosinophilic disorders (disorders relating to elevated numbers of certain white blood cells), Ehlers-Danlos Syndrome (a connective tissue disorder), and dysautonomia (an autonomic nervous system disorder).<sup>24</sup> These charges are occurring across the country.<sup>25</sup>

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to avoid MCA charges. Email from MaryBeth Hollinger, Nurse, Education, Support, and Advocacy Navigator, MitoAction, to author (Oct. 4, 2016, 12:33 EST) (on file with author).

<sup>22</sup> Telephone Interview with John Martin, KJC Law Firm (Sept. 28, 2016).

<sup>23</sup> Email from Christine Cox, Director of Outreach & Advocacy, MitoAction to author (Feb. 5, 2015, 5:51 EST) (on file with author). This author first became acquainted with the issue of MCA when she was invited to join this task force. *See also* Eichner, *supra* note 18.

<sup>24</sup> *See* Eichner, *supra* note 18.

<sup>25</sup> *See id.*

This article argues that medical child abuse charges, as conceptualized and weaponized against parents, constitute a gross and devastating infringement on parents' constitutional right to determine their children's medical care.<sup>26</sup> Part I describes the recent origin of MCA charges. Part II shows that the broad definition of MCA adopted by physicians constitutes a vast, unprecedented, and unconstitutional expansion of the state's power to supervene and supervise parents' medical decision-making. Part III contends that the process through which physicians identify cases of MCA further expands its unconstitutional reach, and particularly targets parents of children with rare or complex health conditions. Part IV suggests that the untrammelled authority courts are allowing physicians in MCA cases may be influencing courts to expand physicians' authority beyond their proper bounds in medical neglect cases, as well. Finally, Part V suggests legislative reforms and litigation strategies that protect against these audacious incursions on parents' constitutional rights.

## The Rise of Medical Child Abuse Charges

### A. *From Munchausen's Syndrome by Proxy to Medical Child Abuse*

The precursor to the MCA movement dates back to 1977, when British pediatrician Roy Meadow published case studies of two mothers, each of whom had repeatedly sought medical care for their child but, according to Meadow, turned out to be deliberately making them ill, perhaps to earn sympathy from the child's physicians.<sup>27</sup> In one of the cases, the child ultimately died. Both mothers, Meadow noted, "were very pleasant people to

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<sup>26</sup> I criticized the rising phenomenon of medical child abuse charges in a 2015 *New York Times* op-ed, in part based on my experience as the parent of a child with complicated medical issues, see Eichner, *supra* note 18, and provided a detailed explication of the legal, medical, and scientific problems with these charges in Maxine Eichner, *Bad Medicine: Parents, The State, and the Charge of "Medical Child Abuse,"* 50 U.C. DAVIS L. REV. 205 (2016) [hereinafter Eichner, *Bad Medicine*]. The current article expands on these earlier pieces and is addressed to lawyers defending parents against these charges.

<sup>27</sup> See Roy Meadow, *Munchausen Syndrome by Proxy: The Hinterland of Child Abuse*, 310 LANCET 343, 343-45 (1977).

deal with, cooperative, and appreciative of good medical care.”<sup>28</sup> Noting that the behavior resembled Munchausen Syndrome, the psychological syndrome in which healthy patients feign illness to obtain medical care, Meadow suggested that the phenomenon might be called “Munchausen [S]yndrome [B]y [P]roxy” (MSBP).<sup>29</sup> The name stuck. Beginning in the 1980s, doctors on both sides of the Atlantic began to diagnose cases of MSBP.<sup>30</sup>

However, the conceptualization of this behavior as MSBP soon proved problematic for several reasons. First, while there was no doubt that the behavior constituted child abuse, debate arose regarding whether MSBP truly constituted a diagnosable psychological disorder;<sup>31</sup> Meadow had not intended to assert that it did when he likened the behavior to Munchausen’s Syndrome.<sup>32</sup> Controversy also arose over the limits of the conduct that constituted MSBP (must the parent’s motive be to assume the sick role by proxy?),<sup>33</sup> over whether to assign the MSBP diag-

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<sup>28</sup> *Id.* at 344.

<sup>29</sup> *Id.* at 345.

<sup>30</sup> See generally Margaret Talbot, *The Bad Mother*, NEW YORKER, Aug. 9, 2004, at 62, 62-68 (discussing the history of MSBP charges).

<sup>31</sup> Compare, e.g., Herbert A. Schreier & Judith A. Libow, *Munchausen Syndrome by Proxy: Diagnosis and Prevalence*, 63 AM. J. ORTHOPSYCHIATRY 318, 318 (1993) (treating MSBP as a psychological diagnosis), with Geoffrey C. Fisher & Ian Mitchell, *Is Munchausen Syndrome by Proxy Really a Syndrome?*, 72 ARCHIVES DISEASE CHILDHOOD 530, 532 (1995) (“The word diagnosis is usually understood as the identification or inferring of the presence of a disease by means of the patient’s symptoms,” yet no underlying psychological disease process had been identified in mothers identified with MSBP.). See generally ERIC MART, *MUNCHAUSEN’S SYNDROME BY PROXY RECONSIDERED* (2002) (describing numerous conceptual and evidentiary problems with MSBP); THOMAS A. ROESLER & CAROLE JENNY, *MEDICAL CHILD ABUSE: BEYOND MUNCHAUSEN SYNDROME BY PROXY* 17-35 (2008) (describing problems with MSBP diagnosis).

<sup>32</sup> Roy Meadow, *What Is, and What Is Not, ‘Munchausen Syndrome by Proxy’?*, 72 ARCHIVES DISEASE CHILDHOOD 534, 535 (1995) (“In the past I have resented being asked in court whether someone is ‘suffering from Munchausen syndrome by proxy’: it has seemed no more appropriate than being asked if a man who has buggered his stepson is ‘suffering from sex abuse.’”).

<sup>33</sup> Compare, e.g., Meadow, *supra* note 27, at 345 (suggesting in his original paper that the mothers described seemed to “us[e] the children to get themselves into the sheltered environment of a children’s ward surrounded by friendly staff.”), and Herbert Schreier, *Munchausen by Proxy Defined*, 110 PEDIATRICS 985, 985 (2002) (“The primary motivation seems to be an intense need



nosis to the parent or the child,<sup>34</sup> and over whether the diagnosis should properly be made by a mental health specialist or a pediatrician.<sup>35</sup> Finally, and most consequentially, the criteria used to diagnose MSBP were never tested empirically for accuracy and turned out to falsely identify some parents of genuinely sick children.<sup>36</sup> In England, MSBP diagnoses were generally called into doubt and an official legal inquiry was opened after a number of mothers' criminal convictions were reversed because of expert pediatric diagnoses of MSBP that proved incorrect, not to mention grossly deficient in scientific rigor. These included at least five cases in which Dr. Meadow had testified as an expert witness against mothers being tried for the murder of their children,

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for attention from, and manipulation of, powerful professionals, most frequently, but not exclusively a physician.”), with Donna Rosenberg, *From Lying to Homicide: The Spectrum of Munchausen Syndrome by Proxy*, in *MUNCHAUSEN SYNDROME BY PROXY: ISSUES IN DIAGNOSIS AND TREATMENT* 34 (Alex V. Levin & Mary S. Sheridan eds. 1995) (perpetrator's intent “diagnostically immaterial”), and Donna A. Rosenberg, *Web of Deceit: A Literature Review of Munchausen Syndrome by Proxy*, 11 *CHILD ABUSE & NEGLECT* 547, 547-63 (1987) [hereinafter Rosenberg, *Web of Deceit*] (perpetrator's motivation excluded from diagnostic criteria).

<sup>34</sup> Compare Meadow, *supra* note 32, at 535 (assigning diagnosis to child), with Donna A. Rosenberg, *Munchausen Syndrome by Proxy: Medical Diagnostic Criteria*, 27 *CHILD ABUSE & NEGLECT* 421, 423 (2003) (“MSBP is a pediatric, not a psychiatric, diagnosis”), with Schreier & Libow, *supra* note 31, at 318 (assigning the diagnosis to a parent). A special task force of the American Professional Society on the Abuse of Children sought to split the difference, dividing the diagnosis into two parts: “factitious disorder by proxy,” properly assigned to the perpetrator, and “pediatric condition falsification,” to be assigned to the child. See Catherine C. Ayoub et al., *Position Paper: Definitional Issues in Munchausen by Proxy*, 7 *CHILD MALTREATMENT* 105, 105-06 (2002).

<sup>35</sup> See Loren Pankratz, *Persistent Problems with the “Munchausen Syndrome by Proxy” Label*, 34 *J. AM. ACAD. PSYCHIATRY & L.* 90, 92 (Jan. 2006) (“[S]ome MSBP experts have admitted that they are not qualified to make a psychiatric diagnosis of the mother.”).

<sup>36</sup> By 1995, Roy Meadow himself lamented that the term's “over use has led to confusion for the medical, social work, and legal professions,” and that MSBP's diagnostic criteria “lack specificity: [too] many different occurrences fulfil them.” Meadow, *supra* note 32, at 534. In the United States, two psychologists—Loren Pankratz and Eric Mart— have provided the most persuasive critiques of the overbreadth of MSBP diagnostic criteria. See MART, *supra* note 31; Pankratz, *supra* note 35; Loren Pankratz, *Persistent Problems with the “Separation Test” in Munchausen Syndrome by Proxy*, 38 *J. PSYCHIATRY & L.* 307 (2010).

which were later dismissed or the conviction overturned after strong evidence emerged that the children had actually died from genuine illnesses.<sup>37</sup>

The discrediting of MSBP diagnoses in the United Kingdom did not diminish pediatricians' zeal to root out problematic parental behavior on this side of the Atlantic, however. Instead, the controversies surrounding MSBP prompted innovation. Beginning in the mid-1990s, two physicians—Carole Jenny, a pediatrician who specialized in child abuse, and her husband, Thomas Roesler, a psychiatrist—began to argue that MSBP was so flawed a concept that it needed to be scrapped.<sup>38</sup> The conduct at its core, they argued, should instead be dealt with by reconceptualizing it as a distinct form of child abuse, which they termed “medical

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<sup>37</sup> See John Sweeney & Bill Law, *Gene Find Casts Doubt on Double 'Cot Death' Murders*, *GUARDIAN* (July 15, 2001, 6:54 PM EDT), <https://www.theguardian.com/uk/2001/jul/15/johnsweeney.theobserver>. Commenting later, the Royal Statistical Society declared that the “calculation . . . is invalid.”; see also Rebecca Hardy, *The Unending Nightmare: Ian and Angela Gay Speak Out*, *DAILY MAIL* (Mar. 5, 2007, 9:32 AM), <http://www.dailymail.co.uk/news/article-440053/The-unending-nightmare-Ian-Angela-Gayspeakout.html> (Ian & Angela Gay); Nicole Martin, *GMC Strikes off Meadow for 'Abusing Position' in Cot Death Trial*, *TELEGRAPH* (July 16, 2005, 12:01 AM BST), <http://www.telegraph.co.uk/news/uknews/1494147/GMC-strikes-off-Meadow-for-abusing-position-in-cot-death-trial.html>; *Mother Cleared of Killing Sons*, *BBC NEWS* (Dec. 10, 2003, 9:01 PM GMT), [http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk\\_news/england/wiltshire/3306271.stm](http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/england/wiltshire/3306271.stm); Stewart Payne, *Joy for Mother Cleared of Baby Deaths*, *TELEGRAPH* (June 12, 2003, 12:01 AM BST), <https://www.telegraph.co.uk/news/uknews/1432760/Joy-for-mother-cleared-of-baby-deaths.html>; David Pallister, *Solicitor Wrongly Jailed for Killing Sons Died from Excess Alcohol*, *GUARDIAN* (Nov. 8, 2007, 6:04 AM EST), <https://www.theguardian.com/society/2007/nov/08/childrens>; Thair Shaikh, *Sally Clark, Mother Wrongly Convicted of Killing Her Sons, Found Dead at Home*, *GUARDIAN* (Mar. 17, 2007, 5:22 AM EDT), <https://www.theguardian.com/society/2007/mar/17/childrenservices.uknews>. In 2004, the Attorney General of the United Kingdom opened an inquiry on previous MSBP convictions because of false diagnoses of MSBP and gross misstatements by expert witnesses. See *Anthony Latest Mother to Be Freed*, *BBC NEWS* (Apr. 11, 2005, 12:24 PM GMT), [http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk\\_news/england/somerset/4431851.stm](http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/england/somerset/4431851.stm). Although only a handful of appeals occurred, most were successful, including that of a mother who served six years for murdering her two infants. See *Baby Death Mother 'Has Nothing'*, *BBC NEWS* (Apr. 12, 2005, 10:40 AM GMT), [http://news.bbc.co.uk/2/hi/uk\\_news/england/somerset/4435989.stm](http://news.bbc.co.uk/2/hi/uk_news/england/somerset/4435989.stm).

<sup>38</sup> See ROESLER & JENNY, *supra* note 31, at 43-44, 46.

child abuse.”<sup>39</sup> Roesler and Jenny defined MCA broadly as any time “a child receives unnecessary and harmful or potentially harmful medical care at the instigation” of a parent.<sup>40</sup> From pediatricians’ perspective, this new conceptualization conveniently circumvented the objection that only an expert with mental health training could diagnose MSBP: it was well within pediatricians’ capability to “diagnose” abuse in the child.<sup>41</sup> Indeed, some pediatricians were experts in just this.

The emerging subspecialty of child abuse pediatricians (CAPs), of which Carole Jenny is a prominent leader, was central to the rise of the MCA “diagnosis.”<sup>42</sup> In the 1970s, as child abuse was increasingly recognized as a social problem, hospitals began to hire pediatricians to detect child abuse, rather than to treat their own patients,<sup>43</sup> although the field was not formally recog-

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<sup>39</sup> See *id.* at 35, 56 (“If a large group of pediatricians and child psychiatrists cannot come to agreement, why should we expect the community at large to understand what we are trying to identify, treat, and prevent? Let’s just call it child abuse.”).

<sup>40</sup> *Id.* at 43.

<sup>41</sup> Jenny and Roesler themselves were somewhat ambiguous about whether their conception of MCA should be treated as a medical “diagnosis.” Compare, e.g., *id.* at 55 (“Is this really a syndrome?” “No . . . Child abuse is not an illness or a syndrome in the traditional sense but an event that happens in the life of the child.”), with *id.* at 142 (“In the 87 children we diagnosed with ‘medical child abuse’”). Subsequent pronouncements by the American Academy of Pediatrics make it clear that MCA should be treated as a medical diagnosis. See, e.g., John Stirling, Jr. & the Committee on Child Abuse and Neglect, *Beyond Munchausen Syndrome by Proxy: Identification and Treatment of Child Abuse in a Medical Setting*, 119 PEDIATRICS 1026, 1028 (2007) [hereinafter 2007 AAP Report] (“the falsification of a medical condition is a medical diagnosis”).

<sup>42</sup> Among other positions, Jenny served as chair of the Section on Child Abuse and Neglect of the American Academy of Pediatrics, as well as the Chair of the Academy’s Committee on Child Abuse and Neglect. Jenny was also instrumental to the application to the American Board of Pediatrics for establishment of a subspecialty in Child Abuse and Forensic Pediatrics. Robert W. Block & Vincent J. Palusci, *Child Abuse Pediatrics: A New Pediatric Subspecialty*, 148 J. PEDIATRICS 711 (2006).

<sup>43</sup> The identification of child abuse as a subject for pediatric concern is often dated back to the publication of two papers by C. Henry Kempe and his colleagues. See C. Henry Kempe et al., *The Battered Child Syndrome*, 181 J. AM. MED. ASS’N 17 (1962); C. Henry Kempe et al., *Marginal Comment, Uncommon Manifestations of the Battered Child Syndrome*, 129 J. AM. DISEASES OF CHILDREN 1265 (1975); see also Steven C. Gabaeff, *Exploring the Contro-*

nized as a subspecialty of pediatrics until 2006.<sup>44</sup> As the field has developed, CAPS have been embroiled in controversies over the scientific accuracy of their diagnostic methods, recently prompting a wave of journalistic exposes on the issue.<sup>45</sup> Some, but not all, of this controversy surrounds CAPs' support for the diagnosis that had been known as "Shaken Baby Syndrome," but which CAPs have now renamed "Abusive Head Trauma," the underlying science of which has been increasingly questioned by scientists and courts.<sup>46</sup>

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*versy in Child Abuse Pediatrics and False Accusations of Abuse*, 18 LEGAL MED. 90 (2016) (describing the coalescing of this group of physicians).

<sup>44</sup> See Robert W. Block, *Child Abuse Subspecialty to Work with Primary Care Providers*, AAP NEWS (Nov. 2007), <https://www.aappublications.org/content/28/11/10>; Kristina Fiore, *Child Abuse Pediatricians Face Media Scrutiny*, MEDPAGE TODAY (Oct. 30, 2019), <https://www.medpagetoday.com/special-reports/exclusives/83024>.

<sup>45</sup> See, e.g., Keri Blakinger & Mike Hixenbaugh, *'Please Don't Take My Children'*, HOUSTON CHRON. (Nov. 7, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/abuse-kids-CPS-children-doctors-14814201.php>; Fiore, *supra* note 44; Mike Hixenbaugh, *An ER Doctor Was Charged with Abusing His Baby. But 15 Medical Experts Say There's No Proof*, NBC NEWS (Jan. 27, 2020), <https://www.nbcnews.com/news/us-news/er-doctor-was-charged-abusing-his-baby-15-medical-experts-n1123756>; Mike Hixenbaugh, *Hundreds of Parents Say Kids Wrongly Taken From Them After Doctors Misdiagnosed Abuse*, NBC NEWS (Dec. 5, 2019), <https://www.nbcnews.com/news/us-news/hundreds-parents-say-kids-wrongly-taken-them-after-doctors-misdiagnosed-n1096091>; Mike Hixenbaugh & Keri Blakinger, *Burned by 'Bad Science'*, HOUSTON CHRON. (Oct. 24, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Burned-doctor-medical-child-abuse-science-prison-14538710.php>; Mike Hixenbaugh & Keri Blakinger, *A Devastating Diagnosis*, HOUSTON CHRON. (Sept. 19, 2019), <https://www.houstonchronicle.com/news/investigations/article/A-Devastating-Diagnosis-14419072.php>; Mike Hixenbaugh & Keri Blakinger, *'Imminent Danger'*, HOUSTON CHRON. (Oct. 10, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Doctors-accuse-moms-of-abusing-their-children-14492174.php>; Eric Russell, *State's Rush to Judgment Almost Took This Boy from His Family*, PRESS HERALD (Jan. 26, 2020), <https://www.pressherald.com/2020/01/26/the-states-rush-to-judgment-almost-took-this-boy-away-from-his-family/>; Elizabeth Weill-Greenberg, *The State Convicted Him of Child Abuse. A Medical Expert Said It Was Likely Diaper Rash*, THE APPEAL (Jun. 29, 2021), <https://theappeal.org/child-abuse-diaper-rash-innocence-claim/>.

<sup>46</sup> The most notable among the scientific inquiries was undertaken in 2016 by the Swedish Agency for Health Technology Assessment and Assessment of Social Services (SBU), which appointed a panel of leading pediatricians and experts in forensic medicine, radiology, medical epidemiology, and medical and

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research ethics to undertake a systematic review of the medical literature to assess the underlying strength of the SBS hypothesis and the validity of the diagnostic protocol used to identify SBS. After retrieving 3,773 medical papers and identifying 1065 of them as relevant, the SBU found that only thirty met the inclusion criteria of potentially providing evidence on the diagnostic methods used. Of these thirty papers, exactly zero of these papers were deemed high-quality research. Just two papers were deemed to be of moderate quality; the remaining 28 papers were deemed low quality. The most predominant flaw in this literature, the SBU found, was circular reasoning in the form of studies that treated doctors' unconfirmed identifications of SBS as genuine SBS cases for purposes of subsequent research—a research design that raised a high risk of introducing systematic bias into the results. The SBU ultimately concluded that the evidentiary foundation for SBS is of “very low quality,” and that “there is insufficient scientific evidence on which to assess the diagnostic accuracy of the triad in identifying traumatic shaking (very low quality evidence).” SWEDISH AGENCY FOR HEALTH TECHNOLOGY ASSESSMENT AND ASSESSMENT OF SOCIAL SERVICES, *Traumatic Shaking: The Role of the Triad in Medical Investigations of Suspected Traumatic Shaking—A Systematic Review* (2016), <https://www.sbu.se/255e> [<https://perma.cc/J5YW-S53C>]; see also Mans Rosen et al., *Shaken Baby Syndrome and the Risk of Losing Scientific Scrutiny*, 106 ACTA PÆDIATRICA 1905, 1906 (2017).

Other scientific evaluations of the SBS literature have reached similar conclusions. Lantz et al. discovered only two flawed case-control studies of the accuracy of the diagnosis, and concluded that much of the published work displayed an absence of precise and reproducible case definition, and interpretations or conclusions that overstep the data. Patrick E. Lantz et al., *Perimacular Retinal Folds from Childhood Head Trauma*, 328 BMJ 754, 754–56 (2004). Mark Donohoe found that “there was inadequate scientific evidence to come to a firm conclusion on most aspects of causation, diagnosis, treatment, or any other matters,” and identified “serious data gaps, flaws of logic, [and] inconsistency of case definition.” Donohoe also noted another research flaw that characterizes the SBS/AHT literature: particular assertions enter the relevant literature despite being premised on weak evidence, and are then cited and recited as established fact without being rigorously tested. In his words: “One may need reminding that repeated opinions based on poor-quality data cannot improve the quality of evidence.” That same research flaw pervades the literature on medical child abuse. Mark Donohoe, *Evidence-Based Medicine and Shaken Baby Syndrome Part I: Literature Review, 1966–1998*, 24 AM. J. FORENSIC MED. PATHOLOGY, 239, 241 (2003). Further, work by biomechanical engineers have cast doubt on the very possibility that simply violently shaking a child could produce enough force ever to produce one of the diagnostic signs, bleeding on the brain, at least without causing significant damage to the infant's neck, as well. See Faris A. Bandak, *Shaken Baby Syndrome: A Biomechanics Analysis of Injury Mechanisms*, 151 FORENSIC SCI. INT'L 71, 78 (2005) (“Head acceleration and velocity levels commonly reported for SBS generate forces that are far too great for the infant neck to withstand without injury. . . . [A]n

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SBS diagnosis in an infant with intracerebral but without cervical spine or brain stem injury is questionable and other causes of the intracerebral injury must be considered.”); Jan E. Leestma, *Case Analysis of Brain-Injured Admittedly Shaken Infants: 54 Cases, 1969–2001*, 26 AM. J. FORENSIC MED. & PATHOLOGY 199, 211 (2005) (“[M]ost of the pathologies in allegedly shaken babies are due to impact injuries to the head and body . . . .”); Waney Squier, *Shaken Baby Syndrome: The Quest for Evidence*, 50 DEVELOPMENTAL MED. & CHILD NEUROLOGY 10, 13 (2008) (“[H]ead impacts onto carpeted floors and steps from heights in the 1 to 3 feet range result in far greater head impact forces and accelerations than shaking and slamming onto either a sofa or a bed . . . .”); Ronald H. Uscinski, *Shaken Baby Syndrome: An Odyssey*, 46 NEUROLOGIA MEDICO-CHIRURGICA 57, 59 (2006) (“[T]he hypothetical mechanism of manually shaking infants in such a way as to cause intracranial injury is based on a misinterpretation of an experiment done for a different purpose, and contrary to the laws of injury biomechanics as they apply specifically to the infant anatomy.”). See also, Debbie Cenziper, *Shaken Science: A Disputed Diagnosis Imprisons Parents*, WASH. POST (Mar. 20, 2015), <https://www.washingtonpost.com/graphics/investigations/shaken-baby-syndrome/> (biomechanical testing demonstrates that short falls results in far greater impact to the head than does shaking).

For court decisions that have questioned the science underlying the Shaken Baby Syndrome/Abusive Head Trauma diagnosis, see, e.g., *Del Prete v. Thompson*, 10 F. Supp. 3d 907, 909, 957 n.10 (N.D. Ill. 2014) (granting habeas corpus relief to a woman who had been convicted of murder for the death of a child in her care on the ground that the expert opinions presented at trial were “more an article of faith than a proposition of science.”); *People v. Bailey*, 999 N.Y.S.2d 713, 726 (N.Y. 2014) (overturning the murder conviction of a 55-year-old babysitter who had spent more than a decade in prison, on the ground “that a significant and legitimate debate in the medical community has developed in the past 13 years, over whether young children can be fatally injured by means of shaking”); *State v. Edmunds*, 746 N.W.2d 590, 592 (Wis. 2008) (overturning a conviction for first-degree reckless homicide after 11 years). It is notable that the trial expert whose testimony the *Del Prete* judge described as “more an article of faith than a proposition of science” was Emalee Flaherty, the chair of the committee on Abuse and Neglect that released the 2013 AAP Clinical Report accepting the medical child abuse diagnosis. See Emalee G. Flaherty, Harriet L. MacMillan & Committee on Child Abuse and Neglect, *Caregiver-Fabricated Illness in a Child: A Manifestation of Child Maltreatment*, 132 PEDIATRICS 590 (Aug. 2013), [https://www.researchgate.net/publication/262044678\\_Caregiver-Fabricated\\_Illness](https://www.researchgate.net/publication/262044678_Caregiver-Fabricated_Illness) [hereinafter 2013 AAP Report].

It is also notable that the government expert who asserted the scientific validity of the diagnosis at the *Del Prete* habeas hearing was Carole Jenny, co-originator of the MCA diagnosis. In the district judge’s words, Dr. Jenny’s testimony revealed (albeit with reluctance), “that the evidence basis for the proposition that shaking alone can cause injuries of the type at issue here is arguably non-scientific.” *Del Prete*, 10 F. Supp. 3d at 954.

In 2007, the American Academy of Pediatrics' Committee on Child Abuse and Neglect issued a report endorsing Roesler and Jenny's call for physicians to identify MSBP-type behavior as "medical child abuse" and adopting their broad MCA definition (2007 AAP Report).<sup>47</sup> Doing so greatly increased the types of cases in which CAPs would play a role beyond the bruises and broken bones they had mainly been charged with identifying in earlier decades. Indeed, the 2007 Report suggested that MCA should be investigated in all cases in which the caregiver insisted there was something wrong with the child but pathologic findings failed to explain the described signs or symptoms and contended that, "[w]henever possible, . . . a pediatrician with experience and expertise in child abuse [should] consult on the case, if not lead the team."<sup>48</sup> In 2013, the American Academy of Pediatrics again endorsed the concept of pediatricians "diagnosing" medical overtreatment as child abuse under the label of "MCA," or the closely-related terms of "caregiver-fabricated illness," "pediatric condition falsification," or "child abuse in the medical setting," and calling for physicians to "diagnose" the condition.<sup>49</sup> All such charges of alleged overtreatment by physicians will be referred to in this article as MCA charges, regardless of whether the physicians identified them as MCA or one of these alternative terms, as will claims styled as "MSBP," but in which a physician makes a "diagnosis" based on the child's medical records and treatment without a mental health examination of the parent. The closely allied psychological diagnosis of the parent, which is often called either MSBP or "factitious disorder imposed on another," will be referred to as MSBP.<sup>50</sup>

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<sup>47</sup> 2007 AAP Report, *supra* note 41, at 1029.

<sup>48</sup> *Id.* The 2017 APSAC Taskforce goes still further, declaring that "[o]nce all of the records are obtained directly from the treating facilities, . . . a professional with expertise in assessing suspected . . . MCA should organize and analyze them. It is *not* sufficient to have a clinician with general medical knowledge read the record." APSAC Taskforce, Munchausen by Proxy: Clinical and Case Management Guidance, AMERICAN PROFESSIONAL SOCIETY ON ABUSE OF CHILDREN (APSAC), 19 (2017) [hereinafter 2017 APSAC Taskforce] <https://2a566822-8004-431f-b136->.

<sup>49</sup> 2013 AAP Report, *supra* note 46, at 590.

<sup>50</sup> In 2013, the American Psychiatric Association for the first time included "factitious disorder imposed on another," a diagnosis related to MSBP, as an official diagnosis in its manual. *See id.* AMERICAN PSYCHIATRIC ASSOCIA-

### B. MCA's Expanded and Ambiguous Definition

The conduct that the MSBP diagnosis had sought to target was generally limited to cases in which a parent lied about or induced symptoms in a healthy child.<sup>51</sup> The definition of MCA that Roesler and Jenny adopted, and which continues to be used

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TION, THE DIAGNOSIS AND STATISTICAL MANUAL OF MENTAL DISORDERS 325, § 300.19 (Am. Psychiatric Ass'n 5th ed. 2013) [hereinafter *DSM-V*]. This inclusion does not settle the issue of whether the MSBP diagnosis rests on an organized, scientific body of knowledge. Eric Mart and Loren Pankratz have already amply demonstrated that this diagnosis patently fails the test of scientific reliability. *See generally* MART, *supra* note 31; Pankratz, *supra* note 35; Pankratz *supra* note 36. Commentators have mustered persuasive critiques of the reliability of the American Psychiatric Association's process to select new diagnoses. *See, e.g.*, Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAV. SCI. 565, 568-70 (2015) (arguing that past inclusion of homosexuality as a disorder was not based on legitimate scientific research, but on the subjective, unscientific opinions of early therapists, who had been influenced by psychoanalytic theories); Allen J. Frances, *DSM5 in Distress: Two Who Resigned From DSM-5 Explain Why*, PSYCHOL. TODAY BLOG (July 12, 2012), <https://www.psychologytoday.com/blog/dsm5-in-distress/201207/two-who-resigned-dsm-5-explain-why> (noting that two members of a DSM-5 working group on personality disorders resigned because of the group's "truly stunning disregard for evidence. Important aspects of the proposal lack any reasonable evidential support of reliability and validity. . . . Even more concerning is the fact that a major component of proposal is inconsistent with extensive evidence."); S. Nasir Ghaemi, *Why DSM-III, IV, and 5 Are Unscientific*, PSYCHIATRIC TIMES (Oct. 14, 2013) ("As so well documented by [Hannah S.] Decker and historian Edward Shorter and others who observed the process, . . . [the DSM] diagnoses were based almost entirely on the opinions and beliefs of leaders and interest groups in the psychiatric profession. . . . Were those ideas tested with observational studies, and then revised based on confirmations and refutations of their content? Not before 1980, and hardly since."). A Justice of the England and Wales High Court reached a similar conclusion in a concurring opinion. MSBP and related diagnoses "are child protection labels that are merely descriptions of a range of behaviours, not a paediatric, psychiatric or psychological disease that is identifiable. . . . In these circumstances, [such a diagnosis] in any individual case is as likely to be evidence of mere propensity which would be inadmissible at the fact finding stage . . ." *A County Council*, [2005] EWCH (Fam) 31, [178].

<sup>51</sup> There were attempts to define MSBP more broadly as time wore on in order to include pervasive exaggerations of a child's symptoms, rather than the complete fabrication of an illness. *See, e.g.*, C. J. Morley, *Practical Concerns About the Diagnosis of Munchausen Syndrome by Proxy*, 72 ARCHIVES DISEASE CHILDHOOD 528, 529 (1995) (criticizing extension of MSBP to a broader range of cases). Nevertheless, the basic pattern still generally held. *See Rosen-*



by CAPs, was far broader: MCA occurs any time “a child receives unnecessary and harmful or potentially harmful medical care at the instigation” of a parent.<sup>52</sup> Yet this definition opens the door for CAPs to identify a vast spectrum of children’s medical care as abusive. Virtually all health care that children receive is “instigated” by a parent in the factual sense. Few children, obviously, have the wherewithal to make an appointment, get themselves to the doctor, explain to the doctor what their medical situation is, and pay for the appointment; even if they had, children lack the legal capacity to consent to most treatment. Although a diagnosis of MCA can be equated with child abuse only because the term “instigate” is read as a placeholder for some nefarious parental action, MCA can be diagnosed without any such showing.<sup>53</sup> Furthermore, physicians interpret the “potentially harmful” requirement of the MCA broadly to cover even a small risk of harm to the child, so that “[a]ny medical procedure, for example, a blood draw, or a trial of medication that is potentially harmful, could be considered abusive. . . .”<sup>54</sup> In addition, although MSBP was generally seen to require deliberate deception on the part of the parent motivated by her own secondary gain,<sup>55</sup> MCA is framed explicitly to exclude inquiry into parental motive or intent.<sup>56</sup>

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berg, *supra* note 34, at 424 (describing MSBP diagnosis by exclusion in terms of credibly excluding “all other possible explanations for the child’s condition”).

<sup>52</sup> ROESLER & JENNY, *supra* note 31, at 43.

<sup>53</sup> The 2007 AAP Report, *supra* note 41, states simply that a doctor needs two circumstances to diagnose abuse: “harm or potential harm to the child involving medical care and a caregiver who is causing it to happen.” *Id.* at 1027-28.

<sup>54</sup> Reena Isaac & Thomas Roesler, *Medical Child Abuse, in A PRACTICAL GUIDE TO THE EVALUATION OF CHILD PHYSICAL ABUSE AND NEGLECT* 291, 291 (Eileen R. Giardino ed., 2d ed. 2010).

<sup>55</sup> Meadow suggested in his original paper that the mothers described seemed to “us[e] the children to get themselves into the sheltered environment of a children’s ward surrounded by friendly staff.” Meadow, *supra* note 27, at 345; *see also* Schreier, *supra* note 33 (“The primary motivation seems to be an intense need for attention from, and manipulation of, powerful professionals, most frequently, but not exclusively a physician.”).

<sup>56</sup> ROESLER & JENNY, *supra* note 31, at 43-44 (“[W]ith this definition it is not necessary to determine the parent’s motivation to know that a child is being harmed.”); *id.* (“[T]he definition and diagnosis of caregiver-fabricated illness in a child should focus on the child’s exposure to risk and harm and associated

Given this broad definition, once a child receives virtually any medical care, the only significant factor in restricting an MCA “diagnosis” will be whether the CAP concludes the care is unnecessary. Yet this determination will vary considerably among physicians. One national study of medical second opinions outside of the MCA context found that more than one in three physicians recommended treatment changes.<sup>57</sup> Rates of disagreement over treatment would likely be still higher for children with rare or complex medical conditions, who are most likely to be evaluated for MCA. It is unsurprising, then, that, when Dr. Jenny and Dr. Roesler applied their new definition of MCA to consider 115 cases they had earlier analyzed for MSBP, they discovered that MCA criteria identified more than three times as many cases than did MSBP diagnostic criteria—76% as compared to 25%.<sup>58</sup> What is surprising, however, is that this result did not cause alarm bells to ring for Roesler and Jenny, despite the fact that bringing such charges would subject three times as many families to the deep trauma inflicted by abuse charges. To the contrary, Roesler and Jenny touted the fact that their definition identified three times as many parents as abusers as an *advantage* of their approach.<sup>59</sup>

Conceptualizing MCA this broadly allows CAPs to target an extensive array of parental conduct relating to children’s medical care, with no clear standards for making this determination. At the benign end of the spectrum, representative cases could include a parent’s simply seeking medication with which a CAP later disagreed (e.g., seeking a medication for a child’s nausea resulting from migraines); a mother’s seeking care for her child because she was overly anxious or traumatized by an earlier pediatric emergency; and a mother’s innocent misstatement of a

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injuries or impairment rather than the motivation of the offender. Caregiver-fabricated illness in a child is best defined as maltreatment that occurs when a child has received unnecessary and harmful or potentially harmful medical care because of the caregiver’s fabricated claims or signs and symptoms induced by the caregiver.”).

<sup>57</sup> Ashley Meyer, Hardeep Singh & Mark Graber, *Evaluation of Outcomes from a National Patient-Initiated Second-Opinion Program*, 128 AM. J. MED. 1138 (2015).

<sup>58</sup> ROESLER & JENNY, *supra* note 31, at 142-47 (using Donna A. Rosenberg’s diagnostic criteria for MSBP).

<sup>59</sup> *See id.*

child's condition. Toward the middle of the spectrum, it could include the relatively common occurrence of a parent who exaggerates a child's symptoms to get treatment the parent believes necessary ("my child hasn't slept in days");<sup>60</sup> a parent who unintentionally overstates a child's condition because she was misled by the child; and a parent who suffers from "hypochondriasis by proxy," and therefore reports false symptoms she genuinely believes are true.<sup>61</sup> Finally, at the more blameworthy end of the spectrum, it could include MSBP-type behavior—the intentional lie or inducement of symptoms to get the child medical care that the parent knows is unnecessary. Under the label of "MCA," all these behaviors become identifiable as "overmedicalization," and pathologized as abuse at the CAP's discretion.

Despite MCA's far broader standards than MSBP, CAPs still frequently suggest that the parents identified by the MCA definition are psychopaths intent on hurting their children, who "use [physicians'] trust to exaggerate, fabricate, or induce symptoms resulting in diagnoses, medications, procedures, and attention."<sup>62</sup> This is despite the fact that a large portion of the behavior that falls within the broad definition of MCA would otherwise be considered simple differences of opinion between mothers and doctors, differences of opinions between two sets of doctors, an innocent mistake on the parent's part, or a slight, within-the-bell-curve-of-normal exaggeration by a concerned parent.<sup>63</sup> It would be far clearer for the evaluating pediatrician to specify the particular parental behavior deemed wrongful, for ex-

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<sup>60</sup> Morley, *supra* note 51, at 528 ("Many mothers are just over anxious and trying to get the doctor to listen, or exaggeration may be part of her normal language.").

<sup>61</sup> The term is Eric Mart's. See MART, *supra* note 31, at 26.

<sup>62</sup> Allison M. Jackson et al., *Aspects of Abuse: Recognizing and Responding to Child Maltreatment*, 45 CURRENT PROBS. PEDIATRIC & ADOLESCENT HEALTH CARE 58, 64 (2015).

<sup>63</sup> See Meadow, *supra* note 27, at 344-45 ("We recognise that parents sometimes exaggerate their child's symptoms, perhaps to obtain faster or more thorough medical care of their child."); Morley, *supra* note 51, at 529 ("[M]others frequently exaggerate their child's symptoms, not through any malignant desire to mislead the doctor but as part of common language: 'he hasn't eaten a thing all week', 'he vomits up all the feed'. Such phrases are part of everyday life and experienced paediatricians do not take the mother's story at face value but take a careful history to find out exactly what has been happening.").

ample stating “I think you were being overly anxious and didn’t need to bring the child to the doctor.” Or “I think you mistakenly gave the other doctor an incorrect picture of the child’s symptoms. I don’t think the child’s nausea merited a prescription for Zofran.” Yet framing the parents’ behavior as “abuse” impugns the parents’ motives before a court (without requiring the physician to have evidence that such a motive existed) and gives the physician a potential legal lever to interfere coercively with the parent’s decision-making. In contrast, framing the conflict as a simple disagreement between a doctor and a parent over what medical care the child needs allows a doctor no power to dictate the child’s medical care, given that parents have a constitutional right to make health care decisions for their children absent abuse.<sup>64</sup>

The vast expansion in doctors’ supervisory power over parents’ medical decisions provided by the MCA definition was not motivated by empirical literature that established actual problems with parents’ decision-making beyond the MSBP context.<sup>65</sup> Indeed, the far more significant threat to children’s health documented in empirical literature is not parents’ attempts to overmedicate their children, but doctors’ own mistakes in providing care,<sup>66</sup> particularly through misdiagnosing children.<sup>67</sup> Dr.

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<sup>64</sup> See *infra* Part II.

<sup>65</sup> Chapter 2 of Roesler & Jenny’s book, which makes the case for the movement from the MSBP model to the MCA model, points only to the controversies regarding MSBP as reasons to shift to the MCA model. See ROESLER & JENNY, *supra* note 31, at 43-60.

<sup>66</sup> In 1999, an Institute of Medicine report described medical errors as an “epidemic.” INST. OF MED., *TO ERR IS HUMAN: BUILDING A SAFER HEALTH CARE SYSTEM* (1999), <https://www.nap.edu/resource/9728/To-Err-is-Human-1999—report-brief.pdf>. A subsequent study in the *BMJ* found that “medical errors in hospitals and other health-care facilities are common and may be the third-leading cause of death in the United States—claiming 251,000 lives every year, more than respiratory disease, accidents, stroke and Alzheimer’s.” Ariana Eunjung Cha, *Researchers: Medical Errors Now Third Leading Cause of Death in United States*, WASH. POST (May 3, 2016), <https://www.washingtonpost.com/news/to-your-health/wp/2016/05/03/researchers-medical-errors-now-third-leading-cause-of-death-in-united-states> (citing Martin Makary & Michael Daniel, *Medical Error—The Third Leading Cause of Death in the U.S.*, 353 *BMJ* (2016)). For documentation of the widespread problem of misdiagnosis, see INST. OF MED., *IMPROVING DIAGNOSIS IN HEALTH CARE* 19, 37 (Erin P. Balogh, Bryan T. Miller, & John R. Ball eds. 2015), <http://>

Jenny and Dr. Roesler did not address these more pervasive threats to children associated with the health care system. Indeed, their concept of MCA increases the threat of medical mistakes to children by attributing blame for unnecessary medical care to parents rather than doctors, making it more likely that the mistakes will not be corrected.<sup>68</sup>

### C. Medical Child Abuse Charges Today

Since Doctors Roesler and Jenny first proposed it, U.S. physicians' preferred way to conceptualize and deal with the perceived problem of medical overtreatment by parents has been to identify it as child abuse under the label of "MCA"<sup>69</sup> Doctors are now being trained to treat MCA as a diagnosis that should be routinely considered in complicated medical cases,<sup>70</sup> and to re-

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www.nationalacademies.org/hmd/Reports/2015/Improving-Diagnosis-in-Healthcare.aspx; Eta S. Berner & Mark L. Graber, *Overconfidence as a Cause of Diagnostic Error in Medicine*, 121 AM. J. MED. S2, S3, S4 tbl. 1 (2008); Helene Epstein, *Why It's So Easy for Doctors to Misdiagnose Kids*, ATLANTIC (Nov. 17, 2015), <http://www.theatlantic.com/health/archive/2015/11/why-its-so-easyfordoctors-to-misdiagnose-kids/416112/>(citing Hardeep Singh et al., *The Frequency of Diagnostic Errors in Outpatient Care: Estimations from Three Large Observational Studies Involving US Adult Populations*, 23 BMJ QUALITY & SAFETY 727, 731 (2014)).

<sup>67</sup> See SHIRE, RARE DISEASE IMPACT REPORT (Apr. 2013), <https://globalgenes.org/wp-content/uploads/2013/04/ShireReport-1.pdf>.

<sup>68</sup> Indeed, in the Houston case of Katie Ripstra, Stanford University kidney specialist Dr. Steven Alexander testified that the first time he looked at Ripstra's daughter's file, he thought he was being asked to review a potential medical malpractice case based on the medical treatment that the child had received. See Meagan Flynn, *Defense Claims Girl's Illness Stumped Doctors, So They Blamed Salt Poisoning*, HOUS. PRESS (Sept. 23, 2015, 11:30 AM), <https://www.houstonpress.com/news/defense-claims-girls-illness-stumped-doctors-so-they-blamed-salt-poisoning-7787782>. Instead, based on expert testimony diagnosing MCA, Ripstra was sentenced to two twenty-year sentences in prison. Flynn, *supra* note 7.

<sup>69</sup> See APSAC Taskforce, *Munchausen by Proxy: Clinical and Case Management Guidance*, AMERICAN PROFESSIONAL SOCIETY ON ABUSE OF CHILDREN (APSAC) 19 (2017) [hereinafter 2017 APSAC Taskforce], [https://2a566822-8004-431f-b136-8b004d74bfc2.filesusr.com/ugd/4700a8\\_47be1e8b569a428dad3e41fd366e2f4f.pdf](https://2a566822-8004-431f-b136-8b004d74bfc2.filesusr.com/ugd/4700a8_47be1e8b569a428dad3e41fd366e2f4f.pdf).

<sup>70</sup> For example, the 2007 AAP Report suggested that MCA should be investigated in all cases in which the caregiver insisted there was something wrong with the child but pathologic findings failed to explain the described signs or symptoms. 2007 AAP Report, *supra* note 42, at 1029.

port suspicions of MCA to child protection authorities.<sup>71</sup> Mental health professionals, nurses, clergy, and social workers are likewise being taught to be vigilant to possible MCA cases in order to protect children from harm.<sup>72</sup> The fact that physicians are urged to consider MCA whenever they see “children with highly unusual clinical presentations, when clinical findings are unexpectedly inconsistent with the reports of the caregiver, or when a child’s response to standard treatments is surprising” means that many parents of children with rare or undiagnosed genetic diseases will face scrutiny for abuse.<sup>73</sup> Unfortunately, nothing in the “diagnostic” process used by CAPs reliably rules such parents out.<sup>74</sup>

The importance of identifying possible cases of MCA is hyped by statistics relating to prevalence and severity that are poorly supported by science but are nevertheless repeatedly restated in the medical literature. Two weaknesses in the science are especially prominent in this literature. First, particular assertions enter the relevant literature despite being premised on weak evidence, and are then cited and recited as established fact without being rigorously tested. Second, doctors’ identifications of MSBP or MCA in past cases are treated as confirmed diagnoses for the purposes of research that seeks to discern how to identify future MCA cases — a tautologous mode of research

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<sup>71</sup> *See id.* (“If the parent’s care-seeking is harming the child but the parent refuses to cooperate with the physician in limiting the amount of medical care to an appropriate level, the state child protective services agency should be informed.”); STATE OF MICHIGAN GOVERNOR’S TASK FORCE ON CHILD ABUSE AND NEGLECT, *MEDICAL CHILD ABUSE: A COLLABORATIVE APPROACH TO IDENTIFICATION, INVESTIGATION, ASSESSMENT AND INTERVENTION* 1, 3 (Mich. Dep’t of Hum. Servs., 2013), [https://www.michigan.gov/documents/dhs/DHS\\_PUB\\_0017\\_200457\\_7.pdf](https://www.michigan.gov/documents/dhs/DHS_PUB_0017_200457_7.pdf) [hereinafter 2013 MICH. TASK FORCE REP.] (“When a medical provider, or other person, recognizes that the child may be a victim of Medical Child Abuse and is at risk of harm, a report should be made with CPS”).

<sup>72</sup> *E.g.*, Flyer from Megan Goodpasture, M.D., for training on Medical Child Abuse: A Review of Caregiver Fabricated Illness and Its Impact on Children, Families and the Medical Team at the Wake Forest Baptist Medical Center (June 14, 2016) (on file with author) (suggesting MCA training be attended by “nurses, doctors, social workers, clergy, and any interested health care professional”).

<sup>73</sup> 2017 APSAC Taskforce, *supra* note 69, at 8.

<sup>74</sup> *See infra* Part III.

that cannot separate out spurious from genuine characteristics. These are the same flaws that have led scientists, and more recently a number of courts, to reject the proof of another diagnosis that CAPs have vociferously pressed – that of Shaken Baby Syndrome, which CAPs have now renamed “Abusive Head Trauma,” in part in response to these critiques.<sup>75</sup>

Take, for example, the discussion of MCA rates set out in the 2017 American Professional Society on the Abuse of Children (APSAC) Practice Guidelines on Munchausen by Proxy, a document that courts have treated as an authoritative, scientific pronouncement on MCA.<sup>76</sup> The Guidelines state that the rate of MCA cases is “approximately from .5 to 2.0 per 100,000 children younger than 16 years,” and cites the 2013 AAP Report for the figure.<sup>77</sup> However, the 2013 AAP Report cited does not calculate MCA incidence rates itself. Instead, it repeats rates cited in significantly older (1987, 1996, and 2001) studies seeking to measure rates of MSBP behavior, rather than the far broader category of MCA behavior.<sup>78</sup> Further, the methodology of these older studies is both unscientific and dubious, even as it pertains to incidence rates of MSBP behavior in other countries. For example, the high estimate of 2.0 per 100,000 children is derived from a 2001 New Zealand study on MSBP.<sup>79</sup> In that study, the authors simply surveyed pediatricians regarding how many cases of MSBP they had seen in the last year that they either reported to child protection officials or they believed were highly suspicious, without making any attempt to confirm whether the pediatri-

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<sup>75</sup> See *supra* note 46, and accompanying text.

<sup>76</sup> See, e.g., *In re A.B.*, No. B297961, 2019 WL 6522031, at \*9, 11 (Cal. Ct. App. Dec. 4, 2019) (relying on APSAC Practice Guidelines recommendations, described as “reflect[ing] current knowledge about best practices related to identification, reporting, assessment, and management” of MCA to deny grandfather of mother accused of MCA from custody of or visitation with child).

<sup>77</sup> 2017 APSAC Taskforce, *supra* note 69, at 5.

<sup>78</sup> See 2013 AAP Report, *supra* note 46, at 592, 595 (citing Rosenberg, *Web of Deceit*, *supra* note 33, R.J. McClure et al., *Epidemiology of Munchausen Syndrome by Proxy, Non-Accidental Poisoning, and Non-Accidental Suffocation*, 75 ARCHIVES DISEASE CHILDHOOD 57 (1996); S.J. Denny et al., *Epidemiology of Munchausen Syndrome by Proxy in New Zealand*, 37 J. PAEDIATRICS & CHILD HEALTH 240, 240 (2001)).

<sup>79</sup> See Denny et al., *supra* note 78, at 240.

cian's suspicions were correct in any of the cases.<sup>80</sup> To the extent that reporting physicians wrongly suspected MPSP, which, given what we know about the number of wrongful diagnoses of MSBP during this period is eminently possible,<sup>81</sup> this study fails to convey reliable information about actual MSBP incidence rates in New Zealand twenty years ago, let alone about in the United States today.

Not content simply to repeat these poorly supported MCA rates as fact, the APSAC Practice Guidelines then attempt to heighten the urgency associate with MCA by stating that "this form of abuse and neglect is significantly underrecognized and underreported. Therefore, these estimates likely underrepresent the actual extent of this abuse."<sup>82</sup> The Guidelines provide no citation to support this assertion; however, the 2013 AAP Report makes this same claim, citing a 1996 study by McClure et al. that analyzed surveys of pediatricians in the UK and Ireland during 1992-94.<sup>83</sup> The AAP Report's assertion about the 1996 study, however, derives solely from the fact that, when pediatricians who had reported MSBP behavior were asked about their confidence that their suspicions of MSBP were correct,

one hundred and nine (85%) of pediatricians estimated the probability of their (MSBP) diagnosis being correct as greater than 90%. In 14 cases [the pediatrician estimated] the probability of abuse was estimated to be between 71% and 90% and in four, between 50% and 70%. In only one case was the probability less than 50%.<sup>84</sup>

From this, the AAP Report derives the tenuous conclusion that, "it appears that pediatricians needed to have a strong degree of certainty before reporting, suggesting that many cases go unreported when a physician is less sure of the diagnosis."<sup>85</sup> Yet even leaving aside the possibility that U.S. pediatricians thirty years later might not be reporting at the same rates and level of confidence as UK and Ireland pediatricians decades before, and that reporting rates may be very different for MCA than MSBP given

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<sup>80</sup> *See id.* at 241.

<sup>81</sup> *See supra* note 37 and accompanying text.

<sup>82</sup> 2017 APSAC Taskforce, *supra* note 69, at 5.

<sup>83</sup> 2013 AAP Report, *supra* note 46, at 592 (citing McClure et al. *supra* note 78).

<sup>84</sup> McClure, *supra* note 78, at 59.

<sup>85</sup> 2013 AAP Report, *supra* note 46, at 592.



the different diagnostic criteria, this conclusion holds only if both the pediatricians who responded were in fact correct about their MSBP diagnoses that they did report, and, in addition, they did not report correctly diagnosed cases of MSBP when they were less confident of their diagnosis. The McClure study provides no data that answer these questions. However, we now know that pediatricians of that era in the United Kingdom, including Roy Meadow, a coauthor of the study, were overconfident of their diagnoses of MSBP, and made false diagnoses based on overly broad diagnostic criteria.<sup>86</sup> This suggests that, what the McClure study reveals—contrary to the suggestion of the 2013 AAP Report—is not underreporting by pediatricians of true MSBP behavior, but instead overconfidence in false diagnoses of MSBP. Nevertheless, the 2017 APSAC Practice Guidelines presents this tenuously derived assertion as scientific fact.

Similarly, the 2017 APSAC Practice Guidelines make several supposedly scientific assertions that suggest that returning a child who is medically abused to the parent will put the child in severe danger. For example, the Guidelines state:

Re-abuse (further falsification or other abuse or neglect) is a risk for children who have been deemed by CPS [child protective services] or the courts to be safe to return to the home of the abuser. Re-abuse rates have been found to range from 17% for mild cases of MBP to 50% for moderate cases.<sup>87</sup>

The Guidelines cite two studies to support these alarming statistics. The first is a 1993 co-authored article by Bools, Neale, and Meadow that followed up on 54 children who had previously been determined to be victims of MSBP to see if their symptoms and physical condition had improved once the MSBP was diagnosed, and which found that many children still exhibited symptoms. That study, though, should be deemed completely discredited. Not only were the original MSBP diagnoses in that study not independently confirmed, Roy Meadow, one of the study's co-authors, stated that the bulk of these cases were accessible to the researchers because he had been consulted as an expert on MSBP on many of them.<sup>88</sup> As an expert, Meadow

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<sup>86</sup> See *supra* note 37.

<sup>87</sup> 2017 APSAC Taskforce, *supra* note 69, at 22.

<sup>88</sup> See C. N. Bools, B. A. Neale, & S.R. Meadow, *Follow-up of Victims of Fabricated illness (Munchausen Syndrome by Proxy)*, 69 ARCHIVES DISEASE

presumably had an instrumental role in making the determinations of MSBP presumably in these cases. Yet, as the AAP certainly knew, Meadow's diagnostic methods were grossly unscientific and rendered significant numbers of false-positive results.<sup>89</sup> The result was not only that at least five murder convictions of mothers based on his testimony were later overturned, but also that the UK Medical Council publicly condemned him for violating his expert authority, which "carried with it a unique responsibility to take meticulous care in a case of this grave nature." It continued: "You should not have strayed into areas that were not within your remit of expertise. Your misguided belief in the truth of your arguments is both disturbing and serious."<sup>90</sup> If, as seems likely, Meadow mistook genuine genetic illnesses for MSBP in cases cited in the article as well, it would be unsurprising that so many of the children still had symptoms at the time he followed up. The problem, though, was not the "re-abuse" the AAP asserts, but rather false positive determinations of abuse – a possibility that the AAP does not mention.

The second article cited to support the AAP's alarming statistics on "re-abuse" was a 1998 article, also co-authored by Roy Meadow, which was also grossly flawed in method. This 1998 article treated any case for which a formal child protection case conference was held, regardless of the conference's findings, as if it were a confirmed case of MSBP, excluding it only if the reporting physician did not have a great degree of certainty about the

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CHILDHOOD 625, at n.7 and accompanying text (1993) (noting that study relied on data from Bools, Neale, and Meadow, 1992); C. N. Bools, B. A. Neale, & S. R. Meadow, *Co-morbidity Associated with Fabricated Illness (Munchausen Syndrome by Proxy)*, 67 ARCHIVES DISEASE CHILDHOOD 77, 77 (1992), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1793550/pdf/archdisch00642-0007.pdf>.

<sup>89</sup> See *supra* note 37.

<sup>90</sup> Martin, *supra* note 37 (quoting General Medical Council's opinion). Although the General Medical Council removed Meadow's ability to practice because of his "erroneous" and "misleading" testimony, see David Batty, *Q&A: Sir Roy Meadow*, GUARDIAN (Feb. 17, 2006, 10:33 AM GMT), <https://www.theguardian.com/society/2006/feb/17/NHS.health>, that decision was subsequently overturned by the Court of Appeals. See Joshua Rozenberg, *Sir Roy Meadow, the Flawed Witness, Wins GMC Appeal*, TELEGRAPH (Feb. 18, 2006, 12:01 AM GMT), <http://www.telegraph.co.uk/news/uknews/1510798/Sir-Roy-Meadow-the-flawed-witness-wins-GMC-appeal.html>.

MSBP determination.<sup>91</sup> The authors then surveyed the reporting pediatrician for his or her opinion about whether the child had been “re-abused” in the aftermath of the case conference. Given that no attempt was made to confirm the accuracy of the original MSBP charges, aside from measuring the confidence of the reporting physician, all that can truly be ascertained from the study is that the pediatricians who reported MSBP had a high confidence that they themselves were correct about these diagnoses and that, among the 30 children that had case conferences for MSBP who were not physically harmed, and who were subsequently returned to their homes, the reporting physicians believed that two were subsequently “reabused” through MSBP and that another three were emotionally abused—making the total rate of children that physicians believed were subsequently abused in any manner 5 of 30, or 17%.<sup>92</sup> This is hardly the stuff of which high-quality science is composed.

Once physicians report suspected abuse to child protection authorities, because these authorities generally do not have a doctor on staff, they often turn to outside experts. Very often, this is the child abuse protection team of the same hospital from which the report was just made.<sup>93</sup> The protocol CAPs then use to make the determination inserts them into complicated medical cases in which they sometimes assert the presence of MCA over the objections of the child’s treating doctors—often experienced specialists who believe that the child has one or more genuine medical diagnoses.<sup>94</sup> Nevertheless, child protection authorities in

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<sup>91</sup> P. Davis, R. McClure, K. Rolfe, N. Chessman, S. Pearson, J. Sibert & R. Meadow, *Procedures, Placement, and Risks of Further Abuse After Munchausen Syndrome by Proxy, Non-accidental Poisoning, and Non-accidental Suffocation*, 78 ARCHIVES DISEASE CHILDHOOD 217 (1998).

<sup>92</sup> *Id.* at 219.

<sup>93</sup> See, e.g., Swidey & Wen, *supra* note 5 (noting that Massachusetts Department of Children and Families has longstanding ties with Boston Children’s Hospital (BCH), and treats the hospital as MCA experts even in cases in which the report of abuse comes from BCH).

<sup>94</sup> See, e.g., *In re McCabe*, 580 S.E.2d 69, 72-74 (N.C. Ct. App. 2003) (accepting child abuse pediatricians’ diagnosing a child with MSBP over a cardiologist’s contrary diagnosis). In one such case, CAP Dr. Adelaide Eichman, within months after she completed her residency, determined that a child needed to be “de-medicalized” based on reading the child’s medical records, despite the view of the child’s specialists that the child had several genuine medical diagnoses and might still have undiagnosed conditions. See Transcript

at least many of these cases treat the evaluating pediatrician's "diagnosis" of MCA — often made without examining the child or meeting the child's parents—as authoritative.<sup>95</sup> This gives the pediatricians in this new subspecialty, in the words of Dr. Eli Newberger, a pediatrician who founded the child protection team at Boston Children's Hospital in 1970, but now acts as an expert witness on behalf of parents, "enormous and really unchecked power."<sup>96</sup>

At trial on these charges, judges generally give CAP opinions great credence, on the ground that they are experienced at both detecting abuse and making medical diagnoses.<sup>97</sup> In doing

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of Child Abuse Appeal of D.H. Hearing at 26-27, 48-49, *In re G.M.*, No. 329-2014 (Penn. Dep't Hum. Servs.) (Sept. 29, 2015) [hereinafter Child Abuse Appeal of D.H.]. After the medical records that Dr. Eichman relied on to diagnose abuse were determined to be inaccurate, the child was eventually returned to her mother's custody and the finding of abuse was expunged—still over the objection of Dr. Eichman. *See id.* at 106. In another case, Jessica Hilliard was charged with MCA for seeking medical care for her son despite the fact that an expert in mitochondrial disease had diagnosed the child as having mitochondrial dysfunction and the child's other sister had already died from what two outside specialists concluded was a genetic disease that affected mitochondrial function. *See Eichner, supra* note 18. Other cases in which child abuse pediatricians disputed the diagnoses of specialists in the field of the child's symptoms include the *Ripstra* case described in Flynn, *supra* note 7; the *Parker* case described in Wagner, *supra* note 7; and the *Pelletier* case, described *supra* notes 11-18 and accompanying text.

<sup>95</sup> *See, e.g.,* Child Abuse Appeal of D.H., *supra* note 94, at 106. (when asked why the county found a physician's report of MCA to be substantiated, despite considerable evidence to the contrary, the county case worker responded: "We have to go based upon the statement from the [charging child abuse] medical professional. We cannot get from each individual doctor what they feel in regards to it. We solely rely on the statement from the three [child abuse pediatricians] at the Child Advocacy Clinic."); Swidey & Wen, Wen, *supra* note 5 ("In Massachusetts, the Department of Children and Families . . . is supposed to be a neutral referee assessing the charges against the parents. Many parents and their advocates complain, however, that the state agency, because of its lack of in-house medical expertise and its longstanding ties with [BCH], is overly deferential to the renowned Harvard teaching hospital.").

<sup>96</sup> Swidey & Wen, *supra* note 5 ("Newberger said he's seen a tendency for state child-welfare agencies to be 'overly credulous to hospitals' and for some child protection teams to show a 'reflexive willingness to label and to punish,' especially educated mothers who are perceived as being too pushy.")

<sup>97</sup> *See, e.g., In re Adoption of Keefe*, 733 N.E.2d 1075, 1079 (Mass. App. Ct. 2000); *see In re J.M.*, No. 1339 EDA 2018, 2018 WL 5857891, at \*6 (Pa.

so, they fail to recognize that MCA is not a genuine medical diagnosis,<sup>98</sup> and that the supposed “diagnostic” process CAPs use to identify cases of MCA is not only vastly different from the standard differential diagnosis process, but also untested and unreliable.<sup>99</sup> Courts also accept CAP claims that MCA is essentially the same diagnosis as MSBP, despite the fact that MCA requires no proof of psychopathology on the part of the parent, uses criteria that are far easier than MSBP to meet, and few cases present any strong evidence of the psychopathology required for MSBP.<sup>100</sup> From the judge’s perspective, on hearing that the state’s medical expert believes the parent is a serious risk to the child’s safety, (a belief based on flawed science,) the far smaller risk is to remove custody from the parent.<sup>101</sup> Ultimately, some parents have their parental rights terminated completely as a result of these charges.<sup>102</sup> Other parents retain custody either by agreeing to outside supervision of their medical decisions for the child or by having such supervision imposed on them.<sup>103</sup> Still others eventu-

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Super. Ct. Nov. 9, 2018) (basing aggravated abuse determination on the “credible and insightful” testimony of CAP that the “[c]hild was the victim of medical child abuse and neglect through Mother’s factitious disorder imposed on another, formerly Munchausen syndrome by proxy.”); *Id.* at \*6 (“The trial court found this testimony credible and insightful. [The CAP] testified with a reasonable degree of medical certainty that Child was the victim of medical child abuse and neglect through Mother’s factitious disorder imposed on another, formerly Munchausen syndrome by proxy.”).

<sup>98</sup> See *infra* at Part IV.B.ii.

<sup>99</sup> See *infra* at Part III.

<sup>100</sup> See, e.g., *McCabe*, 580 S.E.2d at 71 (accepting the diagnosis of MSBP by child abuse pediatricians despite absence of mental health professional proof or any strong evidence to suggest such issues); *In re Z.S.*, No. 25986, 2014 WL 4267478 at ¶¶ 2-3 (Ohio Ct. App. Aug. 29, 2014) (pediatrician diagnoses MCA, presented as the same diagnosis as MSBP).

<sup>101</sup> See, e.g., *Z.S.*, 2014 WL 4267478 at ¶16; *J.M.*, 2018 WL 5857891.

<sup>102</sup> See, e.g., *Shawna N. v. Dep’t of Child Safety*, No. 1 CA-JV 18-0255, 2020 WL 207071, at \*1 (Ariz. Ct. App. Jan. 14, 2020); see, e.g., *In re A.J.B.*, No. 12-0071, 2012 WL 1066483 (Iowa Ct. App. Mar. 28, 2012).

<sup>103</sup> This was the case in a lawsuit filed by two Massachusetts parents against the Massachusetts Department of Children and Families for violations of their parental rights. See Memorandum of Law *ex rel.* 7 (July 17, 2014), *Karen T. & Robert T. Sr. v. Deveney*, Civ. Action 1:14-cv-12307 (D. Mass. 2014) (state requires parents to identify a new pediatrician to oversee the child’s care, and later intervenes to recommend that the parents take the child to psychological counseling).

ally have such charges dismissed, but only after months of separation from their children, thousands of dollars in legal fees, and, they report, harm resulting from changes to the child's medical care in the interim.<sup>104</sup>

Parents suspected of MCA find themselves placed in a Kafkaesque situation. The fact that their child has a probable or confirmed alternative diagnosis from another doctor does not negate a diagnosis of MCA.<sup>105</sup> Neither does the fact that some other doctor ordered the medical care deemed abusive, documented the medical reasons for it, or even still believes that the medical treatment that the child received was appropriate.<sup>106</sup> Instead, such doctors are deemed the unwitting dupes of the parent's deception.<sup>107</sup> Martin Guggenheim, a law professor at New York University, likens the situation of parents charged with MCA to that of women accused of witchcraft by "experts" in the seventeenth century: "If the expert declares that you're a witch, how in the world can you begin to prove that you're not?"<sup>108</sup> The comparison to witchcraft may be particularly apt given the MCA literature's description of the considerable powers that MCA mothers have to bend doctors and others to their will in order to

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<sup>104</sup> This was the case for Justina Pelletier's family. *See supra* note 14 and accompanying text. *See also* Eric Russell, *State's Rush to Judgment Almost Took This Boy from His Family*, PRESS HERALD (updated May 27, 2020), <https://www.pressherald.com/2020/01/26/the-states-rush-to-judgment-almost-took-this-boy-away-from-his-family/>.

<sup>105</sup> For examples of cases in which MCA charges were brought despite a child having a suspected or confirmed diagnoses from another doctor, *see, e.g.*, Eichner, *supra* note 18 (*Hilliard* case); Neil Swidey, *The PANDAS Puzzle: Can a Common Infection Cause OCD in Kids?*, BOS. GLOBE (Oct. 28, 2012), <https://www.bostonglobe.com/magazine/2012/10/27/the-pandas-puzzle-can-common-infection-cause-ocd-kids/z87df6Vympu7bvPtapETLJ/story.html>; Swidey & Wen, *supra* note 14 (*Pelletier* case) (quoting attorney for parents, Beth Maloney, who argued at MCA hearing: "What we have is an argument within the medical community about whether infection can cause behavioral disorders and mental health issues . . . And Boston Children's Hospital is going to work that out on the backs of parents in your courtroom.").

<sup>106</sup> *See* sources cited *supra* note 105.

<sup>107</sup> *See, e.g.*, 2013 MICH. TASK FORCE REP., *supra* note 71, at 5 ("In many cases, parents who engage in this form of abuse are effective at rallying allies or locating one or more providers who are vulnerable to their deceptions rather than accepting the possibility of Medical Child Abuse.").

<sup>108</sup> Telephone interview with Martin Guggenheim, Fiorello LaGuardia Professor of Law, NYU School of Law (July 24, 2014).

hurt their children,<sup>109</sup> as well as the fact that it is almost universally women who are accused of masterminding MCA.<sup>110</sup>

## II. The Medical Child Abuse Theory and Parents' Constitutional Rights

Parents' right to make health-care decisions for their children is one of the fundamental liberty interests protected by the U.S. Constitution. Although this decision-making right is limited by prohibitions on child abuse and neglect, as this Part shows, the broad definition of MCA now being propounded by CAPs was created without giving deference to parents' rights to determine their children's health care. CAPs' definition of MCA expands the meaning of the term "child abuse" far beyond its current legal meaning. In doing so, it unconstitutionally eviscerates parents' decision-making authority in a broad range of cases.

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<sup>109</sup> See, e.g., *In re A.B.*, No. B297961, 2019 WL 6522031, at \*8-9 (Cal. Ct. App. Dec. 4, 2019) ("most of the perpetrators are articulate, convincing, and sympathetic . . . Even the most well intended, skilled, and committed relatives may have great difficulty enduring unrelenting pressure from the abusive caregiver to gain access to and control over the victim.").

<sup>110</sup> Viewing mothers as the instigator of abuse derives from MSBP diagnostic practices, which generally profiled the perpetrator as the mother. See McClure et al., *supra* note 78, at 59 (identifying the mother as the sole perpetrator in 85% of cases), cited in 2013 AAP Report, *supra* note 46, at 592. The link between MCA charges and the long history of gender stereotypes that have been invoked to impugn women's judgment and restrict their autonomy merits significant further consideration. In the United States, this history extends back not only to the trials of witches, but also to the medical diagnosis of "hysteria," which was increasingly applied to women by medical doctors in the nineteenth century. See ELAINE SHOWALTER, *THE FEMALE MALADY: WOMEN, MADNESS, AND ENGLISH CULTURE, 1830-1980*, at 145-64 (1985). Medical child abuse charges also bear similarity to forced interventions involving pregnant women insofar as both construe the actions of mothers as inimical to the interests of their children, often with scant evidence to support such a conflict. See Lynn M. Paltrow & Jeanne Flavin, *The Policy and Politics of Reproductive Health Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health*, J. HEALTH POL'Y, POL. & L. 299, 318 (2013) ("In cases where a harm was alleged (e.g., a stillbirth), we found numerous instances in which cases proceeded without any evidence, much less scientific evidence, establishing a causal link between the harm and the pregnant woman's alleged action or inaction.")

A. *Parents' Constitutional Right to Make Medical Decisions for Their Children*

Parents' interest in the care, custody, and control of their children is among the most venerable and longstanding of the liberty interests that the Supreme Court has deemed protected by the Constitution. Almost a century ago, in the case of *Pierce v. Society of Sisters*, the Court overturned a state statute on the ground that it "unreasonably interfere[d] with the liberty of parents . . . to direct the upbringing and education of [their] children."<sup>111</sup> In the Court's words,

The fundamental theory of liberty . . . excludes any general power of the state to standardize its children . . . . 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.<sup>112</sup>

The Supreme Court more recently reaffirmed parents' decision-making rights for their children in the case of *Troxel v. Granville*.<sup>113</sup> In it, the Court struck down a Washington State statute that a trial court had relied on to grant grandparents visitation with their grandchildren over the mother's objection.<sup>114</sup> In Justice O'Connor's words,

so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.<sup>115</sup>

In words that have great import when applied to the MCA issue, the Court stated, "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."<sup>116</sup>

Parents' right to make childrearing decisions encompasses decision making regarding their children's health care.<sup>117</sup> Fur-

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<sup>111</sup> *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925).

<sup>112</sup> *Id.* at 535.

<sup>113</sup> *Troxel v. Granville*, 530 U.S. 57, 57 (2000).

<sup>114</sup> *Id.* at 57-58.

<sup>115</sup> *Id.* at 68-69.

<sup>116</sup> *Id.* at 72-73.

<sup>117</sup> *Parham v. J.R.*, 442 U.S. 584, 602 (1979).



ther, the presumption that fit parents act in the best interests of their children also extends to medical decision making.<sup>118</sup> Both the right and the presumption are based, not on the view that parent's "own" their children and therefore have the right to control them, but instead, in the Supreme Court's words, on the view that the "natural bonds of affection lead parents to act in the best interests of their children."<sup>119</sup> As Professor Joseph Goldstein noted:

As *parens patriae* the state is too crude an instrument to become an adequate substitute for parents. . . . It does not have the capacity to deal on an individual basis with the consequences of its decisions or to act with the deliberate speed required by a child's sense of time and essential to his well being.<sup>120</sup>

Parents' right to determine children's medical care is not, of course, absolute.<sup>121</sup> Under the doctrine of *parens patriae*, the state has a right and indeed a duty to protect children. Yet it is only when a parent, through action or inaction fails to provide the minimum degree of acceptable parenting, and therefore commits abuse or neglect, that the state is permitted to exercise its *parens patriae* protective role.<sup>122</sup> As the next section shows, the situations that authorize government intervention in medical decision making are supposed to be the exceptions rather than the rule, however.

#### B. *Parents' Constitutional Rights in Established Medical Neglect Case Law*

As Professor Goldstein observed decades ago, the boundary between parents' medical decision-making rights and the state's right to intervene based on dependency law is one dangerously vulnerable to incursion through the vague prohibitions of abuse and neglect encoded in state statutes.<sup>123</sup> Until MCA was concep-

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 603 (citing 1 W. Blackstone, Commentaries \*447; 2 J. Kent, Commentaries on American Law \*190.).

<sup>120</sup> Goldstein, *supra* note 3, at 650.

<sup>121</sup> *Parham*, 442 U.S. at 604.

<sup>122</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Newmark v. Williams*, 588 A.2d 1108, 1110 (Del. 1991); *Custody of a Minor*, 393 N.E. 836, 843-44 (Mass. 1979); *In re Application of L.I. Jewish Med. Ctr.*, 557 N.Y.S.2d 239, 243 (N.Y. Sup. Ct. 1990); *In re Willmann*, 493 N.E.2d 1380, 1388-89 (Ohio 1986).

<sup>123</sup> Goldstein, *supra* note 3, at 650-51.

tualized, the only cases that had tested the line between parents' medical decision-making authority and the state's right to intervene to protect children were medical neglect cases. In these cases, doctors asserted that parents were depriving children of appropriate treatment—in other words, undertreating them, in contrast to the MCA cases' assertions of overtreatment. In response to these claims, courts carefully drew the line circumscribing state intervention in order to provide robust protection to parents' rights while still safeguarding children's wellbeing.

The limits that courts have traditionally imposed on government intervention in medical neglect cases are instructive in the MCA context. Courts declared that “[s]tate intervention . . . is only justifiable under compelling conditions.”<sup>124</sup> While different courts phrased the legal tests to ascertain the presence of such compelling conditions in slightly different ways, at their core, they authorize intervention only when three circumstances are present. First, the state's preferred course of treatment must be compelling in the sense that all the child's medical doctors agree that it is the correct one.<sup>125</sup> Second, the state's preferred course of treatment must be both likely to result in great benefit and to pose few countervailing risks to the child.<sup>126</sup> Third, the threat to the child's health from forgoing the treatment must be significant.<sup>127</sup> Under these standards, for example, courts generally authorize blood transfusions when doctors agree that a child's life is at stake but the parent refuses such treatment based on religious reasons.<sup>128</sup> Likewise, courts will override the decision of a parent

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<sup>124</sup> *Newmark*, 588 A.2d at 1117.

<sup>125</sup> See, e.g., *In re Storar*, 420 N.E.2d 64, 73 (N.Y. 1981); *In re Hofbauer*, 393 N.E.2d 1009, 1014 (N.Y. 1979); *Custody of a Minor*, 393 N.E. at 846.

<sup>126</sup> See, e.g., *Newmark*, 588 A.2d at 1117-18; Goldstein, *supra* note 3, at 653; see also *In re Burns*, 519 A.2d 638, 645 (Del. 1986).

<sup>127</sup> See, e.g., *In re D.L.E.*, 645 P.2d 271, 275-77 (Colo. 1982) (en banc); *Muhlenberg Hosp. v. Patterson*, 320 A.2d 518, 521 (N.J. Super. Ct. Law Div. 1974); *In re Green*, 292 A.2d 387, 390-93 (Pa. 1972).

<sup>128</sup> See, e.g., *Jehovah's Witnesses v. King Cnty. Hosp. Unit No. 1*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd per curiam*, 390 U.S. 598 (1968); *People ex rel. Wallace v. Labrenz*, 104 N.E.2d 769 (Ill. 1952); *In re Guardianship of L.S. & H.S.*, 87 P.3d 521 (Nev. 2004); *John F. Kennedy Mem'l Hosp. v. Heston*, 279 A.2d 670 (N.J. 1971), *rev'd on other grounds*, *In re Conroy*, 486 A.2d 1209 (N.J. 1985); *In re Cabrera*, 552 A.2d 1114 (Pa. Super. Ct. 1989).

who refuses clearly-warranted medical treatment for no good reason when death is the likely consequence.<sup>129</sup>

By contrast, courts refuse intervention when physicians disagree among themselves. For example, in the case of *In re Hofbauer*, the New York Court of Appeals refused to declare a child with Hodgkin's disease a neglected child although his parents declined the standard treatment of radiation and chemotherapy, instead placing him on nutritional therapy and injections of laetrile.<sup>130</sup> Despite the unconventionality of the parent's preferred treatment, the court held that the decision was within the parents' rights since a licensed physician was administering their chosen treatment.<sup>131</sup> According to the court, "great deference must be accorded a parent's choice as to the mode of medical treatment to be undertaken and the physician selected to administer the same."<sup>132</sup> The court continued:

[T]he most significant factor in determining whether a child is being deprived of adequate medical care, and, thus, a neglected child within the meaning of that statute, is whether the parents have provided an acceptable course of medical treatment for their child in light of all the surrounding circumstances. This inquiry cannot be posed in terms of whether the parent has made a "right" or a "wrong" decision, for the present state of the practice of medicine, despite its vast advances, very seldom permits such definitive conclusions. Nor can a court assume the role of a surrogate parent and establish as the objective criteria with which to evaluate a parent's decision its own judgment as to the exact method or degree of medical treatment which should be provided, for such standard is fraught with subjectivity. Rather, in our view, the court's inquiry should be whether the parents . . . have provided for their child a treatment which is recommended by their physician and which has not been totally rejected by all responsible medical authority.<sup>133</sup>

The reason for the rule requiring agreement among doctors is straightforward. In Professor Goldstein's words:

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<sup>129</sup> See, e.g., *In re Vasko*, 263 N.Y.S. 552 (N.Y. App. Div. 1933).

<sup>130</sup> *Hofbauer*, 393 N.E. 2d at 1014-15.

<sup>131</sup> *Id.* at 1014.

<sup>132</sup> *Id.* at 1013.

<sup>133</sup> *Id.* at 1014; see also *Storar*, 420 N.E.2d at 73 ("Of course it is not for the courts to determine the most 'effective' treatment when the parents have chosen among reasonable alternatives."); *id.* at 69 n.3 ("[A]s a matter of public policy a medical facility generally has no responsibility or right to supervise or interfere with the course of treatments recommended by the patient's private physician, even when the patient is incapable of consent due to age.").

No one has a greater right or responsibility and no one can be presumed to be in a better position, and thus better equipped, than a child's parents to decide what course to pursue if the medical experts cannot agree . . . . Put somewhat more starkly, how can parents in such situations give the wrong answer since there is no way of knowing the right answer? In these circumstances[,] the law's guarantee of freedom of belief becomes meaningful and the right to act on that belief as an autonomous parent becomes operative within the privacy of one's family.<sup>134</sup>

By the same token, Massachusetts' highest court authorized state intervention to administer chemotherapy for a child's cancer only because all the child's doctors agreed to the treatment.<sup>135</sup> In the court's words, "[u]nder our free and constitutional government, it is only under serious provocation that we permit interference by the State with parental rights. That provocation is clear here."<sup>136</sup>

On the same rationale, courts refuse to intervene in medical neglect cases when the state's proposed course of treatment presents significant risks to a child or lacks a high chance of success, even where a child's life is threatened by the absence of this treatment. For example, the Supreme Court of Delaware refused to order that a child receive a novel form of chemotherapy because the "proposed medical treatment was highly invasive, painful, involved terrible temporary and potentially permanent side effects, posed an unacceptably low [40%] chance of success, and a high risk that the treatment itself would cause his death."<sup>137</sup> These factors, the court held, undercut the compelling conditions necessary to "outweigh the parental prerogative."<sup>138</sup> Concomitantly, courts that have authorized medical treatment over a parent's objection have noted that intervention would be inappropriate if the treatment was inherently dangerous or invasive, or reasonable persons could disagree about whether the child's life after the intervention would be worth living.<sup>139</sup>

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<sup>134</sup> Goldstein, *supra* note 3, at 654-55.

<sup>135</sup> See *Custody of a Minor*, 393 N.E. at 846.

<sup>136</sup> *Id.*

<sup>137</sup> *Newmark v. Williams*, 588 A.2d 1108, 1118 (Del. 1991).

<sup>138</sup> *Id.*; see also *In re Phillip B.*, 156 Cal. Rptr. 48, 52 (Ct. App. 1979) (refusing a state's request to repair a child's heart defect over the parents' objection based on the risks posed by the surgery).

<sup>139</sup> See, e.g., *People ex rel. Wallace v. Labrenz*, 104 N.E.2d 769, 773 (Ill. 1952) (noting the low risk associated with blood transfusion); *Muhlenberg*

C. *The Broad Definition of Medical Child Abuse and Medical Neglect Safeguards*

The broad definition of MCA developed by physicians undercuts the careful balance between parent and state that courts have constructed in past medical neglect cases. In these cases, courts have denied intervention when physicians disagree about a medical plan. In stark contrast, MCA allows physicians to declare abuse whenever they disagree with the medical care that a child has received, even when another doctor ordered it and still supports that care. And unlike medical neglect, with MCA, when physicians disagree about a child's diagnosis and therefore the child's care plan, and a parent chooses between these physicians, a physician can declare abuse despite the absence of any compelling reason for the court to choose one side over the other.<sup>140</sup> Likewise, the MCA definition does not exclude situations in which the benefits and risks of particular treatments are unclear, or in which the doctor and the parent weigh these pluses and minuses differently. Finally, medical neglect doctrine does not authorize intervention to stop parents from seeking other physicians' opinions when a parent believes a child is not yet correctly diagnosed, although the MCA definition would call such behavior "abuse." Of course, physicians may choose to adopt any set of decision-making rules they want, including those that accord parents no deference whatsoever, as unwise and un-American as such a set of rules may be. But for courts to accept physicians'

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*Hosp. v. Patterson*, 320 A.2d 518, 521 (N.J. Super. Ct. Law Div. 1974) (stating "if the disputed procedure involved a significant danger to the infant, the parents' wishes would be respected"); *State v. Perricone*, 181 A.2d 751, 760 (N.J. 1962) (declaring the parents would have a strong argument that they should make the decision if "there were substantial evidence that the treatment itself posed a significant danger to the infant's life").

<sup>140</sup> In the words of one judge properly concerned about this issue in an MCA case, to be sufficient to establish abuse:

the conflict in evidence before the trial court has to be more than physicians disagreeing over whether the prior diagnoses of and treatment plans for the children were correct. Rather, the conflict must be whether those diagnoses and treatment plans in part were based on voluntary misreporting of symptoms by parents to meet their own psychological needs.

*Frank D. v. Ariz. Dep't of Econ. Sec.*, No. 1 CA-JV 11-0017, 2011 WL 3300669, at \*5 (Ariz. Ct. App. Aug. 2, 2011) (Norris, J. concurring).

determination and to put the force of government intervention behind these rules, as courts have been doing, grossly violates our constitutional scheme.

Justina Pelletier's case, described in the introduction, provides a clear example of how MCA charges breach parents' constitutional rights.<sup>141</sup> The state's intervention in that case was justified by the charges of abuse made against her parents. Yet those abuse charges turned on a dispute between physicians over Justina's correct diagnosis. When doctors disagree, however, it is properly the role of parents, not the state, to make these tough medical decisions on behalf of their children.<sup>142</sup> Furthermore, as fit parents, the Pelletiers' decision was entitled to the presumption that it served the child's best interests.<sup>143</sup> Recall the words of the New York Court of Appeals in *Hofbauer* that the state may not "assume the role of a surrogate parent and establish as the objective criteria with which to evaluate a parent's decision its own judgment as to the exact method or degree of medical treatment which should be provided, for such standard is fraught with subjectivity."<sup>144</sup> The state's forcible intrusion into the Pelletiers' decision-making, and its taking sides on which doctor's opinion to accept, placed the state in precisely the role of surrogate parent forbidden by the Constitution.

Indeed, the *Pelletier* case shows exactly why such governmental intervention generally disserves the best interests of children, even if physicians and state officials act with the best of intentions. When two sets of physicians fundamentally disagree about diagnosis and treatment, the decision maker best positioned to resolve the conflict is generally not a court or child protection official who has spent little to no time with the child. Instead, it is the parent who knows the child best, is most motivated to ensure their welfare, and who has seen the child's medical issues develop over time. In Justina's case, in the face of

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<sup>141</sup> See Swidey & Wen, *supra* note 5; Swidey & Wen, *supra* note 14; Swidey & Wen, *supra* note 8.

<sup>142</sup> See *Custody of a Minor*, 393 N.E. at 846; *Storar*, 420 N.E.2d at 73; *Hofbauer*, 393 N.E.2d at 1013-14; see also Goldstein, *supra* note 3, at 652 (the state may overcome a presumption of parental autonomy in health-care matters only when "the medical profession is in agreement about what non-experimental medical treatment is right for the child.").

<sup>143</sup> See *Troxel*, 530 U.S. at 69.

<sup>144</sup> *Hofbauer*, 393 N.E.2d at 1014.

diametrically conflicting medical opinions, the best decision makers were her parents.<sup>145</sup>

While proponents of the MCA theory use the fact that a few parents have intentionally used the medical system to abuse children in order to cast suspicion on all parents who disagree with a doctor's care plan, this rare abuse does not justify the wholesale scrutiny of medical decisions by parents of children with complex medical issues. As the Supreme Court recognized, "[t]hat some parents 'may at times be acting against the interests of their children' creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests."<sup>146</sup> Further, "[s]imply because the decision of a parent . . . involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state."<sup>147</sup> The failure of the MCA theory to accord appropriate deference to parents' decisions regarding their children's medical care renders it unconstitutional and bars its use in court.

#### D. "Medical Child Abuse" and the Legal Test for Child Abuse

The fact that physicians call their determination "medical child abuse," and portray their determination as demonstrating legal child abuse, does not authorize government intervention. That is because, as described below, the MCA conceptualization is far broader than legal standards for child abuse in three important ways. First, the medical standards do not require any particular showing of blameworthiness on the part of the parent, in contrast to the legal definition of abuse. Second, abuse law demands, at the very least, some significant level of risk to the child, while MCA standards impose liability when a parent subjects the child to any degree of potential risk. Third, the medical standard

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<sup>145</sup> Justina Pelletier's parents later filed a civil action against Boston Children's Hospital claiming that the hospital and four pediatric specialists had committed medical malpractice in its treatment of the Justina. A jury ultimately found in favor of the hospital. Tonya Alanez, *Justina Pelletier's Family Loses Their Civil Suit Against Boston Children's Hospital*, BOS. GLOBE (Feb. 20, 2020), <https://www.bostonglobe.com/2020/02/20/metro/boston-childrens-hospital-not-negligent-justina-pelletier-civil-trial/#bgmp-comments>.

<sup>146</sup> *Parham v. J.R.*, 442 U.S. 584, 602-603 (1979) (citations omitted).

<sup>147</sup> *Id.* at 603.

that physicians use to “diagnose” MCA allows a more lenient standard of proof than the law requires.

### 1. *Blameworthiness of the Parent*

MCA-charge proponents make clear that a parent’s culpable intent is not required to diagnose MCA. As Dr. Jenny and Dr. Roesler put it, MCA “occurs when a child receives unnecessary and harmful or potentially harmful medical care at the instigation of a caretaker . . . [W]ith this definition it is not necessary to determine the parent’s motivation to know that a child is being harmed.”<sup>148</sup> Yet this standard omits the critical showing of blameworthiness required by law to find child abuse.

As our legal system has long recognized, parents will never be perfect, and sometimes—probably often—will make mistakes. These mistakes do not constitute child abuse, even if they lead to the child’s injury, unless they are accompanied by a level of blameworthiness that exceeds simple negligence on the part of the parent. Requiring more than negligence when a child is injured, in the words of the New Jersey Supreme Court, “reflect[s] a compromise between a parent’s right to raise a child as he sees fit and the child’s right to receive protection from injuries.”<sup>149</sup> The Maryland Supreme Court explored the level of culpability required to find child abuse in a civil dependency proceeding in the case of *Taylor v. Harford County Department of Social Services*.<sup>150</sup> In the court below, an administrative law judge had found abuse by a father based on his intentionally kicking a footstool in anger, which inadvertently hit and injured his daugh-

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<sup>148</sup> ROESLER & JENNY, *supra* note 31, at 43-44; *see also* 2013 AAP Report, *supra* note 46, at 591 (“The term ‘fabricated illness in a child’ has been used in this report to reflect the emphasis on the child as the victim of the abuse rather than on the mental status or motivation of the caregiver who has caused the signs and/or symptoms. . . . [T]he definition and diagnosis of caregiver-fabricated illness in a child should focus on the child’s exposure to risk and harm and associated injuries or impairment rather than the motivation of the offender. Caregiver-fabricated illness in a child is best defined as maltreatment that occurs when a child has received unnecessary and harmful or potentially harmful medical care because of the caregiver’s fabricated claims or signs and symptoms induced by the caregiver.”).

<sup>149</sup> *G.S. v. Dep’t of Hum. Servs.*, 723 A.2d 612, 620-21 (N.J. 1999).

<sup>150</sup> *Taylor v. Harford Cty. Dep’t of Soc. Servs.*, 862 A.2d 1026, 1035-37 (Md. 2004).



ter.<sup>151</sup> The Maryland Supreme Court reversed on the ground that considering any intentional act that resulted in harm to the child to be “child abuse” would:

basically creat[e] a strict liability standard for parents or caretakers who unintentionally injure their children. We consider, for example, . . . a father . . . swinging a hammer while nailing together pieces of a partition wall and does not notice that his child has walked up behind him. The father swings the hammer backwards and strikes the child in the face, causing significant injury. Under the ALJ’s reading . . . , because the act of swinging the hammer back before striking a nail was an intentional act and not “accidental or unintentional,” and his child was injured because of this intentional act, the father might be found to have committed child physical abuse. We doubt that [the statutory scheme] intends for such a draconian strict liability standard.<sup>152</sup>

Instead, the court held that the parent’s act must at least be “reckless,” meaning “[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk” to constitute abuse.<sup>153</sup> Reckless conduct, the court declared, “is much more than mere negligence: it is a gross deviation from what a reasonable person would do.”<sup>154</sup>

Many if not most of the range of acts that could be deemed MCA by physicians would not rise to the standard of culpability needed for child abuse. For example, it is doubtful that the parent who takes a child to the doctor too often as a result of a previous health crisis would be deemed negligent, let alone reckless. The same is likely true for parents who inadvertently misstate their child’s medical history, particularly given, as shown in Part III, that a large number of parents routinely misstate their child’s medical history outside of the medical child abuse context.<sup>155</sup> Further, in a case like Justina Pelletier’s, where doctors were split on their views of the child’s proper diagnosis,<sup>156</sup> the state would have been hard pressed to show that her parents’

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<sup>151</sup> *Id.* at 1029-30.

<sup>152</sup> *Id.* at 1036.

<sup>153</sup> *Id.* at 1033 (citations omitted).

<sup>154</sup> *Id.* (citation omitted); *see also* *G.S.*, 723 A.2d at 620-21 (recognizing that the wanton and willful standard “reflect[s] a compromise between a parent’s right to raise a child . . . and the child’s right to receive protection from injuries”).

<sup>155</sup> *See infra* Part III.

<sup>156</sup> *See supra* notes 11-18 and accompanying text.

actions in choosing one doctor's views over another constituted negligent, let alone reckless, behavior.

## 2. *Unreasonable Risk to the Child*

The standards for diagnosing MCA also go well beyond the legal definition of child abuse by imposing liability on a parent who exposes a child to *any* potential risk of harm, no matter how remote. MCA proponents claim that “[a]ny medical procedure, for example, a blood draw, or a trial of medication that is potentially harmful, could be considered abusive if there was no clear medical reason for it to happen.”<sup>157</sup> Yet courts have made clear that when a parent did not intend harm, the child must be subjected to a significant, actual risk of harm to constitute abuse.<sup>158</sup> Some states frame this standard as requiring at least a “substantial” or “serious” risk of harm.<sup>159</sup> Others require that the harm be “imminent” or “immediate.”<sup>160</sup>

Neither of these tests would be met by the far more speculative harms deemed to meet MCA standards. For example, Jenny and Roesler state that in their MCA study, the “most common form of abusive behavior was subjecting children to unnecessary medical examinations.”<sup>161</sup> Yet most medical examinations present an extremely small risk of harm to the child. The same is true for many noninvasive tests, as well as a number of relatively benign medications. Accordingly, these would not rise to the level of risk that would constitute child abuse under applicable state law.

<sup>157</sup> Isaac & Roesler, *supra* note 54, at 291.

<sup>158</sup> See *In re Soram*, 25 I. & N. Dec. 378, 382 (BIA 2010) (noting that, with respect to states' civil definitions of child abuse, in Pennsylvania, Tennessee, and Wyoming, the threat of harm must be quite high, requiring that the child be placed in “imminent” or “immediate” danger of injury or harm, while “the remaining States use various terms to describe the level of threat required, including ‘realistic,’ ‘serious,’ ‘reasonably foreseeable,’ ‘substantial,’ or ‘genuine’”); see also *State v. Chavez*, 211 P.3d 891, 897 (N.M. 2009) (holding that child abuse statute's purpose was to “punish conduct that creates a truly significant risk of serious harm to children.”).

<sup>159</sup> See *Soram*, 25 I. & N. Dec. at 382; see, e.g., *Chavez*, 211 P.3d at 897; see also *State v. Burdine-Justice*, 709 N.E.2d 551, 555 (Ohio Ct. App. 1998).

<sup>160</sup> See *Soram*, 25 I. & N. Dec. at 382; see also *Hernandez v. State*, 531 S.W.3d 359, 363 (Tex. App. 2017) (holding that the child must be placed in “imminent danger of death, bodily injury, or physical or mental impairment.”).

<sup>161</sup> ROESLER & JENNY, *supra* note 31, at 146.

### 3. Standard of Proof

Even if the methods that CAPs used to “diagnose” MCA were reliable, the standard of proof they use to make their decisions falls short of the heightened standard that every state requires to show child abuse at some point in a civil or criminal proceeding. When it comes to the initial adjudication of child abuse in civil dependency proceedings, states are divided on the requisite standard of proof. Many use a standard of “clear and convincing evidence,”<sup>162</sup> while others use a lower “preponderance of the evidence” standard.<sup>163</sup> Later, at the termination of parental rights stage, all states use, at the minimum, a “clear and convincing evidence” standard of proof.<sup>164</sup> In a criminal child abuse proceeding the standard of proof is still higher: “beyond a reasonable doubt.”<sup>165</sup> Yet although the centerpiece of evidence of abuse in an MCA case is the doctor’s “diagnosis” of MCA, the diagnostic standards used by doctors incorporate no such heightened standards of proof.

<sup>162</sup> See, e.g., *M.G. v. Madison Cnty. Dep’t of Hum. Res.*, 248 So. 3d 13, 16 (Ala. Civ. App. 2017); *In re A.W.*, 797 S.E.2d 655, 658 (Ga. Ct. App. 2017); *In re Delaney*, 185 N.W.2d 726, 728 (Iowa 1971); *In re B.D.-Y.*, 187 P.3d 594, 598 (Kan. 2008); *State in Interest of Gray*, 353 So. 2d 393, 394 (La. Ct. App. 1977); *Care and Protection of Laura*, 610 N.E.2d 934, 937 (Mass. 1993); *In re V.R.*, 355 N.W.2d 426, 431 (Minn. Ct. App. 1984); *In re G.C.*, 50 S.W.3d 408, 410 (Mo. Ct. App. 2001); *ex rel. Children, Youth & Families Dep’t v. Michael H.*, 417 P.3d 1130, 1136 (N.M. Ct. App. 2017); *In re N.K. & D.K.*, 851 S.E.2d 389, 392 (N.C. Ct. App. 2020); *In re J.B.*, 916 N.W.2d 787, 790 (N.D. 2018); *In re L.S.*, 60 N.E.3d 9, 18 (Ohio Ct. App. 2016); *In re A.C.*, 237 A.3d 553, 563, (Pa. Super. Ct. 2020); *In re Jermaine H.*, 9 A.3d 1227, 1231 (R.I. 2010); *In re J.A.H.*, 502 N.W.2d 120, 123 (S.D. 1993); *In re S.J.*, 387 S.W.3d 576, 587 (Tenn. Ct. App. 2012); *State ex rel. N.K.C.*, 995 P.2d 1, 3 (Utah Ct. App. 1999); *State v. Thornton*, 720 S.E.2d 572, 586 (W. Va. 2011); *In re Lauren F.*, 533 N.W.2d 812, 818 (Wis. 1995).

<sup>163</sup> See, e.g., ALASKA STAT. ANN. § 47.10.011 (2021); *In re Izabella M.*, Nos. T11CP12014147, T11CP12014148, 2013 WL 453067 (Conn. Super. Ct. 2013); *In re Brandon L.*, Nos. 1–15–0779, 1–15–0944, 2015 WL 5254431 (Ill. App. Ct. 2015); *Greysen G. v Liz C.*, 61 Misc. 3d 1216(A), 110 N.Y.S.3d 893, (N.Y. Fam. Ct., 2018); *In re L.A.T.-J.*, 12 Wash. App. 2d 1038, No. 80254-2-I, 2020 WL 2026087 (Wash. App. Ct. 2020).

<sup>164</sup> That standard was required by the U.S. Supreme Court in *Santosky v. Kramer*, 455 U.S. 745, 747-49 (1982). One state, New Hampshire, uses a higher standard of proof, “beyond a reasonable doubt.” *In re Jessica B.*, 429 A.2d 320, 322 (N.H. 1981).

<sup>165</sup> See, e.g., *State v. Consaul*, 332 P.3d 850, 865 (N.M. 2014).

The New Mexico Supreme Court in *State v. Consaul* reversed a defendant's criminal conviction of child abuse because the heart of the prosecution's case turned on expert testimony that a child's injuries were caused by suffocation.<sup>166</sup> In the court's words,

doctors usually testify as to what caused a patient's condition using phrases like "to a reasonable medical probability" or "to a reasonable medical certainty," phrases that demonstrate a sufficient degree of conviction to be probative. These phrases "are also terms of art in the law that have no analog for a practicing physician." Essentially, these phrases satisfy a minimal standard of probability, and therefore admissibility, that an opinion is more likely than not true.

In a criminal trial, however, unlike a medical differential diagnosis, the jury must determine beyond a reasonable doubt that a defendant is guilty of the crime charged. The jury must have a sufficient evidentiary basis to conclude that the defendant actually committed the criminal act he is accused of . . . Essentially, the doctors in this case testified in various ways, and with various degrees of conviction, that they suspected child abuse, that they could not rule out child abuse, that they could not think of other explanations for Jack's injuries, or that child abuse was a likely cause . . . The best these opinions could offer was that, to a preponderance of the evidence, [the child] was likely suffocated.<sup>167</sup>

Accordingly, the court held, the evidence presented in the case was not sufficient to establish proof of child abuse beyond a reasonable doubt, the standard required for a criminal conviction.<sup>168</sup> The same situation arises in cases of MCA "diagnoses"

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<sup>166</sup> Because the defendant's attorney did not object to the admission of the testimony at trial, the court explicitly did not address the issue of admissibility rather than the weight to be given the testimony. *Id.* at 862.

<sup>167</sup> *Id.* at 865 (quoting JOHN B. WONG, ET AL., Federal Judicial Center, Reference Manual on Scientific Evidence, Reference Guide on Medical Testimony 687, 691 n.9 (3d ed.2011); citing *Renfro v. San Juan Hosp.*, 403 P.2d 68, ¶ 9 (N.M. 1965).

<sup>168</sup> *Consaul*, 332 P.3d at 866. In a footnote, the *Consaul* court noted that the same issue arose with respect to pediatricians' testimony in SBS cases, which had been called into question as unscientific in recent years:

Shaken baby syndrome (SBS) cases may provide a reasonable analogy because medical testimony comprises the foundation of the prosecution's theory in many of these cases. In SBS cases, scholars and advocates for the wrongly convicted have begun to question whether testimony from medical experts that is used to establish a "triad" of indicators of SBS by itself is enough to establish beyond a reasonable

by medical experts. Insofar as such “diagnoses” are the centerpiece of the state’s case that the parent has committed child abuse, as they almost always are, that evidence is not sufficient to prove civil child abuse in those states that require a clear and convincing evidence standard, and is not sufficient to terminate parental rights in any state. Neither does it suffice to establish criminal child abuse beyond a reasonable doubt.

Under the doctrine of *parens patriae*, the state may intervene in parents’ health care decisions only when their behavior constitutes abuse or neglect, as legally defined.<sup>169</sup> The fact that an MCA “diagnosis” does not reflect a determination that child abuse has occurred means that it cannot, as a constitutional matter, warrant intervention in parents’ health care decisions for their children. Simply because a group of physicians has constructed a broad, new conceptualization that covers virtually any case in which they disagree with the medical care provided and has labeled their new construction “medical child abuse,” despite its having little to do with legal child abuse, does not change this constitutional calculus.

### III. The “Diagnostic” Process for Medical Child Abuse and Parents’ Constitutional Rights

MCA’s gross intrusion on parents’ constitutional rights is expanded still more by the unreliable process CAPs use to “diagnose” MCA. First developed by Roesler and Jenny, and then adopted by the American Academy of Pediatrics, the “cornerstone” of the MCA evaluation is a detailed review of the child’s

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doubt that the accused shook a baby. According to this research, scientific advances now debunk the idea that a “triad of symptoms” could only be caused by a caretaker shaking a baby. More recently, scholars have noted that “[w]here expert testimony is the case, we should be especially wary of the outcomes that result.”

*Id.* at 866 n.4 (citations omitted) (quoting Deborah Tuerkheimer, *Science-Dependent Prosecution and the Problem of Epistemic Contingency: A Study of Shaken Baby Syndrome*, 62 ALA. L. REV. 513, 564 (2011) (emphasis in original)).

<sup>169</sup> Parham v. J.R., 442 U.S. 584, 604 (1979).

medical records.<sup>170</sup> The “gold standard” for this medical records review is for the CAP to construct a chart summarizing the child’s medical records, and then to analyze the chart in three different ways:<sup>171</sup> (1) comparing the parent’s account of the child’s medical history with the other portions of the medical record;<sup>172</sup> (2) considering whether the parents’ account of the child’s signs and symptoms has been objectively verified;<sup>173</sup> and (3) using the presence of particular, enumerated factors as indications of abuse.<sup>174</sup>

While CAPs maintain that this process reliably distinguishes between parents seeking to abuse a child through medical care and parents legitimately trying to get children the medical care they believe they need, there is little to support this assertion except for CAPs’ say-so. Roesler and Jenny concocted their medical record review process for “diagnosing” MCA out of whole cloth, performing no empirical investigation whatsoever to confirm its validity. The only testing that the researchers did of their process was the retrospective evaluation of 115 case files mentioned earlier.<sup>175</sup> That review, though, did not seek to determine whether the method they used *accurately* separated the rare cases of abusive parents from the many cases of parents legitimately seeking care for ill children. Instead, it simply documented that MCA standards identified *far more* than three times as many cases as abusive than the MSBP criteria had.<sup>176</sup> No testing since

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<sup>170</sup> 2017 APSAC Taskforce, *supra* note 69, at 12 (“Analysis using the available records is the cornerstone of evaluation of this form of abuse and neglect.”); ROESLER & JENNY, *supra* note 31, at 131-44.

<sup>171</sup> 2017 APSAC Taskforce, *supra* note 69, at 12 (“The gold standard medical record analysis requires the creation of a chronological table of nearly every telephone call, office appointment, emergency room visit, pharmacy record, and hospitalization.”).

<sup>172</sup> See 2013 AAP Report, *supra* note 46, at 593 (“An important overall issue to consider is whether the medical history provided by the caregiver matches the history in the medical record and whether the diagnosis reported by the caregiver matches the diagnosis made by the physician.”).

<sup>173</sup> *Id.* (in record review, CAPs should compare the “reported signs/symptoms as stated by the caregiver” with “objective observations documented by the physician [and nurses]” to assess “[t]he veracity of the claims made by the caregiver . . . for each symptom and sign.”).

<sup>174</sup> *Id.* at 593.

<sup>175</sup> See *supra* notes 58–61 and accompanying text.

<sup>176</sup> ROESLER & JENNY, *supra* note 31, at 142-44.

then has sought to determine the accuracy of the MCA diagnostic process either.<sup>177</sup>

In fact, none of the three tests CAPs commonly apply to the medical records review reliably distinguish parents legitimately seeking care from child abusers. When it comes to the first test—comparing the parent’s account of the child’s medical history with other portions of the medical record—a large body of research outside of the MCA context demonstrates that inconsistencies between a parent’s account and the child’s medical records often occur for innocent reasons. To begin with, research shows that ordinary parents outside of the MCA context routinely misstate their child’s medical condition. One survey of parents who took children to the emergency room found that 91.5% of parents stated that their child’s immunizations were up to date, when only 66% of children were actually current. The researchers warned physicians to “use caution in making clinical decisions based on the history given by a caregiver.”<sup>178</sup> Another study found that mothers often provided information inconsistent with their children’s medical records regarding the length of pregnancy and neonatal problems; only half recalled the birth weight accurately. The study concluded that mothers’ accounts of

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<sup>177</sup> Testing the reliability of this process would require investigating the conclusions reached by physicians who applied this process to determine the error rate of their determinations. Thus far, only two empirical studies of MCA have ever been conducted. See Mary Greiner et al., *A Preliminary Screening Instrument for Early Detection of Medical Child Abuse*, 3 HOSP. PEDIATRICS 39 (2013); Constance Mash et al., *Development of a Risk-Stratification Tool for Medical Child Abuse in Failure to Thrive*, 128 PEDIATRICS 1467 (Dec. 2011). Neither of these studies, though, tested the accuracy of this process. Instead, both were retrospective studies that compared the records of children subsequently diagnosed with MCA with those diagnosed with certain legitimate medical conditions to determine whether any characteristics distinguished the two groups. The goal of these studies was to use such characteristics to enable earlier identification of cases suspicious for MCA in future cases. These studies provide no evidence that supports the reliability of the chart review process actually used by CAPs in cases like this. Furthermore, for the reasons laid out in Eichner, *Bad Medicine*, *supra* note 26, at 286-87, these studies were constructed in a manner insufficiently sound even to distinguish reliably between the two groups since there was no attempt to verify independently that the children identified as MCA were in fact abused.

<sup>178</sup> See Edwin R. Williams et al., *Immunization Histories Given by Adult Caregivers Accompanying Children 3–36 Months to the Emergency Department*, 23 PEDIATRIC EMERGENCY CARE 285, 285 (2007).

children's objective data are "not necessarily accurate," and that "[l]ess objective data may be recalled even less accurately."<sup>179</sup> Still another study showed that three weeks after their child's birth, mothers' accounts differed from medical records 22% of the time regarding whether their child was jaundiced, 10% of the time regarding whether an electronic fetal monitor had been used, and 11% regarding whether they had a tear of the perineum.<sup>180</sup>

Reviews of medical records outside of the MCA context demonstrate that they too are riddled with errors and omissions that would conflict with a parent's accurate account. One study investigating surgeons' accuracy in recording patients' symptoms found that surgeons "often failed to document patients' pain," as well as other symptoms they considered less medically relevant.<sup>181</sup> In addition, a study considering the accuracy of electronic medical records demonstrated that 84% of all notes physicians enter directly into such record systems contained at least one documentation error, with an average of eight errors per patient chart.<sup>182</sup> A study comparing parental reports with medical records regarding children's febrile seizures concluded that the significant discrepancies between these two sets of reports are "more likely to reflect underreporting by [the medical records] than over reporting by [parents]."<sup>183</sup> These studies show

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<sup>179</sup> See R. Kim Oates & Douglass Forrest, *Reliability of Mothers' Reports of Birth Data*, 20 J. PEDIATRICS & CHILD HEALTH 185, 185 (1984).

<sup>180</sup> See Daphne Hewson & Adrienne Bennett, *Childbirth Research Data: Medical Records or Women's Reports?*, 125 AM. J. EPIDEMIOLOGY 484, 487 tbl.3 (1987).

<sup>181</sup> Ryan Calfee et al., *Surgeon Bias in the Medical Record*, 32 ORTHOPEDICS 732, 732 (2009); see also Holli A. DeVon et al., *Is the Medical Record an Accurate Reflection of Patients' Symptoms During Acute Myocardial Infarction*, 26 W. J. NURSING RES. 547, 547 (2004) ("Clinicians may be recording those symptoms that support the [heart attack] diagnosis and not those perceived to be less relevant. Findings suggest that the medical record is an inaccurate and inadequate source of information about patients' actual experience of [heart attack] symptoms.").

<sup>182</sup> See Charlene R. Weir & Jonathan R. Nebeker, *Critical Issues in an Electronic Documentation System*, AM. MED. INFO. ASS'N ANN. SYMP. PROC. ARCHIVE 786, 787 (2007).

<sup>183</sup> Bradley K. Ackerson et al., *Agreement Between Medical Record and Parent Report for Evaluation of Childhood Febrile Seizures*, 31 VACCINE 2904, 2907 (2013).



that, in a great number of ordinary cases outside of the MCA context, there will be innocent reasons for discrepancies between a parent's account of the child's medical condition and the medical records. Such discrepancies would be even more likely to arise with children who had a complicated medical condition with extensive medical history—the children generally screened for MCA.

The second test—using the absence of objective evidence supporting the parent's account of the child's signs and symptoms as an indication of MCA—is also an unreliable test to distinguish loving parents from child abusers. The absence of objective evidence can occur for several reasons besides parental fabrication. First, a number of legitimate medical conditions, including migraine, are characterized by symptoms for which there is no objective confirmation.<sup>184</sup> Second, many symptoms and signs of genuine medical conditions are intermittent. These include cyclic vomiting, seizures, syncope (fainting), and apnea.<sup>185</sup>

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<sup>184</sup> See, e.g., Keiji Fukuda et al., *The Chronic Fatigue Syndrome: A Comprehensive Approach to Its Definition and Study*, 121 ANNALS INTERNAL MED. 953, 953 (1994) (“The chronic fatigue syndrome is a clinically defined condition characterized by severe disabling fatigue and a combination of symptoms that prominently features self-reported impairments in concentration and short-term memory, sleep disturbances, and musculoskeletal pain. . . . No pathognomonic signs or diagnostic tests for this condition have been validated in scientific studies.”); Sheryl Haut et al., *Chronic Disorders with Episodic Manifestations: Focus on Epilepsy and Migraine*, 5 LANCET NEUROLOGY 148, 148–49 (2006) (“If migraine occurs very early in life, it would be difficult to detect since diagnosis relies on reported symptoms.”); Boudewijn Van Houdenhove & Patrick Luyten, *Customizing Treatment of Chronic Fatigue Syndrome and Fibromyalgia: The Role of Perpetuating Factors*, 49 PSYCHOSOMATICS 470, 470 (2008) (“Syndromes characterized by chronic, medically unexplained fatigue, effort- and stress intolerance, and widespread pain are highly prevalent in medicine.”).

<sup>185</sup> See, e.g., David C. Good, *Episodic Neurological Symptoms*, in CLINICAL METHODS 272 (H. Kenneth Walker et al. eds., 3d ed. 1990); Haut et al., *supra* note 184, at 148–49 (2006) (“Neurological chronic disorders with episodic manifestations (CDEM) are characterised by recurrent attacks of nervous system dysfunction with a return to baseline between attacks.”); Jochen Schaefer et al., *Characterisation of Carnitine Palmitoyltransferases in Patients with a Carnitine Palmitoyltransferase Deficiency: Implications for Diagnosis and Therapy*, 62 J. NEUROLOGY, NEUROSURGERY, & PSYCHIATRY 169, 169 (1997) (“Deficiency of CPT-I is a rare disorder and usually presents in infancy with recurrent episodes of hypoketotic hypoglycaemia, which are often triggered by

Doctors routinely accept that such conditions are real in other contexts absent objective verification. Third, current staffing practices mean that medical personnel will often not be in the room to observe intermittent signs and symptoms in children.<sup>186</sup>

Finally, the third test for MCA, in which the CAP considers individual factors supposedly indicative of MCA—“(1) use of multiple medical facilities; (2) excessive and/or inappropriate pattern of utilization, including procedures, medications, tests, hospitalizations, and surgeries; [and] (3) a pattern of missed appointments and discharge of the child against medical advice”<sup>187</sup>—fares no better at reliably distinguishing abusers from loving parents of children with complex medical conditions. The first factor, use of multiple medical facilities, occurs with some regularity when parents with children who suffer from rare medical conditions that have not yet been correctly diagnosed shuttle them from doctor to doctor before they find a doctor who can properly diagnose them. The Shire Rare Disease Impact Report found that patients with a rare disease reported on average visiting eight separate physicians before receiving a correct diagnosis.<sup>188</sup> These physicians might often be at different institutions. As with other factors in the MCA determination, this factor has not been tested to determine its error rate. However, that rate is

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fasting and accompanied by a decreased level of consciousness and hepatomegaly. . . . In young adults, CPT-II deficiency classically causes recurrent episodes of fasting or exercise induced muscle pain, rhabdomyolysis, and paroxysmal myoglobinuria”); Thangam Venkatesan, *Cyclic Vomiting Syndrome Clinical Presentation*, MEDSCAPE (last updated Oct. 31, 2018), <http://emedicine.medscape.com/article/933135-clinical>.

<sup>186</sup> See, e.g., Perri Morgan et al., *Time Spent with Patients by Physicians, Nurse Practitioners, and Physician Assistants in Community Health Centers, 2006–2010*, 2 *HEALTHCARE* 232, 232–37 (2014) (physicians, physician assistants, and nurse practitioners spend an average of 20 minutes with each patient in community health centers); Danielle Ofri, *The Doctor Will See Your Electronic Record Now*, SLATE (Aug. 5, 2013, 12:27 PM), <https://slate.com/technology/2013/08/study-reveals-doctors-are-spending-even-less-time-with-patients.html> (“[M]edical interns spent 40 percent of their day with a computer compared with 12 percent of their day with actual living, breathing patients”); Barbara Yawn et al., *Time Use During Acute and Chronic Illness Visits to a Family Physician*, 20 *FAM. PRAC.* 474, 475 tbl.1 (2003) (finding that primary care physician office visits lasted about 10 minutes).

<sup>187</sup> 2013 AAP Report, *supra* note 46, at 593.

<sup>188</sup> See SHIRE, *supra* note 67, at 10.

likely high given that, even by child abuse pediatricians' own high end of estimates of the prevalence of MCA, there are roughly 2,000 children with a rare disease for every *one* child who has been the victim of MCA.<sup>189</sup> That means that it is overwhelmingly more likely that a child who meets this criterion has a rare, undiagnosed disease for which the parent is taking them to multiple medical providers than that they are a victim of medical child abuse.

The "multiple medical facilities" factor also wrongly identifies the many cases in which a child has a complex medical condition that affects multiple organs, and which are treated by different medical specialties. Among others, this includes mitochondrial disease, which may be treated by a neurologist, cardiologist, and pulmonologist, and Ehlers Danlos Syndrome, which may be treated by a vascular specialist, cardiologist, neurologist, and a pediatric orthopedic surgeon. The total prevalence rates of just these conditions, while lower than the prevalence rate for all rare diseases, is still roughly 28 in 100,000—14 times higher than pediatricians' high-end estimates of the prevalence of medical child abuse.<sup>190</sup> Accordingly, use of this criterion is far more likely to identify a child with one of these conditions than to identify a child who has been medically abused.

Using the second factor—"excessive and/or inappropriate patterns of utilization" of medical care—introduces still more unreliability into the MCA determination because it is a near-textbook example of the fallacy of circular reasoning. The point of using diagnostic criteria in the MCA context should be to aid the physician in distinguishing between two different types of cases that seem suspicious for abuse: (1) cases in which a parent is intentionally abusing their child through excess medical care, and (2) cases that, while seeming suspicious, actually involve a loving

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<sup>189</sup> Child abuse pediatricians estimate the rate of children with MCA at approximate 0.5 to 2.0 per 100,000 children younger than sixteen years. See AP-SAC TASKFORCE, *supra* note 69, and *see supra* text accompanying note 77. Meanwhile, it is estimated that up to 8% of the population has a rare disease, and that between 50–75% of rare diseases begin in childhood, so that at least roughly 4% of children have a rare disease. Supriya Bavisetty et al., *Emergence of Pediatric Rare Diseases: Review of Present Policies and Opportunities for Improvement*, 1 RARE DISEASES at \*1 (2013).

<sup>190</sup> For prevalence rates of these conditions, see Eichner, *Bad Medicine*, *supra* note 26, at 304-05.

parent seeking medical care out of concern for their child's well-being. Using the factor of "excessive or inappropriate patterns of utilization" does nothing to assist the CAP in distinguishing between these two groups because it requires that the CAP assume an answer to the question of whether the parent has behaved abusively by getting the child too much care. Only by concluding that patterns of medical care usage have been "excessive or inappropriate" will this factor weigh in favor of an MCA determination, yet determining whether this factor is present requires deciding the very question of abuse that the factor's presence is supposed to answer.

A Washington, D.C. case, *In re N.B.-P.*, illustrates the problems with using this factor to diagnose MCA.<sup>191</sup> In that case, the parents of a baby who was born ten weeks prematurely and spent a month in the neonatal intensive care unit, took him multiple times to the emergency room of the local hospital for reasons that included excessive gas, vomiting and diarrhea, a fall, and the mother's observing something she believed could be a seizure.<sup>192</sup> The CAP "diagnosed" medical child abuse based on finding a "pattern" of inappropriately seeking medical care.<sup>193</sup> After a lengthy hearing, however, the court rejected the CAP's determination, concluding, "This is the case of new parents—with a premature newborn baby who was born with multiple medical issues—and a system of doctors and social workers who jumped to conclusions."<sup>194</sup> The court concluded that "these young, first-time parents were on heightened alert due to [the child's] premature birth and serious medical issues." In this situation, the parents "did the best they could do as parents, which often included taking [the child] to be checked out in case there was something seriously wrong with their already sick newborn."<sup>195</sup> The lesson of *In re N.B.-P.*, put simply, is that a diagnostic criterion focused on a "pattern" of excessive or inappropriate medical care has a high risk of producing inaccur-

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<sup>191</sup> *In re N.B.-P.*, No. 2014 JSF 001448, 2015 WL 4709707 (D.C. Super. Ct. July 30, 2015).

<sup>192</sup> *Id.* at \*2-\*3.

<sup>193</sup> *Id.* at \*4.

<sup>194</sup> *Id.* at \*7.

<sup>195</sup> *Id.* at \*7-8.

rate results because, in order to apply it, the CAP must assume the conclusion that the parents behaved inappropriately.

Use of the third factor—a pattern of missed appointments and discharges against medical advice—also increases the unreliability of the MCA determination. While this factor may be present with children who are truly abused, it will also likely be present in many cases in which parents are legitimately seeking care but are incorrectly suspected of MCA. That is because, in many cases in which a physician suspects MCA, she will either inform the parent that she believes the child is not sick or will seek to remove the child's medical treatments. Many parents of children with rare or complex diseases will, at this point, remove their child from the physicians' care through canceling appointments or discharging their child to enable the child to receive the needed care. Use of this factor involves a different type of circular reasoning than that discussed in the last subsection. Here, the problem is that using missed appointments and discharges against medical advice identifies those cases in which physicians suspect medical abuse without helping distinguish between cases in which their suspicions are correct versus those in which they are incorrect.

This third factor may also appear innocently in cases in which a parent believes that a physician has misdiagnosed their child. As the Shire Rare Disease Impact Report shows, the parent will often be right: the average length of time it takes a patient with a rare disease to get an accurate diagnosis is 7.6 years.<sup>196</sup> In the meantime, the parent of such a child may repeatedly discharge the child against medical advice and sometimes cancel upcoming medical appointments, in order to seek new physicians who will properly diagnose their child.

The fact that CAPs center the MCA determination process on a medical records review arguably makes their determinations seem more like a legitimate medical diagnosis, since this review is often a part of the standard differential diagnostic process. Yet as a test of the veracity of the parent's account regarding the child's condition, which is what the MCA determination supposedly turns on, the medical records investigation is grossly unreliable. That is because this focus on medical records excludes, in the

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<sup>196</sup> SHIRE, *supra* note 67, at 10.

great bulk of cases, the witnesses with the best opportunity to confirm or disconfirm the parent's account of the child's condition—namely those people who have spent the most time with the child outside of the hospital and doctors' offices, such as home health aides, teachers, and the other parent of the child. The fact that the MCA determination process does not take account of the observations of such witnesses makes it far more likely to reach an erroneous result.

In short, even had the MCA definition correctly targeted a category of cases that constituted legal abuse, the process that physicians use to determine which cases met their definition would still be insufficiently reliable to justify interfering with the constitutional rights of those parents identified. That process cannot reliably identify the few cases in which parents seek medical care for their children for their own twisted ends from the many cases in which loving parents legitimately seek answers and care for children with rare or complex medical conditions.

#### **IV. Recent Encroachment on Parents' Rights in Medical Neglect Cases**

Part II of this article suggested that courts in medical abuse cases have improperly failed to apply the longstanding protections of parents' rights that exist in medical neglect cases. This Part raises the troubling possibility that the opposite may be occurring in dependency courts today: judges and lawyers who have become accustomed to accepting the outsized and improper roles that government and physicians are playing in MCA cases may now be transporting these same oversized roles into medical neglect cases, thereby accepting parents' diminished rights to make health-care decisions in these cases as well.

In one recent case, the parents of a young child presented him to a major children's hospital in the northeast for a medical opinion regarding his gastrointestinal issues.<sup>197</sup> A pediatric GI specialist at the hospital diagnosed the child with inflammatory bowel disease (IBD), a condition characterized by chronic inflammation of the gastrointestinal tract. The parents then sought

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<sup>197</sup> Because the case is ongoing and the parents fear retaliation by the hospital, they have asked that identifying information be withheld from my account.

a second opinion from a medical expert at another major children's hospital who was less certain of the diagnosis, and who recommended additional tests, which were performed before the child's IBD diagnosis was affirmed. The family also sought a third opinion on diagnosis and treatment with a pediatric gastroenterologist at a general hospital. During this time, the child wound up being treated by physicians at both children's hospitals. In one of the visits to the second children's hospital, two courses of an autoimmune infusion ordered by physicians were administered. The parents, however, stopped the child from receiving the third dose because his condition worsened significantly shortly after he received the second infusion and physicians could not explain his deterioration. Afterwards, the parents consulted yet another expert at another children's hospital closer to home than the hospital at which the child had received his infusions.

Several months later, the parents returned their child to the first children's hospital. The child was hospitalized there that time and a subsequent time when his condition worsened; he was released after treatment both times. In between, the parents also brought the child to numerous outpatient appointments at the hospital. Throughout the child's treatment, on a number of occasions, the parents questioned whether particular procedures were necessary, and they delayed having the child perform at least one set of laboratory tests that were ordered. Further, at the end of one of the hospital admissions, the parents discharged the child from the hospital the evening before he was scheduled to be discharged the following morning; it is disputed whether they did so against medical advice.

In the fall of 2021, the child was again admitted to the first children's hospital because his condition had worsened, where he was started on a new immunosuppressant drug. Shortly afterwards, because of the seriousness of the child's IBD, the GI physician recommended ileostomy surgery, which would result in the child's wastes being diverted into a pouch. The parents spoke to the Family Relations unit at the hospital for assistance in getting a second opinion on the surgery, also contacting one of the GI specialists they had seen before at a different hospital. Based on the child's medical records, that specialist was not convinced that surgery was warranted before other courses of treatment were

attempted. But rather than facilitate the child's transfer to the other hospital to make that second opinion possible, the GI specialist at the children's hospital filed a petition for medical neglect against the parents, based on the parents' questioning and noncompliance with her orders and their taking the child to the physicians at other hospitals. On this petition, a dependency court judge removed custody from the parents on an emergency basis.

Until this point, the relationship between the first children's hospital and the parents had certainly been somewhat contentious. This was a product of the fact that the parents were very active participants in their son's care and often questioned whether and why particular care was necessary, at times consulting other physicians or refusing care when they believed it was not in their son's best interests. Yet in behaving that way, the parents were well within their constitutional rights as medical decisionmakers for their child. In that role, they were entitled—indeed, charged with the weighty responsibility—to ask questions, make objections, and seek the opinion and care of a second, third, even fourth doctor when they were unconvinced by a diagnosis or a proposed course of treatment. They were also entitled to refuse medical treatment they believed was not in their child's best interests.

As laid out in Part II, good law from the high courts of several states establishes that government intervention in a medical neglect case like this one is appropriate only where the parents' actions are clearly wrong in the sense that licensed physicians are all of the same opinion about the proper course of treatment, the child's condition is life-threatening, and there are no significant downsides or risks to the physician's chosen course. It happened that the state in which the dependency petition was filed had no clear case law from appellate courts that explicitly defined the bounds of parents' constitutional rights to make medical decisions in medical neglect cases. Yet there was nothing to suggest that the state's appellate courts would diverge from the clear law governing other states. Under this law, the parents had never overstepped their roles in a manner that would have authorized government intervention. Earlier in the course of the child's illness, physicians at different hospitals had first disagreed regarding the child's diagnosis and later with his course of treatment.



At the time that the parents discharged their son from the hospital a night early, even if they did so against medical advice (a disputed issue), there was no contention that the child's condition was life threatening. And when the parents discontinued their son's infusions they did so based on evidence that it was creating significant medical problems for the child. The Constitution authorizes such conduct, protecting parents from having to defer blindly to physicians.<sup>198</sup> Looking ahead to the proposed surgery, the doctrinal limits on government intervention should have prevented the court from intruding on the parents' decision making. The fact that the GI expert from the general hospital agreed to evaluate the child, as well as his preliminary opinion doubting that surgery was the preferred course for the child meant that not all physicians were on the same page, which should have precluded government intervention. Recall Professor Joseph Goldstein's words that, where there is no clearly correct medical course, in our constitutional scheme, it is parents rather than the courts or physicians, who have the right to make medical decisions for the child.<sup>199</sup>

The parents, though, never got the chance to argue that the decision regarding surgery was theirs to make. Instead their attorneys, two veteran parents' lawyers, refused to contest the court's preliminary finding of medical neglect. The physicians in abuse and neglect cases, they told the parents, wielded significant clout. The fact that the parents had not followed their doctors' directives, the lawyers told them, meant that a judge would likely reaffirm the finding of dependency if the parents contested the issue. Further, if the parents contested the physicians on this issue, their attorneys advised, the hospital might retaliate by seeking to have the child permanently removed from the parents. In this case, according to the lawyers, there was a reasonable chance that the parents might lose custody of the child permanently, as had occurred in several medical child abuse cases in the local courts. The parents' attorneys therefore counseled that the parents' only viable strategy was simply to argue that the judge should exercise his discretion in ruling that surgery at that time was the less preferable course for the child – leaving the issue of

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<sup>198</sup> See *supra* Part IIA, Part IIB.

<sup>199</sup> Goldstein, *supra* note 3, at 654-55.

the parents' rights to make this determination completely off the table.

It turns out that the views of the parents' attorneys were not outside the bell curve of local practice. When I sought assistance for the parents from a leading state expert in children's rights at a nearby nonprofit clinic, he was astounded to hear me argue that the judge lacked appropriate grounds to resolve the question of surgery in the child's best interests. The physicians from that hospital, he told me, had the best interests of children at heart; when parents sought to reject their advice, it was properly up to the judge to decide what served the child best. Parents' constitutional rights to determine their children's health care played no role in any of these lawyers' analyses. Ultimately, the dependency court judge ordered that it was in the boy's best interests to have the surgery, and the operation was performed over the parents' objections. If what occurred in this case is representative of what is happening in dependency courts in other states, it does not augur well for the future of parents' medical decision-making rights.

## **V. Protecting Parents' Medical Decision-Making Rights**

Our constitutional jurisprudence is grounded on the principle that parents, rather than the state, have the right to the custody and care of their children, including medical decision making. That principle rests on the considered view that parents are best positioned and most motivated to ensure children's wellbeing. The exceptions to this rule occur in cases in which parents neglect or abuse their children. But those exceptions are, in our constitutional system, intended to be rare. Physicians' invention of MCA charges threaten to upend this system, allowing physicians to intervene virtually at will when they disagree with parents. Reasserting parents' decision-making rights in all but the small subset of cases in which neglect or abuse are genuinely threatened is necessary to protect children's wellbeing. Action from legislators and attorneys representing parents can help safeguard parents' rights as well as protect children's wellbeing.

### A. Legislative Action to Limit Medical Child Abuse Charges

Several legislative fixes would stymie pediatricians' unconstitutional overreach on MCA. First, state legislatures can pass statutes that, as a substantive matter, clarify the appropriate boundaries between parents' legitimate exercise of their constitutional rights, on the one hand, and genuine child abuse and neglect, on the other. The draft *Restatement of Children and the Law*, passed in tentative form by the American Law Institute, contains helpful language that could be incorporated into state law:

A parent's [health-care] decision is entitled to deference when licensed medical doctors disagree about the diagnosis or appropriate course of treatment and there is substantial medical support for the parent's choice of treatment. There is medical support for the parent's decision when it is based on an acceptable standard of care or practice in the medical profession sufficient to shield the recommending doctor from liability for negligent diagnosis or treatment. If the recommending doctor could not be subject to malpractice liability based on his or her diagnosis or treatment, . . . the parent's selection of the treatment [is within his or her authority] even if it is not recommended by the majority of doctors.<sup>200</sup>

A later section of the *Restatement* adds that "a parent may choose to seek the opinion of additional licensed medical doctors even if the child's current doctors disagree."<sup>201</sup> Statutes that make it clear that parents who choose between doctors' opinions

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<sup>200</sup> RESTATEMENT OF CHILDREN AND THE LAW § 2.30 cmt. a (AM. L. INST., Tentative Draft No. 1, 2018). The Restatement also provides an illustration of this principle of law derived from Justina Pelletier's case, described *supra* notes 11-17 in the introduction:

Jasmine is nine years old and is experiencing severe gastrointestinal pain and low energy that impairs her ability to walk or participate in daily activities. A licensed doctor diagnoses Jasmine with mitochondrial disease, a genetic condition with complex and disputed diagnostic criteria. Another licensed doctor disagrees with the diagnosis of mitochondrial disease and diagnoses Jasmine's symptoms as psychiatric in nature and prescribes inpatient psychiatric care. There is medical support for each of the conflicting diagnoses. Jasmine's parents agree with the first doctor's diagnosis and consent to treat Jasmine for mitochondrial disease. They reject the second doctor's diagnosis and refuse to consent to inpatient psychiatric treatment. A court will defer to the parents' decision.

*Id.* § 2.30 cmt. c, illus. 11.

<sup>201</sup> *Id.* § 3.20 cmt. a. at 100.

or who seek more doctors' opinions are exercising constitutional rights rather than committing abuse would go a considerable way toward limiting physicians' attempts to encroach on parents' authority to make such decisions.

Legislatures can also mandate changes in child protective services and court procedures to help ensure that only parents who are truly abusive will face MCA charges. At the child protective services stage, legislators should demand that the agency vigorously investigate reports of MCA rather than simply accepting CAPs' "diagnoses" as conclusive of abuse. The new law passed by Texas in the wake of a series of journalistic exposés concerning the unscientific nature of CAP diagnoses provides a good model for such protections.<sup>202</sup> That law requires that once a report of abuse is made, child protective services must refer it for forensic investigation to a healthcare professional other than the one who made the report.<sup>203</sup> (A still-better model would go beyond the Texas act to provide that the forensic investigation be handled by a professional at a different health care facility than the one from which the report of abuse was made.<sup>204</sup>) In addition, in cases in which legitimate medical conditions could be mistaken for abuse, which will often be the case with MCA charges, the Texas law requires that child protection authorities investigating such a report consult with a specialist in those conditions at the request of parents, the parents' attorneys, or other doctors.<sup>205</sup> Child protective services must also consider any opinions of medical professionals offered by the parent.<sup>206</sup> The Texas law also prohibits a court from removing the child from the parent's custody on an emergency basis premised on immediate danger to the child's safety solely on the opinion of a medical professional who has not conducted a physical examination of the child.<sup>207</sup> Finally, it requires that a court holding a hearing

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<sup>202</sup> TEX. FAM. CODE ANN. § 261.3017 (West 2021); Mike Hixenbaugh & Keri Blakinger, *New Texas Law Aims to Protect Parents Wrongly Accused of Child Abuse*, NBC NEWS (June 21, 2021, 3:30PM), <https://www.nbcnews.com/news/us-news/new-texas-law-aims-protect-parents-wrongly-accused-child-abuse-n1271646>.

<sup>203</sup> TEX. FAM. CODE ANN. § 261.3017(c-1).

<sup>204</sup> *Id.* § 261.3017(c-1)(3).

<sup>205</sup> *Id.* § 261.3017(c)-(c-1).

<sup>206</sup> *Id.* § 261.3017(e).

<sup>207</sup> *Id.* § 262.102(b-1) (West 2021).

following an emergency removal of a child must consider safety opinions from any physicians obtained by the child's parents.<sup>208</sup>

For those claims of medical abuse that make it to the courtroom, legislatures should also mandate that MCA "diagnoses" be excluded as proof in abuse proceedings. Excluding such diagnoses would require that the government actually meet its burden to prove all the elements of legal abuse, as they are required to do by law, rather than evade this burden by means of diagnostic fiat. The *Restatement of Children and the Law* offers helpful language on this issue:

In cases in which the allegations of physical abuse involve a parent's seeking unnecessary medical treatment for a child, whether the parent's actions constitute physical abuse is a determination to be made by the factfinder. Expert medical testimony may be relevant to factual issues that underlie the determination of physical abuse, including whether the child possessed genuine medical diagnoses, as well as whether the child received unnecessary medical treatment given the child's medical diagnoses.<sup>209</sup>

The Reporter's Comment to this rule more explicitly explains that "Courts should not admit expert medical testimony regarding the medical child abuse diagnosis."<sup>210</sup> It then describes the rationale for this rule:

[E]xpert testimony regarding diagnoses properly pertains to the child's bodily conditions. In contrast to traditional medical diagnoses, the determination of medical child abuse is not centered on assessing an underlying bodily condition, but instead represents a determination that the parent's actions in obtaining medical care [f]or a child should be considered physical abuse. . . . Whether the parent's conduct constituted physical abuse is a legal question to be determined by the factfinder.<sup>211</sup>

State legislatures should codify similar language to curtail physicians' effort to encroach on parents' constitutional rights through the concocted "diagnosis" of MCA.

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<sup>208</sup> *Id.* § 262.201(i-1) (West 2021).

<sup>209</sup> RESTATEMENT OF CHILDREN AND THE LAW, *supra* note 200, at § 3.20 cmt. k.

<sup>210</sup> *Id.* § 3.20 reporters' note at 119.

<sup>211</sup> *Id.*

B. *Safeguarding Rights to Medical Decision-Making in Litigation*

With or without legislative changes, parents' attorneys should vigorously seek to enforce parents' rights to medical decision-making in cases in which medical abuse or medical neglect has been charged. To do so, they should raise the issue of parents' constitutional rights directly. They should also seek to exclude admission of MCA "diagnoses" as both a violation of parents' rights and as scientifically unreliable.

1. *Asserting Parents' Constitutional Rights to Make Medical Decisions*

In the courtroom, parents' attorneys should move to dismiss appropriate cases of MCA or medical neglect based on the parent's constitutional right to make medical decisions on behalf of their child. This includes cases in which the charges of abuse or neglect stem from parents' simply choosing between licensed physicians who disagree about the child's diagnosis and care plan, as well as those cases in which a parent believes their child has an undiagnosed condition or disagrees with a physician's care plan and seeks to consult physicians over current physicians' objections. The medical neglect cases described in Part II.B provide useful support for such a motion. Further, the relevant provisions from the forthcoming *Restatement of Children and the Law*, quoted in the previous section on legislative reforms, offer a helpful guide on the proper boundaries of parents' broad authority to make such decisions.

2. *Contesting the Admission of MCA Diagnoses as Legally Improper*

For those cases that reach the stage of a court hearing, parents' attorneys should vigorously press to exclude MCA "diagnoses" from admission into evidence.<sup>212</sup> Doing so is critical for a parent to get a fair trial on child abuse charges. Opinion testimony by experts has long generated controversy because of "the crucial and often determinative weight an expert's opinion may

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<sup>212</sup> The author of this article has drafted a stock brief in support of such a motion in limine, which she will make available to parents' lawyers on request.

carry.”<sup>213</sup> Because of this, courts have carefully sought to cabin the testimony of experts to the area within their legitimate expertise. Accepting MCA as a medical diagnosis to which medical experts may testify makes an end run around these carefully constructed limitations by turning what is properly a legal determination — whether a parent has committed child abuse — into a diagnostic decision (that a child “has MCA”) supposedly within the realm of a physician’s diagnostic expertise.

In denominating MCA as a “diagnosis,” its proponents lump together three separate determinations that, as a conceptual matter, must be made in determining whether MCA occurred in any given case.<sup>214</sup> First, the child’s genuine underlying medical diagnoses must be determined. Second, it must be decided whether, given these genuine medical conditions, the child received unnecessary, potentially risky medical care. Third, and finally, it must be determined whether, given the first and second inquiries, the parent’s actions rise to the level that she should be held responsible for (in MCA terminology, be deemed to have “instigated”) the unnecessary medical care.<sup>215</sup> Although MCA proponents treat these three determinations as together comprising the “diagnostic” determination for MCA, in truth, only the first inquiry — which medical diagnoses a child genuinely possesses — constitutes a true diagnostic determination. This is because the term “diagnosis” refers to a process in which the patient’s “signs” (objective phenomena) and “symptoms” (subjective phenomena) are used to determine systematically whether and which abnormal underlying condition or disease the patient has.<sup>216</sup> Neverthe-

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<sup>213</sup> *People v. Bowker*, 249 Cal. Rptr. 886, 889 (Cal. Ct. App. 1998).

<sup>214</sup> *See, e.g.*, 2013 MICH. TASK FORCE REP., *supra* note 71, at 1 (“Medical Child Abuse is a diagnosis recognized and supported by the American Board of Pediatrics.”).

<sup>215</sup> The 2013 AAP Report recognizes that these determinations are lumped together into the diagnostic determination, although it frames them slightly differently: “1. Are the history, signs, and symptoms of disease credible? 2. Is the child receiving unnecessary and harmful or potentially harmful medical care? 3. If so, who is instigating the evaluations and treatment?” 2013 AAP Report, *supra* note 46, at 593-94.

<sup>216</sup> “Differential diagnosis” is the process used by physicians to identify and isolate the medical diseases or conditions from which a patient is suffering. *Differential Diagnosis*, DORLAND’S ILLUSTRATED MEDICAL DICTIONARY (31st ed. 2007). In the words of Richard Rogers, an expert in diagnostic and clinical

less, the second inquiry — whether the child has received unnecessary, potentially risky medical care — although not a true diagnostic determination, is still properly admissible on the ground that it is relevant, so long as it is within the expertise of the particular medical expert. In fact, this second inquiry is quite similar to that often performed by experts in medical malpractice cases.<sup>217</sup>

It is expert testimony on the third and ultimate inquiry wrapped up in the MCA determination — whether the parent seeking medical care committed “medical child abuse” by “instigating” the medical care — that has no place in a courtroom of justice. As explained below, there are two separate reasons that admission of such testimony is improper. First, this inquiry involves an assessment of blame, which is properly a legal rather than a diagnostic, or even a medical, consideration. Second, even if MCA were a proper medical diagnosis, a medical expert would still be prohibited from testifying to its presence in a child abuse proceeding since whether the parent has committed child abuse is the ultimate issue before the court. The fact that the MCA “diagnosis” is rendered based on criteria that are far less strict than the legal definition of abuse renders it still more problematic because of its potential to mislead the trier of fact.

a. *The medical child abuse determination and the differential diagnostic process*

In incorporating a determination of whether the parent “instigated” the child’s overtreatment, MCA exceeds the proper scope of a medical diagnosis. This is because the diagnostic inquiry in which physicians are trained involves a search for a particular kind of cause. That diagnostic process consists of using the patient’s “signs” (objective phenomena) and “symptoms” (subjective phenomena) to determine systematically whether and

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assessment, “The sine qua non of diagnosis is measurable and reliable differences in signs and symptoms.” Richard Rogers, *Diagnostic, Explanatory, and Detection Models of Munchausen by Proxy: Extrapolations from Malingering and Deception*, 28 CHILD ABUSE & NEGLECT 225, 228 (2004).

<sup>217</sup> See generally 2 STEVEN E. PEGALIS, *AMERICAN LAW OF MEDICAL MALPRACTICE* § 8:1 (3d ed. 2016) (“Expert testimony is almost always required in the medical malpractice case to establish the departure from the standard of care and causation.”).



which abnormal underlying condition or disease the patient has.<sup>218</sup> To take a simple example of a differential diagnosis, when a patient presents with a sore throat, the doctor may investigate whether the symptoms are caused by the bacteria associated with strep throat or, alternatively, by a cold virus. To do so, the doctor will use signs and symptoms, including the patient's temperature, swollen lymph nodes or tonsils, and presence or absence of a cough or headache, as well as laboratory tests, to make an informed judgment — a “diagnosis” — regarding which of these conditions the patient likely has.<sup>219</sup>

This type of diagnostic determination certainly occurs in the first part of the MCA inquiry, when the physician uses the child's signs and symptoms to determine which, if any, genuine diseases or conditions the child truly has.<sup>220</sup> Yet determining whether a parent instigated overtreatment requires an inquiry into causes external to the child's body.<sup>221</sup> Courts properly differentiate between such internal and external inquiries of causation by distinguishing between “differential diagnosis” and “differential

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<sup>218</sup> See *supra* note 216.

<sup>219</sup> One diagnostic protocol for strep indicates, for example, that most sore throats result from a viral infection, rather than the bacterial infection of strep, and then quantifies the percentage of strep cases of all sore throat cases. See Monica G. Kalra et al., *Common Questions About Streptococcal Pharyngitis*, 94 AM. FAM. PHYSICIAN 24, 24 (2016) (“Group A beta-hemolytic streptococcal (GABHS) infection causes 15% to 30% of sore throats in children and 5% to 15% in adults”). The diagnostic protocol then specifies which diagnostic signs and symptoms, such as headache, fever, swollen glands, swollen tonsils, and which laboratory tests, indicate the presence of the bacteria associated with strep, how strong these indicators are, and how often these signs and symptoms are associated with false positive or false negative diagnoses. *Id.* at 24-31.

<sup>220</sup> See *supra* notes 209-211 and accompanying text.

<sup>221</sup> Indeed, in transitioning from MSBP to the concept of MCA, Dr. Jenny and Dr. Roesler specifically sought to dismiss the idea that MCA depends on some underlying medical or psychological condition to be diagnosed in the child, in the way that MSBP was believed to have been a diagnosable psychological disorder in the parent. Instead, they argued, doctors should give up the search for an internal condition, and simply identify what happened to the child as child abuse. In response to the question of whether the behavior at the root of the MCA diagnosis is really a syndrome, they answered, “No. The behavior commonly called MSBP is a form of child abuse that takes place in a medical setting. Child abuse is not an illness or a syndrome in the traditional sense but an event that happens in the life of the child.” See, e.g., ROESLER & JENNY, *supra* note 31, at 55.

etiology.”<sup>222</sup> As stated by Dr. Ronald Gots, both types of inquiries “seek to uncover causes, but of very different things.”<sup>223</sup> Differential diagnosis seeks to identify “the internal disease or process which produces or causes the patient’s symptoms or findings;”<sup>224</sup> meanwhile differential etiology “describe[s] the investigation and reasoning that leads to the determination of external causation.”<sup>225</sup> As the New Mexico Supreme Court observed, “the determination of the external cause of a patient’s disease is a complex process that is unrelated to diagnosis and treatment.”<sup>226</sup>

Medical experts’ opinions on etiology are admissible in many types of cases even if they are not accorded as much deference as diagnostic opinions.<sup>227</sup> Yet this is in cases in which medical science sheds light on the physiological process by which a particular medical condition develops, and this science therefore points to factors that may cause the process to occur. Expert testimony in such cases thus serves as the factual predicate to allow the trier of fact to fasten legal liability for a person’s disease or

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<sup>222</sup> See *Bowers v. Norfolk S. Corp.*, 537 F. Supp. 2d 1343, 1360 (M.D. Ga. 2007), *aff’d*, 300 F. App’x 700 (11th Cir. 2008) (“The distinction is more than semantic; it involves an important difference.”); *CONSAUL*, 332 P.3d at 863 (quoting Ian S. Spechler, *Physicians at the Gates of Daubert: A Look at the Admissibility of Differential Diagnosis Testimony to Show External Causation in Toxic Tort Litigation*, 26 REV. LITIG. 739, 740 (2007)) (“Differential etiology is ‘a process that identifies a list of external agents . . . that potentially caused the disease.’”). Deborah Tuerkheimer’s *Flawed Convictions* contains an excellent analysis of this distinction. See DEBORAH TUERKHEIMER, *FLAWED CONVICTIONS: “SHAKEN BABY SYNDROME” AND THE INERTIA OF INJUSTICE* 75-82 (2014).

<sup>223</sup> Ronald E. Gots, *Differential Diagnosis Versus Causation Assessment: Why They Are Separate Methodologies and How They Relate To Daubert*, INT’L CTR. FOR TOXICOLOGY & MED. (last visited Nov. 11, 2021 at 12:15 PM) [https://irp-cdn.multiscreensite.com/562d25c6/files/uploaded/Gots\\_Differential-Diagnosis-versus-Causation-Assessment\\_Why-They-are-Separate-Methodologies-and-How-They-Relate-to-Daubert\\_2004\\_naysayer.pdf](https://irp-cdn.multiscreensite.com/562d25c6/files/uploaded/Gots_Differential-Diagnosis-versus-Causation-Assessment_Why-They-are-Separate-Methodologies-and-How-They-Relate-to-Daubert_2004_naysayer.pdf).

<sup>224</sup> *Id.* at 1.

<sup>225</sup> *McClain v. Metabolife Int’l, Inc.*, 401 F.3d 1233, 1252 (11th Cir. 2005) (quoting Mary Sue Henifin et al., *Reference Guide on Medical Testimony*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 439, 481 (2d ed. 2000)).

<sup>226</sup> *Consaul*, 332 P.3d at 863 (quoting *Parkhill v. Alderman-Cave Milling & Grain Co.*, 245 P.3d 585, 590 (N.M. Ct. App. 2010)).

<sup>227</sup> As one district judge put it, when it comes to doctors’ determinations, “[t]he differential diagnosis method has an inherent reliability; the differential etiology method does not.” *Bowers*, 537 F. Supp. 2d at 1361.

injury by establishing factors that may have served as the “but for” cause of these conditions.<sup>228</sup>

Yet the type of causal determination involved in the third MCA inquiry—whether the parent “instigated” the medical care—turns on a value judgment rather than a factual judgment about cause that is within the province of medical knowledge. This is because virtually all of children’s medical care is “instigated” by parents in the “but-for cause” sense, since parents almost always take children for medical care. CAPs, though, do not identify all such conduct as MCA; instead, they read the term “instigate” to apply only to those parents whom they believe have done something sufficiently improper to rise to the level of “medical child abuse.”<sup>229</sup> Yet the blameworthiness of the parent’s conduct is properly a matter for the court to assess based on legal principles, not for the medical expert. Further, the physicians’ medical expertise gives him/her insight about the child’s bodily processes; it does not contribute any special insight into parent’s blameworthiness. Rule 702’s “helpfulness” standard, which requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility is therefore not met here.<sup>230</sup>

The American Law Institute agrees that the so-called “diagnosis” of MCA exceeds the proper scope of expert medical testimony. Its *Restatement of Children and the Law*, now in draft form, declares that “[i]n cases in which . . . allegations of physical abuse involve a parent’s seeking unnecessary medical treatment for a child, whether the parent’s actions constitute physical abuse

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<sup>228</sup> See *Black v. Food Lion, Inc.*, 171 F.3d 308, 314 (5th Cir.1999). For example, in the case of *Bowers v. Norfolk S. Corp.*, 537 F. Supp. 2d at 1360, the medical expert sought to testify to whether a train’s vibrations were the cause of the plaintiff’s back and neck pain, meaning whether the plaintiff would have experienced the pain absent the railroad’s vibrations. *Id.* at 1345. That judgment reflected a simple factual determination regarding whether vibrations can produce certain conditions that involve pain.

<sup>229</sup> As Roesler and Jenny framed the issue, the question about the parent’s actions at this stage is whether “the harm or potential harm to the child [is] sufficient to warrant consideration for protection?” ROESLER & JENNY, *supra* note 31, at 141.

<sup>230</sup> FED. R. EVID. 702.

is a determination to be made by the factfinder.”<sup>231</sup> The Reporter’s Comments expand on this issue further, declaring that

[c]ourts should not admit expert medical testimony regarding the medical child abuse diagnosis. As Comment *k* explains, expert testimony regarding diagnoses properly pertains to the child’s bodily conditions. In contrast to traditional medical diagnoses, the determination of medical child abuse is not centered on assessing an underlying bodily condition, but instead represents a determination that the parent’s actions in obtaining medical care for a child should be considered physical abuse.<sup>232</sup>

The *Restatement* therefore limits expert medical testimony in abuse proceedings to “factual issues underlying the ultimate legal issue of physical abuse,” including “diagnos[ing] the child’s medical conditions, . . . as well as the medical consequences of those conditions for the child.”<sup>233</sup>

*b. The medical child abuse determination and the ultimate issue in a child abuse case*

Testimony that the child was a victim of “medical child abuse” is also inadmissible because it is the ultimate issue in child abuse proceedings. Federal Rule of Evidence 704, which states that “[a]n opinion is not objectionable just because it embraces an ultimate issue,” at first blush might seem to permit this testimony.<sup>234</sup> Yet courts have made clear that this rule “does not open the door to all opinions. . . . [Q]uestions which would merely allow the witness to tell the jury what result to reach are not permitted. Nor is the rule intended to allow a witness to give legal conclusions.”<sup>235</sup> On this basis, courts allow experts to testify

<sup>231</sup> RESTATEMENT OF THE LAW – CHILDREN AND THE LAW, *supra* note 200, at § 3.20 comment *k*.

<sup>232</sup> *Id.* at reporter’s note comment *k*.

<sup>233</sup> *Id.*

<sup>234</sup> FED. R. EVID. 704.

<sup>235</sup> *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983); *see also* *United States v. Perkins*, 470 F.3d 150, 159 (4th Cir. 2006) (expert opinion must be “helpful[ ] to the jury,” and therefore state some information other than a legal conclusion); *Monroe v. Griffin*, No. 14-CV-00795, 2015 WL 5258115, at \*6 (N.D. Cal. Sept. 9, 2015) (noting that an expert opinion is not objectionable just because it embraces an ultimate issue; “[h]owever, an expert witness cannot give an opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law” (quoting *Elsayed Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1065-66 n.10 (9th Cir. 2002))).

to factual issues underlying the ultimate issue, but preclude testimony on the ultimate legal issue itself.<sup>236</sup> For example, in *Young v. State Farm Mutual Automobile Ins. Co.*,<sup>237</sup> the plaintiff, who sued his insurer to establish that his daughter's injuries were covered, sought to introduce an expert to testify that "in his opinion [plaintiff's daughter] was covered under the automobile insurance policy."<sup>238</sup> The court rejected this testimony on the ground that it presented "nothing more than a legal conclusion as to the ultimate issue in the case."<sup>239</sup>

An expert's use of legal language such as "medical child abuse" is a red flag on this issue. Carole Jenny and Thomas Roesler noted when coining the term "medical child abuse" that it was meant to convey that the parent has committed child abuse.<sup>240</sup> Yet courts have repeatedly held that "expert witnesses' use of 'judicially defined terms,' 'terms that derived their definitions from judicial interpretations,' and 'legally specialized terms' . . . constitute [an] expression of opinion as to the ultimate legal conclusion."<sup>241</sup> For this reason, an expert's testimony in a police excessive force suit that an officer had used "grossly unlawful, unnecessary, and excessive violence," was deemed impermissible.<sup>242</sup> In the court's words, an expert must avoid use of

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<sup>236</sup> See FED. R. EVID. 704 Notes of Advisory Committee on Proposed Rule ("Did T have capacity to make a will?" impermissibly asks for a legal conclusion, while the question "Did T have sufficient mental capacity to know the nature and extent of his property?" does not).

<sup>237</sup> *Young v. State Farm Mut. Auto. Ins. Co.*, No. 2:97- CV-24-B-B, 1999 WL 33537177, at \*2 (N.D. Miss. Feb. 16, 1999).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> See *supra* note 39.

<sup>241</sup> *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 558 (C.D. Cal. Aug. 1, 2014) (quoting *Wiles v. Department of Educ.*, Civ. Nos. 04-00442 ACK-BMK, 05-00247 ACK-BMK, 2008 WL 4225846, \*1 (D. Haw. Sept. 11, 2008)) (declaring improper an expert's opinion that ConAgra "'falsely and deceptively labeled' its products" since "false" and "deceptive" are judicially defined terms relating to the ultimate issue in this case); see also *S.E.C. v. Leslie*, No. C 07-3444, 2010 WL 2991038, at \*9 (N.D. Cal. July 29, 2010) (excluding expert's opinion because "it is for the jury to determine whether Defendants' statements in fact were misleading").

<sup>242</sup> *Monroe v. Griffin*, No. 14-CV-00795-WHO, 2015 WL 5258115, at \*7 (N.D. Cal. Sept. 9, 2015); see also *Estate of Bojic v. City of San Jose*, No. C05 3877 RS, 2007 WL 3314008, at \*3 (N.D. Cal. Nov. 6, 2007) ("[W]hile [the plaintiff's expert] may freely opine that [the officer] should not have acted in the

“language that constitutes legal conclusions, credibility determinations, or otherwise ‘merely tell[s] the jury what result to reach.’”<sup>243</sup> As the Advisory Committee to Federal Rule of Evidence 704 noted, it is particularly important to “exclude opinions phrased in terms of inadequately explored legal criteria.”<sup>244</sup> The importance of excluding such opinions is heightened in the case of MCA testimony because, as Part III noted, such opinion use the legal term “child abuse,” but apply incorrect legal criteria to determine whether it occurred.

Accordingly, in cases in which child abuse through medical care is alleged, assuming their testimony meets the requirements for scientific reliability (which the next section will discuss), doctors may properly testify to the first two determinations now rolled into the MCA analysis: (1) the genuine medical diagnoses that the child possesses; and (2) whether, given these diagnoses, the treatment the child received was excessive. Yet they may not “diagnose” the child with MCA and, through this, assert that the parent committed abuse. Put another way, simply because doctors have concocted a new designation that allows them to designate their disapproval of virtually any medical care that a child receives and then improperly to call this designation a “diagnosis” and incorrectly claim that it demonstrates that parents have committed child abuse, does not mean that they should be permitted to undermine a parent’s fair trial by testifying in court to its presence.

### 3. *The medical child abuse “diagnosis” and scientific reliability*

Counsel for the parents should also seek to bar admission of expert testimony regarding the MCA “diagnosis” on the ground that the methodology used to make this determination is both unscientific and unreliable. As the U.S. Supreme Court made clear in *Daubert v. Merrell Dow Pharmaceuticals*, with state courts following suit, the trial judge must act as a gatekeeper to

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manner that he did, or that he should have done something else, he should not be asked for or volunteer an opinion that [the officer] acted unconstitutionally or exercised ‘excessive force.’”).

<sup>243</sup> *Monroe*, 2015 WL 5258115, at \*7 (quoting FED. R. EVID. 904, Advisory Committee Notes to 1972 Proposed Rules).

<sup>244</sup> FED. R. EVID. 704 Notes of Advisory Committee on Proposed Rules.

“ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”<sup>245</sup> The burden of establishing that expert testimony is scientifically sound “rests on the proponent of the expert opinion.”<sup>246</sup> Establishing reliability “requires more than simply ‘taking the expert’s word for it.’”<sup>247</sup> In evaluating admissibility, the court must assess both “whether the reasoning or methodology underlying the [expert’s] testimony is scientifically valid,” and “whether that reasoning or methodology properly can be applied to the facts in issue.”<sup>248</sup>

Courts acting as gatekeepers require proof of the scientific validity of both the “general” and “specific” medical hypotheses that physicians offer. Proof of the general medical hypothesis requires a showing that the disease or agent claimed responsible for causation can cause the kind of signs and symptoms that the patient has shown *in at least some people*.<sup>249</sup> Meanwhile, proof of the specific medical hypothesis requires a showing that the disease or agent claimed to cause the condition is responsible for the signs and symptoms *in the specific patient*. For example, a medical expert testifying that the patient’s acute back pain was caused by a train’s vibrations must be able to prove scientifically that train vibrations are capable of causing acute back pain *in some people* (the general causation question), as well as defend the validity of the determination that *this patient’s* back pain was caused by train vibrations (the specific causation question).<sup>250</sup>

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<sup>245</sup> *Daubert*, 509 U.S. at 590.

<sup>246</sup> *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004).

<sup>247</sup> FED. R. EVID. 702 advisory committee’s note (2000); *see also* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 137 (1997) (“[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.”).

<sup>248</sup> *Daubert*, 509 U.S. at 592–93.

<sup>249</sup> *McClain*, 401 F.3d at 1242; *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1057–58 (9th Cir. 2003) (“The issue . . . is which of the competing causes are *generally* capable of causing the patient’s symptoms or mortality.”); *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 278 (5th Cir. 1998) (excluding expert testimony which “offered no scientific support for his general theory that exposure to Toluene solution at any level would cause RADS”).

<sup>250</sup> *See Doe v. Ortho-Clinical Diagnostics, Inc.*, 440 F. Supp. 2d 465, 471 (M.D.N.C. 2006) (“General causation ‘is established by demonstrating . . . that exposure to a substance can cause a particular disease. . . . Specific, ‘or individual causation, however[,] is established by demonstrating that a given exposure is the cause’ of a particular individual’s disease.”).

As described in the next subsections, expert diagnoses of MCA fail to meet the bar of scientific reliability both for general and specific causation. Subsection a. shows that the general theory underlying MCA is not grounded in the methods of science because it has no testable hypothesis, and instead turns on an unscientific assessment regarding the parent's blameworthiness. Subsection b. demonstrates that the reliability of the process for determining MCA in particular cases has never been tested and, therefore, has an unknown but likely high error rate. Further, the process CAPs use to identify MCA cannot accurately distinguish between loving parents legitimately seeking care for sick children and genuine child abusers.

a. *The general medical child abuse theory*

The general theory of MCA fails the test for scientific validity because no testable scientific proposition underlies it. As *Daubert* makes clear,

a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact is whether it can be (and has been) tested . . . G]enerating hypotheses and testing them to see if they can be falsified . . . is what distinguishes science from other fields of human inquiry.<sup>251</sup>

As described in the Advisory Committee Notes to Rule 702, the "testability" of a theory refers to "whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot be reasonably assessed for reliability."<sup>252</sup> The general theory that underlies MCA fails this standard because it is nonfalsifiable.

To explain: Usually, the general hypothesis that underlies a medical diagnosis postulates that a particular biological process or disease produces a certain constellation of symptoms. Such a hypothesis is scientific because it can be disconfirmed based on observational or experimental evidence. As stated by Karl Popper, the philosopher of science cited in *Daubert*, "[S]tatements or systems of statements, in order to be ranked as scientific, must be capable of conflicting with possible, or conceivable, observa-

<sup>251</sup> *Daubert*, 509 U.S. at 593 (citing Michael Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation*, 86 Nw. U. L. REV. 643, 645 (1992)).

<sup>252</sup> FED. R. EVID. 702 advisory committee's note (2000),



tions.”<sup>253</sup> Genuine medical diagnoses can be tested. For example, the flu is a medical diagnosis that postulates that a particular set of viruses cause a particular set of symptoms in humans that include fever, achiness, and lack of energy. This general medical hypothesis is potentially testable and falsifiable through, for example, experiments that investigate whether any such viruses can be isolated among a group of patients with these symptoms. To take another example, the theory underlying the controversial diagnosis of chronic Lyme disease is that Lyme disease remains in the body of patients for long periods of time and causes a long-term cluster of symptoms that include fatigue, pain, and decreased short-term memory.<sup>254</sup> This hypothesis is subject to testing, which can support or contradict the hypothesis. For example, researchers tested the genetic “fingerprint” of the bacteria in the blood of patients with a resurgence of active Lyme disease to determine if it matches the old Lyme bacteria; the finding that these two “fingerprints” do not match weighs against the hypothesis that chronic Lyme disease remains in the body and is the cause of the resurgence of Lyme symptoms.<sup>255</sup>

The general theory of MCA rests on no such testable scientific hypothesis. Its proponents’ description of this “diagnosis” as a “child [who] receives unnecessary and harmful or potentially harmful medical care at the instigation of a caretaker,”<sup>256</sup> does not produce a testable hypothesis regarding an underlying disease process or other underlying cause that is responsible for the MCA symptoms. Indeed, it is difficult to conceptualize what evidence would be sufficient to disprove it.<sup>257</sup> Unlike strep, there is

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<sup>253</sup> KARL R. POPPER, *CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE* 51 (2d ed. 2002); *see also* S.V. v. R.V., 933 S.W.2d 1, 26 (Tex. 1996) (Gonzalez, J., concurring) (“The key question in determining whether a theory or technique can be classified as science is whether it can be tested empirically.”).

<sup>254</sup> Denise Grady, *New Infection, Not Relapse, Brings Back Lyme Symptoms, Study Says*, N.Y. TIMES, (Nov. 14, 2012), <https://www.nytimes.com/2012/11/15/health/new-infection-not-relapse-brings-back-symptoms-of-lyme-disease-study-finds.html>.

<sup>255</sup> *Id.*

<sup>256</sup> *See* ROESLER & JENNY, *supra* note 31, at 43.

<sup>257</sup> *See* Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 *FORDHAM L. REV.* 263, 271 (1989) (“If theories are non-falsifiable, they are unscientific.”).

no swab of a child's body that can be tested in a lab; unlike cancer, it cannot be seen in a scan; unlike Lyme disease, there are no blood tests to disprove or refine the theory. While MCA's progenitor, the MSBP diagnosis, was deeply flawed, it at least rested on a testable hypothesis—that a particular psychological disorder in the parent was causing the parent's behavior. That hypothesis could be tested through, for example, psychological testing to show whether parents who committed such behavior had particular psychological abnormalities. But in rejecting considering the parent's psychology and simply focusing on a parent's "instigating" overtreatment of the child, MCA has moved to an untestable theory.

It could be argued that the hypothesis that underlies the MCA diagnosis is that parents' instigation of medical care causes MCA in much the same way that a virus causes the flu. Yet, if the term "instigation" is read as simply a factual description of parents' actions, similar to the but-for cause test for causation, the hypothesis is essentially tautological: given that almost all medical care received by children is instigated by a parent, this tells us nothing meaningful about medical child abuse that, for example, would let us distinguish children who are the victims of medical malpractice from children who are the victims of Munchausen-type behavior. This reading of MCA is equivalent to postulating that lungs are the cause of the cluster of symptoms associated with lung cancer: Of course, lungs are the necessary precondition to having those symptoms, but positing lungs as the problem tells us nothing useful about what has gone awry with this condition. In the alternative, to the extent that the term "instigate" is interpreted in a manner that incorporates some judgment that the parent's seeking medical care is blameworthy, the determination is not an empirical determination within the province of science, but a normative inquiry properly within the province of the court.<sup>258</sup> The postulate regarding strep can ultimately be empirically supported or disconfirmed. In contrast, the postulate regarding a parent's role in MCA involves a value judgment

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<sup>258</sup> See FED. R. EVID. 702 advisory committee's note to 2000 amendment (stating that the court is required to consider whether the expert's theory can be tested or challenged by objective means or whether, instead, it is based simply upon the subjective, conclusory assertions of the expert).

regarding moral responsibility that is not testable or falsifiable in the same way.

MCA proponents may therefore certainly argue to a state legislature that the broad group of parental behaviors this conceptualization would include should all, as a matter of public policy, be considered abuse. However, they may not make such assertions as expert witnesses in court based on their claimed scientific expertise. Allowing expert testimony regarding MCA gives it the misleading appearance of a true medical diagnosis like polio or breast cancer. This cloaks the medical expert's own unscientific opinion about the blameworthiness of the parent's actions under a veneer of scientific respectability and reliability.

In seeking to present an expert's subjective opinion in the guise of a scientific diagnosis, MCA bears similarity to the discredited "diagnosis" of "Parental Alienation Syndrome" (PAS). That "diagnosis" was concocted in the 1980s by mental-health experts testifying for fathers in custody cases. These experts claimed to identify a constellation of symptoms in children that resulted from the mother's attempts to "brainwash" them to dislike their fathers. However, an increasing number of courts have deemed PAS inadmissible as junk science on several grounds.<sup>259</sup>

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<sup>259</sup> See *Hanson*, 685 N.E.2d at 85 ("Dr. Garner's PAS 'disorder' is a disturbing, inflammatory, unscientific and unsubstantiated theory which has no place in our courtrooms."); *Snyder*, 2006 WL 539130, at \*8 ("There is insufficient evidence that the description . . . of 'parental alienation syndrome' has any scientific basis."); *Mastrengelo v. Mastrengelo*, No. NNHFA054012782S, 2012 WL 6901161, at \*9 (Conn. Super. Ct. Dec. 20, 2012) ("the proffer of Dr. Baker's testimony regarding the concept of 'parental alienation syndrome' does not meet the relevant standards . . . , and is therefore inadmissible"); *Gillespie v. Gillespie*, No. 1849, 2016 WL 1622890, at \*12 (Md. Ct. Spec. App. Apr. 25, 2016) (Friedman, J., concurring) ("I would caution courts, lawyers, expert witnesses, and litigants not to use the terms 'parental alienation' or 'parental alienation syndrome' casually, informally, or as if they have a medically or psychologically diagnostic meaning that has not been established."); *NK v. MK*, No. XX07, 2007 WL 3244980, at \*64 (N.Y. App. Div. Oct. 1, 2007) ("This court does not believe that there is a generally accepted diagnostic determination or syndrome known as 'parental alienation syndrome.'"). See generally Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 FAM. L.Q. 527, 539 (2001) (quoting Dr. Paul J. Fink, past president of the American Psychiatric Association: "PAS as a scientific theory has been excoriated by legitimate researchers across the nation. Judged solely on [its] merits, [PAS] should be a rather pathetic footnote or an example of poor scientific standards.").

First, PAS was conceptualized by doctors seeking to treat a child's condition therapeutically; instead, both were framed to put a pejorative spin in court on a parent's actions. As one commentator put it, framing these doctors' views as a diagnosis "sounds more impressive coming from the lips of a testifying mental health professional than 'She's just a lying, angry woman.'"<sup>260</sup> Second, PAS was never subjected to rigorous empirical research or testing either then or since.<sup>261</sup> Third, although the real target of the PAS diagnosis is the parent, experts invented a diagnosis for the child.<sup>262</sup> Indeed, as with MCA, the charging expert in a PAS case has often never examined the child, let alone the parent.<sup>263</sup> Judges should exclude MCA for the same reasons.

b. *The process of making MCA determinations*

Even if the general theory of MCA were scientific, to admit an MCA diagnosis in a particular case, the government would still have to demonstrate that the methodology applied in that case was reliable.<sup>264</sup> A key factor in assessing the reliability of a determination made using a particular methodology is that meth-

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<sup>260</sup> Paula J. Caplan, *Parental Alienation Syndrome: "Another Alarming DSM-5 Proposal,"* PSYCHOL. TODAY (June 7, 2011), <https://www.psychologytoday.com/blog/science-isnt-golden/201106/parental-alienation-syndrome-another-alarming-dsm-5-proposal>.

<sup>261</sup> See *Snyder v. Cedar*, No. NNHCV010454296, 2006 WL 539130, at \*8 (Conn. Super. Ct. Feb. 16, 2006) ("[T]here appears to be an absence of empirical research that reliably identifies a cause for the behavior of a pre-adolescent child who decides to reject contact with a parent. The prevailing opinion in the field, as Rotnem herself admitted when pressed, is that such empirical studies are unlikely ever to result in a reliable means of identifying such a 'syndrome' or its causes.").

<sup>262</sup> See, e.g., *Mastrengelo*, 2012 WL 6901161, at \*9 ("[T]he analytical basis of, and one of the strongest objections to the scientific validity of, 'parent alienation syndrome' is that, rather than encompassing a review of the actions of the aligned parent, estranged parent *and* the child or children, the so-called syndrome focuses solely on the behaviors or actions of the child or children.").

<sup>263</sup> See, e.g., *Snyder*, 2006 WL 539130, at \*9 ("Rotnem testified that [the child] exhibited all of the classic characteristics of an 'alienated child,' notwithstanding that Rotnem had not . . . laid eyes on Aviva since [seven years before the asserted abuse]"); *Hanson v. Spolnik*, 685 N.E.2d 71, 85 (Ind. Ct. App. 1997) (Chezem, J., concurring) (noting that the expert making the PAS diagnosis interviewed neither mother nor child).

<sup>264</sup> See *Magistrini v. One Hour Martinizing Dry Cleaning*, 180 F. Supp. 2d 584, 602 (D.N.J. 2002).

odology's "known or potential rate of error."<sup>265</sup> Yet the government cannot show the reliability of the methodology used to "diagnose" MCA because it has never been tested for accuracy.<sup>266</sup> This in itself should warrant exclusion of these diagnoses.<sup>267</sup>

Even leaving aside the absence of testing the MCA determination process for reliability, for an expert determination to be admissible, "it is critical that an expert's analysis be reliable at every step."<sup>268</sup> This "means that *any* step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible."<sup>269</sup> Yet, as the discussion in Part III showed, all three standards used to identify MCA are likely to produce "false-positive" results. The failure to account for alternative innocent explanations for the positive results of each of these tests renders the entire MCA determination unreliable, and warrants its exclusion.<sup>270</sup>

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<sup>265</sup> *Daubert*, 509 U.S. at 594.

<sup>266</sup> See *supra* notes 58-61, 174-177 and accompanying text.

<sup>267</sup> *Frank v. State of New York*, 972 F. Supp. 130, 135 (N.D.N.Y. 1997). (excluding Multiple Chemical Sensitivity diagnosis in part based on "the lack of an objective testing method for MCS[, which] gives rise to high probability of error in MCS diagnoses. . . . [P]laintiffs have submitted no proof of any testing rate for MCS, much less a reliable one."); *State v. Walters*, 698 A.2d 1244, 1247 (N.H. 1997) (refusing to admit repressed memories on the ground that "it would be impossible, ethically, to test repression and recovery of memory of severely traumatic events in a laboratory setting," and because there "was no real way to track the percentage or number of recovered memories that are 'false'").

<sup>268</sup> *Amorgianos v. Amtrak*, 303 F.3d 256, 267 (2d Cir. 2002).

<sup>269</sup> *In re Paoli*, 35 F.3d at 745; see also *In re Zolof*, 858 F.3d at 797 (3d Cir. 2017)

<sup>270</sup> See *General Electric Company v. Joiner*, 522 U.S. 136, 139-40 (1997) (excluding expert testimony for failure to exclude alternative explanations for subjects' symptoms); *In re Paoli*, 35 F.3d at 757 (excluding expert opinion that failed to consider alternative causes of the plaintiff's bruising); *Perry*, 564 F. Supp. 2d at 471 (excluding expert testimony that defendant's drug caused cancer because expert "fail[ed] to adequately account for the possibility that [defendant's cancer] was idiopathic"); see also Fed. R. Evid. 702 advisory committee's note to 2000 amendment ("[O]ther factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact . . . include . . . [w]hether the expert has adequately accounted for obvious alternative explanations.").

## Conclusion

The right that our constitutional system grants parents to make decisions about their children's healthcare—a right premised on the recognition that parents are generally better situated than any other decisionmaker to understand and pursue their children's best interests—is being jeopardized by physicians too certain they know what is best for other people's children. These doctors are relying on the vague language of abuse statutes and wielding the fake medical diagnosis of MCA to persuade judges to ride roughshod over parents' constitutional rights. The result is that loving families of children with rare or complex medical conditions are being traumatized by abuse charges rather than able to get their children the medical care that is their constitutional right. Restoring parents' decision-making rights will take vigorous action from legislatures and attorneys representing parents to ensure that, in the future, abuse proceedings “hold in check, not release, the rescue fantasies” of the physicians they are now empowering to intrude.<sup>271</sup>

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<sup>271</sup> See Goldstein, *supra* note 3, at 651 (“Legislatures must be made to see that the requisite of parental consent to medical care for children becomes meaningless if refusal to consent automatically triggers state inquiry or a finding of neglect. State statutes then must be revised to hold in check, not release, the rescue fantasies of those it empowers to intrude, and thus to safeguard families from state-sponsored interruptions of ongoing family relationships by well-intentioned people who ‘know’ what is ‘best’ and who wish to impose their personal health-care preferences on others.”).

## **Equal Protection and the Indian Child Welfare Act: States, Tribal Nations, and Family Law**

by  
Ann Laquer Estin\*

The complex legal relationship between states, the United States, and Native nations can produce serious confusion in family law. Our system of federal Indian law, developed over several centuries, recognizes tribal sovereignty and defines the scope of state power with respect to federally-recognized Indian lands and communities.<sup>1</sup> For the most part, however, this body of federal law has not directly addressed family law, where there may be a significant overlap between tribal and state authority.

In the Indian Child Welfare Act of 1978 (ICWA),<sup>2</sup> Congress defined the jurisdiction of state and tribal courts in cases involving Indian children,<sup>3</sup> and established substantive and procedural rights for parents in these proceedings.<sup>4</sup> ICWA recognizes that Indian tribes have a profound interest in their children and provides a path for protecting these interests structured within the long and complicated relationship between the United States, tribal nations, and state governments.

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<sup>1</sup> The terms “Indian” and “tribes” are used in the U.S. Constitution, statutes, and several centuries of case law, and are used here in that context, along with terms such as Native, indigenous and nation. See generally the discussion in the Reporter’s Introduction, *RESTATEMENT OF THE LAW OF AMERICAN INDIANS* (2021) (hereafter *RESTATEMENT*).

<sup>2</sup> ICWA, 92 Stat. 3069, 25 U.S.C. §§ 1901-1963 (2022).

<sup>3</sup> “Indian child” is defined in § 1903(4) as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” See generally KELLY GAINES-STONER ET AL., *THE INDIAN CHILD WELFARE ACT HANDBOOK* 52-57 (3d ed. 2018).

<sup>4</sup> See generally COHEN’S *HANDBOOK OF FEDERAL INDIAN LAW* ch. 11 (2012 ed.) (hereafter *COHEN HANDBOOK*); GAINES-STONER ET AL., *supra* note 3, ch. 3-5.

The Supreme Court considered ICWA in *Mississippi Band of Choctaw Indians v. Holyfield*<sup>5</sup> and *Adoptive Couple v. Baby Girl*;<sup>6</sup> and will hear a third case during its new term. *Haaland v. Brackeen*<sup>7</sup> comes to the Court from a sharply divided *en banc* ruling in the Fifth Circuit, in a case that sought to overturn the statute.<sup>8</sup> A majority of the Fifth Circuit rejected this challenge, overruling the court below and affirming Congress's authority to enact ICWA. The judges divided equally on one aspect of the plaintiffs' equal protection challenge.<sup>9</sup> In addition to reviewing this question, subject to a determination of the plaintiffs' standing, the Supreme Court also agreed to hear issues raised by several state plaintiffs under the anticommandeering doctrine of the Tenth Amendment that divided the Fifth Circuit.<sup>10</sup>

In upholding the broader constitutionality of ICWA, the Fifth Circuit followed long-settled Supreme Court precedent recognizing Congress's broad powers and responsibilities for Native communities. In the past, the Court has taken a highly deferential approach in equal protection challenges to federal legislation that includes classifications based on tribal membership.<sup>11</sup> The test was first articulated in *Morton v. Mancari*:<sup>12</sup> "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."<sup>13</sup>

Unpacking the complexities of ICWA and the *Brackeen* case begins with the principles of federal Indian law. Our Constitution gives the federal government exclusive authority to recognize In-

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<sup>5</sup> 490 U.S. 30 (1989), discussed *infra* at part I.A.

<sup>6</sup> 570 U.S. 637 (2013), discussed *infra* at part I.B.

<sup>7</sup> *Brackeen v. Haaland*, 994 F.3d 249 (2021) (*en banc*), *cert. granted sub nom.* *Haaland v. Brackeen*, No. 21-376, 2022 WL 585885 (U.S. Feb. 28, 2022).

<sup>8</sup> *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018). See *infra* notes 159-162 and accompanying text.

<sup>9</sup> This split left the district court ruling in place. See *Brackeen*, 994 F.3d at 268. The judges disagreed on ICWA provisions that prioritize placement for Indian children with "other Indian families," 25 U.S.C. § 1915(a)(3), or "Indian foster homes," 25 U.S.C. § 1915(b)(iii), when a placement with another member of the child's family or tribe is not available. See *infra* part II.B.

<sup>10</sup> See *infra* note 106 and accompanying text.

<sup>11</sup> See *Brackeen*, 994 F.3d at 333-35. See *infra* part II.A.

<sup>12</sup> *Morton v. Mancari*, 417 U.S. 535 (1974).

<sup>13</sup> *Id.* at 555. See *infra* part II.A.



dian nations or tribes, to legislate with respect to tribes and their members, and to define the powers of states with respect to Indian governments and communities.<sup>14</sup> The right of Indian nations to self-government has been respected in American law for centuries. Decisions from the Marshall Court to the present day affirm that tribes retain an inherent sovereignty that predates the Constitution, distinct from that of the state and federal governments.<sup>15</sup> This authority is at its strongest with respect to tribal members and questions of family law.<sup>16</sup>

At the same time, family law disputes involving tribal members also come up in state courts.<sup>17</sup> Divorce, child support, custody, and inheritance cases may cross reservation borders, presenting complex conflict of laws questions that highlight the importance of comity and cooperation between tribes and states. In child welfare cases, ICWA has helped to build this cooperation, and many states have signaled their strong support for the law.<sup>18</sup> This story is easily lost amid the challenges directed to the statute, but it presents more important lessons for family lawyers. With its careful balancing of tribal and state responsibilities, ICWA has allowed more effective protection for the interests of Indian children and their families.

This article offers family law practitioners an introduction to the unique balance of federal, tribal, and state authority with respect to Native American communities and tribal members, and the Supreme Court's distinctive equal protection jurisprudence in this context. It considers the challenges posed by cross-border family litigation from this perspective, arguing that states have an important role to play in recognizing and supporting the ties between tribes and their members.

Part I frames the discussion with an overview of federal power in Indian affairs, tribal government authority with respect

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<sup>14</sup> *Worcester v. Georgia*, 31 U.S. 515, 561 (1832). See *infra* part I.A. See generally Matthew L. M. Fletcher, *Politics, Indian Law and the Constitution*, 108 CALIF. L. REV. 495 (2020).

<sup>15</sup> See *id.* at 558; *Cherokee Nation v. Georgia*, 30 U.S. 1, 4 (1831).

<sup>16</sup> See *infra* part I.B.

<sup>17</sup> See *infra* part I.C.

<sup>18</sup> The States of Indiana, Louisiana, and Texas were plaintiffs in *Brackeen*. 338 F. Supp. 3d at 519. In the Supreme Court, a group of 25 states and the District of Columbia appeared as amicus supporting the United States and the tribal parties. See *infra* note 186 and accompanying text.

to membership and family law questions, and the interaction of state and tribal courts in family law matters including ICWA. Part II describes the Supreme Court's approach to Equal Protection in federal Indian law cases and considers the equal protection issues before the Court in *Brackeen*. Part III argues for building on the experience gained with ICWA to expand state and tribal comity and collaboration in child welfare and other family law matters, including domestic violence, child support, custody, and divorce.

## I. Federal, Tribal, and State Powers

### A. Federal Power in Indian Affairs

Since the Constitution was adopted, Congress has exercised exclusive power to regulate relations with Native American peoples and their property and communities. Initially, this authority was understood as deriving from the Indian Commerce Clause<sup>19</sup> and the war, treaty, and foreign relations powers of the federal government,<sup>20</sup> and it applied only to the external relations of Indian nations.<sup>21</sup> During the reservation period that began after the Civil War, the Court began to characterize Congress's power as a "guardianship," extending to the internal affairs of Indian nations.<sup>22</sup> At the same time that it expanded its conception of federal authority over tribes, the Court described Congressional power in Indian affairs as plenary and nonjusticiable, with no legal remedy available when tribes sought to challenge federal action.<sup>23</sup>

Exercising these expansive and unreviewable powers, the U.S. government engaged in wholesale removal of Native children from their families, placing them in strictly regimented boarding schools located far from their homes in the name of

<sup>19</sup> U.S. CONST. art. I, § 8, cl. 3. See *Worcester*, 31 U.S. at 558-59.

<sup>20</sup> See generally COHEN HANDBOOK, *supra* note 4, at § 5.01; RESTATEMENT, *supra* note 1, at § 7; Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015); Fletcher, *supra* note 14, at 520-32.

<sup>21</sup> *Cherokee Nation*, 30 U.S. at 17 (describing tribes as "domestic dependent nations").

<sup>22</sup> *United States v. Kagama*, 118 U.S. 375, 383-84 (1886); see generally, Ann L. Estlin, *Federal Plenary Power in Indian Affairs After Weeks and Sioux Nation*, 131 U. PA. L. REV. 235, 246-50 (1982).

<sup>23</sup> See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

civilization and assimilation.<sup>24</sup> The federal government also promoted transracial adoption of Native children during the 1950s and 1960s, through a partnership between the Bureau of Indian Affairs and the Child Welfare League of America.<sup>25</sup>

During the twentieth century, federal policies cycled between attempts at assimilation and termination of Native communities, and periods of somewhat greater respect and support for tribal self-government. During the Termination era in 1953, Congress enacted P.L. 280, authorizing a number of states to assume criminal and civil adjudicatory jurisdiction over Indian reservations and tribal members within their borders.<sup>26</sup> Despite changes in federal policy since that time, P.L. 280 and similar laws still apply in many states. Absent a law such as P.L. 280, however, states may not exercise criminal or civil jurisdiction in “Indian country.”<sup>27</sup>

During the Nixon Administration, Congress and the Executive Branch embraced a new policy of “Indian Self-Determination,” recognizing tribes as governments and supporting their authority through means such as contracts to administer federal

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<sup>24</sup> See BARBARA ANN ATWOOD, CHILDREN, TRIBES, AND STATES: ADOPTION AND CUSTODY CONFLICTS OVER AMERICAN INDIAN CHILDREN 155-63 (2010); COHEN HANDBOOK, *supra* note 4, at 76-77. The Department of Interior released the first volume of a report investigating the history of Federal Indian Boarding Schools in May 2022. See *Federal Indian Boarding School Initiative Investigative Report (May 2022)*, [https://www.bia.gov/sites/default/files/dup/in-line-files/bsi\\_investigative\\_report\\_may\\_2022\\_508.pdf](https://www.bia.gov/sites/default/files/dup/in-line-files/bsi_investigative_report_may_2022_508.pdf). On the long history of federal intervention in Indian families, see Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L.R. 885, 910-28, 938-44, & 952-55 (2017).

<sup>25</sup> See Karen Balcom, *The Logic of Exchange: The Child Welfare League of America, The Adoption Resource Exchange Movement and the Indian Adoption Project, 1958-1967*, 1 ADOPTION & CULTURE 5 (2007); Margaret D. Jacobs, *Remembering the “Forgotten Child”: The American Indian Child Welfare Crisis of the 1960s and 1970s*, 37 AM. INDIAN Q. 136, 140-45 (2013). See also Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. 295, 331-32 (2015); Addie Rolnick & Kim Pearson, *Racial Anxieties in Adoption: Reflections on Adoptive Couple, White Parenthood, and Constitutional Challenges to the ICWA*, 2017 MICH. ST. L. REV. 727, 733-35.

<sup>26</sup> See 11 U.S.C. § 1162; 28 U.S.C. § 1360. There are many other similar federal statutes. See generally COHEN HANDBOOK, *supra* note 4, at § 6.04.

<sup>27</sup> Defined at 18 U.S.C. § 1151. See COHEN HANDBOOK, *supra* note 4, at § 6.04.

programs.<sup>28</sup> ICWA was a central component of this policy, designed to reverse a century of practices that had broken Native families apart.<sup>29</sup> Congress reaffirmed its commitment to ICWA in 1994 when it enacted the Multiethnic Placement Act (MEPA) with language providing that MEPA's prohibition on racial matching policies did not affect application of ICWA.<sup>30</sup> During this time period, the Supreme Court also softened its approach to the plenary power doctrine, allowing for the possibility of constitutional challenges to federal Indian legislation while maintaining a high level of deference to Congress.<sup>31</sup>

In *Mississippi Band of Choctaw Indians v. Holyfield*,<sup>32</sup> the Supreme Court discussed the history of ICWA and the special Congressional responsibility for Indian affairs. The issue was whether a state could exercise adoption jurisdiction over children born to parents who were enrolled members of the Mississippi Band of Choctaw Indians, both residents of and domiciled on the Choctaw reservation.<sup>33</sup> ICWA provides for exclusive tribal court jurisdiction in proceedings involving "an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law."<sup>34</sup> The Court rejected Mississippi's claim that children who were born off the reservation were not "domiciled within the reservation" for ICWA purposes, concluding that Congress did not intend for the meaning of "domicile" to vary based on state law.<sup>35</sup> Given the common legal understanding that a child's

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<sup>28</sup> See, e.g., Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 5301-5423.

<sup>29</sup> See 25 U.S.C. § 1901; House Report 95-1386, 95th Cong. (July 24, 1978), reprinted in 1978 U.S.C.C.A.N. 7530. See also *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-36 (1989) (discussing the legislative history of ICWA). See generally ATWOOD, *supra* note 24, at 163-67.

<sup>30</sup> 42 U.S.C. § 1996b. On the tension between ICWA and MEPA, see ATWOOD, *supra* note 24, at 185-91.

<sup>31</sup> See generally Estin, *Federal Plenary Power*, *supra* note 22.

<sup>32</sup> 490 U.S. 30 (1989).

<sup>33</sup> *Id.* at 37.

<sup>34</sup> 25 U.S.C. § 1911(a). Jurisdiction could be "otherwise vested in the State" under a federal law such as P.L. 280, discussed *supra* at note 26 and accompanying text. See ATWOOD, *supra* note 24, at 171-72.

<sup>35</sup> 490 U.S. at 43-47 ("We therefore think it beyond dispute that Congress intended a uniform federal law of domicile for the ICWA.").

domicile follows that of the child's parents,<sup>36</sup> the Court reversed the Mississippi courts, sending the case to the Choctaw Tribal Court.<sup>37</sup>

*Mississippi Band* pointed out that “Tribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA.”<sup>38</sup> The Court noted: “In enacting the ICWA Congress confirmed that, in child custody proceedings involving Indian children domiciled on the reservation, tribal jurisdiction was exclusive as to the States.”<sup>39</sup> Given Congress’s concern in ICWA for the effects of state child welfare practices on Indian children placed outside their culture and on the Tribes themselves, the Court also concluded that “a rule of domicile that would permit individual Indian parents to defeat the ICWA’s jurisdictional scheme is inconsistent with what Congress intended.”<sup>40</sup> Ultimately, the Court emphasized that ICWA defined “*who* should make the custody determination concerning these children – not what the outcome of that determination should be. The law places that decision in the hands of the Choctaw tribal court. . . . [W]e must defer to the experience, wisdom and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy.”<sup>41</sup>

#### B. Tribal Nations and Family Law

Although many federal enactments and court decisions have set limits on the scope of tribal sovereignty, the Supreme Court has often repeated the rule that: “The powers of Indian tribes are, in general, inherent powers of a limited sovereignty which

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<sup>36</sup> 490 U.S. at 47-50.

<sup>37</sup> The Choctaw Tribal Court granted Joan Holyfield’s adoption petition for several reasons, and also ordered that she maintain contact between the twins and their extended family and Tribe. See Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 COLUM. J. GENDER & L. 1, 17-18 (2008).

<sup>38</sup> 490 U.S. at 42 (citing *Fisher v. District Ct.*, 424 U.S. 382 (1976), discussed *infra* at notes 52-53 and accompanying text).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 49-53. Three justices dissented, believing that the court should adopt an interpretation that allows parents of Indian children to choose state jurisdiction by expressing the intent that their child be domiciled off the reservation. *Id.* at 54-65 (Stevens, J. dissenting).

<sup>41</sup> *Id.* at 53-54 (emphasis in original; quoting *Adoption of Halloway*, 732 P.2d 962, 972 (Utah 1986)).

has never been extinguished.”<sup>42</sup> Until Congress acts to curtail those powers, tribes retain “those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”<sup>43</sup> Even in its decisions concluding that a particular tribal government power has been extinguished, either expressly (by Congress) or by implication (by the Court), the Court has emphasized the powers that tribal governments continue to exercise.<sup>44</sup> At the core of these continuing powers, central to tribal self-government, are family matters and the determination of who is a member of the tribe.<sup>45</sup>

Supreme Court cases defining the scope of tribal jurisdiction have distinguished between tribal members and nonmembers, curtailing tribal jurisdiction over nonmembers and affirming jurisdiction over members.<sup>46</sup> At the same time, the Court has made clear that the determination of who is a tribal member belongs exclusively to tribal authorities. In *Santa Clara Pueblo v. Martinez*,<sup>47</sup> the Court observed that: “A tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as a political community.”<sup>48</sup> Indian nations have different membership rules, with some requiring descent through the maternal or paternal line, some imposing a minimum

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<sup>42</sup> *E.g.* *United States v. Wheeler*, 435 U.S. 313, 322 (1978).

<sup>43</sup> *Id.* at 323. The Court has accorded itself authority to determine that some aspects of tribal sovereignty have been lost by implication. *E.g.*, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978) (holding that “by submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.”).

<sup>44</sup> *See, e.g.*, *Montana v. United States*, 450 U.S. 544, 564 (1981) (“Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.”) *See also Wheeler*, 435 U.S. at 326 (“The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.”).

<sup>45</sup> *See Fisher*, 424 U.S. 382, discussed *infra* at notes 52-53 and accompanying text. *See also ATWOOD*, *supra* note 24, at 72-80.

<sup>46</sup> *See generally COHEN HANDBOOK*, *supra* note 4, at 599-601, 765-69.

<sup>47</sup> 436 U.S. 49 (1978).

<sup>48</sup> *Id.* at 72 n.32 (holding that a dispute over tribal membership ordinance filed in federal court under the Indian Civil Rights Act was barred by the tribe’s sovereign immunity). *See also RESTATEMENT*, *supra* note 1, at § 18.

“blood quantum,” and some, like the Cherokee Nation, opening their membership to any descendant.<sup>49</sup>

Many early cases noted the authority of Native communities over the marriages, divorces, parent-child relationships, and inheritance rights of tribal members.<sup>50</sup> With the establishment of contemporary tribal court systems, this area of jurisdiction has been a central concern.<sup>51</sup> The Supreme Court made this point forcefully in *Fisher v. District Court*,<sup>52</sup> a per curiam opinion issued before enactment of ICWA. *Fisher* emphasized that Congress had repeatedly protected the right of the Northern Cheyenne Tribe to govern itself. Noting the creation of the Northern Cheyenne Tribal Court under the Tribe’s Constitution and bylaws, the opinion held that state court jurisdiction over a tribal adoption dispute “plainly would interfere with the powers of self-government” of the Tribe, creating a “substantial risk of conflicting adjudications affecting the custody of the child and a . . . corresponding decline in the authority of the Tribal Court.”<sup>53</sup> As formulated in the Restatement of the Law of American Indians, “Indian tribes have inherent power to regulate the domestic relations of their tribal members domiciled in Indian country.”<sup>54</sup>

The ICWA provision considered in the *Mississippi Band* case, placing exclusive jurisdiction with the tribal court for proceedings concerning an Indian child domiciled on the reservation, is consistent with *Fisher* and the history of tribal authority.

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<sup>49</sup> See generally COHEN HANDBOOK, *supra* note 4, at 175-76. See also *infra* notes 126-137 and accompanying text.

<sup>50</sup> E.g. *Kobogum v. Jackson Iron Co.*, 43 N.W. 602, 605-06 (Mich. 1889) (recognizing tribal jurisdiction over marriage); *Earl v. Godley*, 44 N.W. 254 (Minn. 1890); *Ortley v. Ross*, 110 N.W. 982 (Neb. 1907). This approach was confirmed by the Supreme Court; see *United States v. Quiver*, 241 U.S. 602 (1916) (dismissing an adultery prosecution under a federal statute); *Jones v. Meehan*, 175 U.S. 1, 29-31 (1899) (holding that inheritance rights were controlled by tribal law). See also Antoinette Sedillo Lopez, *Evolving Indigenous Law: Navajo Marriage – Cultural Traditions and Modern Challenges*, 17 ARIZ. J. INT’L & COMP. L. 283, 304-05 (2000).

<sup>51</sup> On tribal court systems, see COHEN HANDBOOK, *supra* note 4, at 263-69. On tribal family law, see ATWOOD, *supra* note 24, at ch. 3.

<sup>52</sup> 424 U.S. 382 (1976) (per curiam).

<sup>53</sup> *Id.* at 387-88. See also e.g. *McKenzie Cnty. Soc. Servs. Bd. v. V.G.*, 392 N.W.2d 399 (N.D. 1986) (dismissing an action to determine parentage and establish child support where all the parties were tribal members).

<sup>54</sup> RESTATEMENT, *supra* note 1, at § 19.

ICWA applies to an important subset of family law cases: foster care placement, termination of parental rights, preadoptive placement, and adoptive placement of Indian children.<sup>55</sup> It does not apply to other family law proceedings, such as custody disputes between divorcing or unmarried parents.<sup>56</sup> Under *Fisher*, however, jurisdiction in these non-ICWA family cases clearly belongs to the tribe when all parties are tribal members living on the reservation.<sup>57</sup>

ICWA has helped to facilitate the development of tribal courts.<sup>58</sup> Like their colleagues in state courts, tribal court judges making decisions regarding children emphasize the child's best interests.<sup>59</sup> Tribal courts apply modern codes, often based on principles of customary law, in family law and inheritance cases.<sup>60</sup> Many tribal courts exercise jurisdiction over children who are tribal members, even if they reside outside the reservation borders,<sup>61</sup> and have exercised jurisdiction over adult tribal members and their families, including nonmembers who are

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<sup>55</sup> 25 U.S.C. § 1903. *See generally* GAINES-STONER ET AL., *supra* note 3, at 48-60.

<sup>56</sup> *Id.* *See also* John v. Baker, 982 P.2d 738, 746-47 (Alaska 1999) (*Baker I*); Cherino v. Cherino, 176 P.3d 1184 (N.M. Ct. App. 2007); *In re DeFender*, 435 N.W.2d 717 (S.D. 1989).

<sup>57</sup> In states with civil adjudicatory jurisdiction under P.L. 280 or a similar law, the tribe and state have concurrent jurisdiction in ICWA and other family law cases. *See* Doe v. Mann, 415 F.3d 1038 (9th Cir. 2005). *See also infra* note 70.

<sup>58</sup> *See* Terry L. Cross & Robert J. Miller, *The Indian Child Welfare Act of 1978 and Its Impact on Tribal Sovereignty and Governance*, in *FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT* AT 30 at 13, 16, 19-20 (Matthew L. M. Fletcher, Wenona T. Single & Kathryn E. Fort, eds. 2009).

<sup>59</sup> *Id.*; *see also* Lisa L. Atkinson, *Best Interest of the Child: A Tribal Judge's Perspective*, 58(1) *JUDGES J.* 6 (2019); Lorinda Mall, *Keeping It in the Family: The Legal and Social Evolution of ICWA in State and Tribal Jurisprudence*, in *FACING THE FUTURE*, *supra* note 58, at 164, 190-99.

<sup>60</sup> On tribal family law, *see* ATWOOD, *supra* note 24, ch. 3; Lopez, *supra* note 50; Lauren van Schilfgaarde & Brett Lee Shelton, *Using Peacemaking Circles to Indigenize Tribal Child Welfare*, 11 *COLUM. J. RACE & L.* 681 (2021).

<sup>61</sup> *E.g.*, *Father J v. Mother A*, No. MPTC-CV-FR-2014-207, 6 Mash. Rep. 297, 2015 WL 5936866 (Mash. Pequot Tribal Ct. Aug. 21, 2015) (holding that the tribe has jurisdiction over parentage and custody cases involving tribal children); *Miles v. Chinle Fam. Ct.*, No. SC-CV-04-08, 7 *Am. Tribal L.* 608, 2008 WL5437146 (Navajo S. Ct. Feb. 21, 2008). *See also Baker I*, 982 P.2d at 748-59 (holding that Native American nations retain independent sovereign power to



domiciled on the reservation.<sup>62</sup> For cases involving families with both tribal members and nonmembers, state courts have exercised concurrent jurisdiction.<sup>63</sup>

In recent years, the Supreme Court has steadily narrowed the scope of tribes' civil jurisdiction over non-Indians and non-member Indians.<sup>64</sup> This trend has uncertain implications for family law,<sup>65</sup> but it is likely to increase the number of family law cases crossing reservation borders that are heard in state courts. In these situations, determination of jurisdiction, choice of law, and recognition of judgments present enormously important and complicated questions for tribal and state courts.

### C. Native American Families in State Courts

Contemporary Native communities are not tightly enclosed within reservation borders. A majority of tribal citizens live outside of Indian country, often as a result of federal policies,

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regulate the internal affairs of members even when they do not occupy Indian country).

<sup>62</sup> *E.g.*, Sanders v. Robinson, 864 F.2d 630 (9th Cir. 1988) (affirming the jurisdiction of a tribal court); *In re A.H.*, 6 Am. Tribal L. 164 (Ft. Peck Ct. App. 2006); Walker v. Tiger, No. SC 2003-01, 10 Okla. Trib. 650, 2004 WL 7081139 (Muscogee May 12, 2004). *See generally* ATWOOD, *supra* note 24, at ch. 2.

<sup>63</sup> *See infra* notes 71-72 and accompanying text. Tribal court cases addressing concurrent jurisdiction include Tupling v. Kruse, 15 Am. Tribal L. 23 (Colville Tribal Ct. App. 2017) (noting concurrent domestic relations jurisdiction in state and tribal courts); Bahe v. Platero, No. SC-CV-48-12, 11 Am. Tribal L. 104, 107-108, 2012 WL 6775428 (Navajo S. Ct. Dec. 20, 2012) (deferring jurisdiction to the state court). State law cases addressing concurrent jurisdiction include Kelly v. Kelly, 759 N.W.2d 721 (N.D. 2009). Barbara Atwood mapped the jurisdictional framework for cases with overlapping tribal and state jurisdiction in 2009. *See* ATWOOD, *supra* note 24, at 81-90. *See also infra* notes 73 to 83 and accompanying text.

<sup>64</sup> *See generally* COHEN HANDBOOK, *supra* note 4, at § 7.02.

<sup>65</sup> *E.g.* Nygaard v. Taylor, 563 F. Supp. 3d 992 (D. S.D. Sept. 24, 2021) (allowing non-Indian fathers to challenge tribal court custody jurisdiction in federal court). *Cf.* DeMent v. Oglala Sioux Tribal Ct., 874 F.2d 510 (8th Cir. 1989) (holding that a father was required to exhaust tribal remedies before challenging tribal court jurisdiction in federal court). *See also* Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1053-67 (2005). Berger's survey of cases decided by the Navajo Nation appellate courts from 1969 to 2005 identified 122 cases involving non-Navajo litigants, six of which were child custody disputes. *See id.* at 1088-94.

even as they continue to maintain citizenship in their tribes.<sup>66</sup> State courts regularly exercise jurisdiction over family law matters involving tribal members, including individuals who are not domiciled on their reservation,<sup>67</sup> but also those living on a reservation that has been “diminished,”<sup>68</sup> or in a Native community that does not occupy Indian country,<sup>69</sup> or in states where Congress has extended civil adjudicatory authority to the state under P.L. 280 or a similar law.<sup>70</sup> State courts also routinely hear cases in which families include both Indian and non-Indian members,<sup>71</sup> or members of different tribes.<sup>72</sup>

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<sup>66</sup> See Indian Child Welfare Act Proceedings; Final Rule, 25 CFR Part 23, 81 Fed. Reg. 38778, 38782-83 (June 14, 2016) (“Final Rule”) (authorized by 25 U.S.C. § 1952).

<sup>67</sup> *E.g.* Rolette Cnty. Soc. Serv. Bd. v. B.E., 697 N.E.2d 333 (N.D. 2005) (child support action) Wells v. Wells, 451 N.W.2d 402 (S.D. 1990) (divorce). *Cf.* Francisco v. State, 556 P.2d 1 (Ariz. 1976) (finding that the state court was without jurisdiction in a child support action against an alleged father who was a tribal member living on a reservation) State *ex rel.* Flammond v. Flammond, 621 P.2d 471 (Mont. 1980) (determining that the state court had no jurisdiction over a father where there were no significant off-reservation acts within the state).

<sup>68</sup> *E.g.* DeCouteau v. District Cnty. Ct., 420 U.S. 425 (1975) (state courts have civil and criminal jurisdiction over conduct of tribal members within reservation borders on non-Indian unallotted lands returned to public domain by Congress).

<sup>69</sup> See, *e.g.*, Baker I, 982 P.2d at 759-61 (deciding that the state has concurrent jurisdiction in family disputes involving members of Alaska Native communities).

<sup>70</sup> *E.g.* Charles v. Charles, 701 A.2d 650, 652-55 (Conn. 1997). *Cf.* Estate of Big Spring, 255 P.3d 121, 133-35 (Mont. 2011) (finding exclusive tribal jurisdiction in an inheritance case where the state had not assumed civil adjudicatory jurisdiction under PL 280). See generally RESTATEMENT, *supra* note 1, at §§ 33-34. On P.L. 280, see *supra* notes 26-27 and accompanying text. Note that P.L. 280 includes choice of law rules directing state courts to apply tribal ordinance or custom if it is not inconsistent with state law. 25 U.S.C. § 1322(c); 28 U.S.C. § 1360(c). See, *e.g.*, WASH. REV. CODE § 37.12.070. On choice of law issues more generally, see, *e.g.*, Baker I, 982 P.2d at 761 (ruling that tribal law applies to custody disputes adjudicated by tribal courts). See also Gary C. Randall & Katti Telstad, *Community Property Rules or American Indian Tribal Law: Which Prevails?*, 31 IDAHO L. REV. 1071 (1995).

<sup>71</sup> *E.g.*, Lonewolf v. Lonewolf, 657 P.2d 627 (N.M. 1982); Harris v. Young, 473 N.W.2d 141 (S.D. 1991).

<sup>72</sup> *E.g.*, Duwyenie v. Moran, 207 P.3d 754 (Ariz. Ct. App. 2009); State v. Peltier, 915 N.W.2d 115 (N.D. 2018); Doe v. Roe, 649 N.W.2d 566 (N.D. 2002).

### 1. Divorce, Custody, and Child Support

In cases that cross boundaries of reservations and tribal membership, tribal and state courts attempt to apply familiar conflict of laws principles,<sup>73</sup> including the divisible divorce rule.<sup>74</sup> State courts extend comity to tribal court rulings, and tribal courts have done the same with state court judgments.<sup>75</sup> A number of states and tribes have enacted comity statutes.<sup>76</sup> Comity

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<sup>73</sup> See generally ATWOOD, *supra* note 24, at 90-109. Tribal court cases include *Matter of A.B.V.M.*, 11 Am. Tribal L. 368 (Ft. Peck Ct. App. 2014) (affirming a ruling that the tribal court was an inconvenient forum). State court cases include *Begay v. Miller*, 222 P.2d 624 (Ariz. 1950) (extending recognition to a tribal divorce decree and dismissing state court proceedings); *Garcia v. Gutierrez*, 217 P.3d 591, 607 (N.M. 2009) (holding that the tribe and the state have concurrent jurisdiction in custody dispute); *In re Absher Children*, 750 N.E.2d 188 (Ohio Ct. App. 2001) (saying that the state court should have communicated with the tribal court before exercising custody jurisdiction). See also Jackie Gardina, *Federal Preemption: A Roadmap for the Application of Tribal Law in State Courts*, 35 AM. INDIAN L. REV. 1 (2010); James M. Janetta, *Reciprocity Between State and Tribal Legal Systems*, 71 MICH. B.J. 400, 403 (1992).

<sup>74</sup> E.g. *Byzewski v. Byzewski*, 429 N.W.2d 394 (N.D. 1988) (finding that the state court had jurisdiction to enter a divorce decree but not to address custody and support).

<sup>75</sup> Comity cases in state courts include *Baker I*, 982 P.2d at 761-64; *John v. Baker*, 30 P.3d 68 (Alaska 2001) (*Baker II*); *Leon v. Numkena*, 689 P.2d 566 (Ariz. Ct. App. 1984); *Wells v. Wells*, 451 N.W.2d 402 (S.D. 1990); *Custody of Sengstock*, 477 N.W.2d 310 (Wis. Ct. App. 1991). In tribal courts, see, e.g., *Husband v. Wife*, No. CV-FR-2000-0226, 3 Mash. App. 37, 2003 WL 25586059 (Mash. Pequot Ct. App. Jan. 24, 2003) (extending comity to a Connecticut divorce judgment). See generally RESTATEMENT, *supra* note 1, at § 35; ATWOOD, *supra* note 24, at 90-94. See also Kelly Stoner & Richard A. Orona, *Full Faith and Credit, Comity, or Federal Mandate? A Path That Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders*, 34 N.M. L. REV. 381, 387-89 (2004).

<sup>76</sup> See, e.g., Recognition and Enforcement of Tribal Court Civil Judgments Act, IOWA CODE §§ 626D.1-626D.8 (2022); S.D. CODIFIED LAWS § 1-1-25 (2022); 1991 WIS. STAT. § 806.245 (2022). Oklahoma's statute allows for extension of full faith and credit to tribal court judgments. 12 OKLA. STAT. ANN. § 728 (2022), applied in *Barrett v. Barrett*, 878 P.2d 1051 (Okla. 1994).

Some state courts have extended full faith and credit to tribal judgments. E.g., *Jim v. CIT Fin. Servs. Corp.*, 533 P.2d 751 (N.M. 1975); *In re Buehl*, 555 P.2d 1334, 1342-43 (Wash. 1976). Other state courts have held that comity applies but full faith and credit does not. E.g., *Begay v. Miller*, 222 P.2d 624 (Ariz. 1950); *Marriage of Red Fox*, 542 P.2d 918 (Or. Ct. App. 1975). See generally ATWOOD, *supra* note 24, at 90-91; Janetta, *supra* note 73, at 402; Stoner & Orona, *supra* note 75, at 382-87.

may be denied on due process grounds, such as a lack of jurisdiction or failure to provide notice and an opportunity for a hearing.<sup>77</sup> The jurisdictional picture remains complex and unwieldy, however, with enormous variation among the tribes and states.

Uniform laws including the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)<sup>78</sup> have been drafted to apply to “an Indian nation or tribe” on the same basis as other states. A significant majority of states have enacted the UCCJEA provisions regarding tribes into their statutes,<sup>79</sup> and courts in these states apply the UCCJEA to cases involving children living on reservations.<sup>80</sup> However, as Barbara Atwood has thoughtfully explored, applying the UCCJEA can present serious difficulties, particularly when tribal lands do not fit the traditional definition of Indian country,<sup>81</sup> or when tribal courts exercise jurisdiction over children who are members but do not reside on the reserva-

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Tribal comity and recognition statutes include 9 NAVAJO CODE § 1718 (2022) (Foreign Orders and Comity); 23 MASHANTUCKET PEQUOT TRIBAL LAWS ch. 1 §§ 1-5 (2022) (Recognition of Foreign Judgments); SWINOMISH TRIBAL CODE § 8-02.060 (2022) (Recognition of Orders from Foreign Courts).

<sup>77</sup> See, e.g. *Duwyenie v. Moran*, 207 P.3d 754 (Ariz. Ct. App. 2009); *Langdeau v. Langdeau*, 751 N.W.2d 722, 734 (S.D. 2008); *In re J.D.M.C.*, 739 N.W.2d 796 (S.D. 2007).

<sup>78</sup> See UCCJEA § 104(b) (requiring state courts to treat tribes as states for jurisdictional purposes), § 104(c) (requiring recognition and enforcement of a child-custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of the UCCJEA). Note that cases within the scope of ICWA are not subject to the UCCJEA. *Id.* at § 104(a). See generally ATWOOD, *supra* note 24, at 94-111.

<sup>79</sup> ATWOOD, *supra* note 24, at 99-100, identifies 37 states that have enacted UCCJEA § 104(b) and (c). In addition, these provisions have been enacted in Indiana, Michigan, Missouri, New Hampshire Utah and Wyoming. Seven jurisdictions have enacted the UCCJEA without 104(b) and (c): Alabama, Alaska, Colorado, Connecticut, the District of Columbia, Idaho and Vermont. Massachusetts has not yet enacted the UCCJEA. On the interaction between ICWA and the UCCJEA, see *Holly C. v. Tohono O’odham Nation*, 452 P.3d 725 (Ariz. Ct. App. 2019).

<sup>80</sup> E.g., *Langdeau*, 751 N.W.2d 722 (applying UCCJEA § 104(b) when the children’s home state was on the reservation); *Schirado v. Foote*, 785 N.W.2d 235 (N.D. 2010). See also *Garcia v. Gutierrez*, 217 P.3d 591, 595-602 (N.M. 2009) (Pueblo was not the home state for UCCJEA purposes); *Billie v. Stier*, 141 So.3d 584 (Fla. Dist. Ct. App. 2014) (concluding that the tribal court did not exercise jurisdiction in substantial conformity with the UCCJEA).

<sup>81</sup> ATWOOD, *supra* note 24, at 100-04. See *supra* note 27 (definition of Indian country).

tion.<sup>82</sup> For similar reasons, state and tribal courts have generally declined to apply the federal Parental Kidnapping Prevention Act (PKPA) in these cases, noting that it does not apply expressly to tribes.<sup>83</sup>

Notably, in contrast to the PKPA, the federal Violence Against Women Act (VAWA) recognizes full tribal court civil jurisdiction to issue and enforce protection orders, and expressly requires states and tribes to give full faith and credit to protection orders in cross-border situations.<sup>84</sup> VAWA reauthorization in 2013 and 2022 expanded the opportunities for tribes to exercise criminal jurisdiction in domestic violence cases.<sup>85</sup> Some states have developed procedures for cooperation in these cases.<sup>86</sup>

States have exercised jurisdiction in child support cases crossing reservation borders seeking future support or repayment of public assistance benefits.<sup>87</sup> The most recent version of the Uniform Interstate Family Support Act (UIFSA), in effect in every state, applies to tribes on the same basis as states.<sup>88</sup> About sixty tribes participate directly in the federal child support enforcement program.<sup>89</sup>

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<sup>82</sup> *Id.* at 105-09; *see supra* note 61.

<sup>83</sup> 28 U.S.C. § 1738A (2022). *E.g.*, *Tulping v. Kruse*, 15 Am. Tribal L. 23 (Colville Tribal Ct. App. 2017); *Garcia v. Gutierrez*, 217 P.3d 591 (N.M. 2009). *Contra* *Marriage of Susan C. & Sam E.*, 60 P.3d 644, 648-50 (Wash. Ct. App. 2002). *See also* *Stoner & Orona*, *supra* note 75, at 399-400.

<sup>84</sup> 18 U.S.C. § 2265 (2022). *See Stoner & Orona*, *supra* note 75, at 389-96; Melissa L. Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Requirements of the Violence Against Women Acts*, 90 KY L.J. 123, 165-93 (2001-02). Professor Tatum notes the additional problem of when VAWA mandates recognition of tribal protection orders issued pursuant to divorce or child custody laws. *Id.* at 185-88.

<sup>85</sup> *See* 25 U.S.C. § 1304.

<sup>86</sup> *See generally* Dayna Olson, *Protecting Native Women from Violence: Fostering State-Tribal Relations and the Shortcomings of the Violence Against Women Act of 2013*, 46 HASTINGS CONST. L.Q. 821, 846-52 (2019).

<sup>87</sup> *E.g.* *New Mexico v. Jojola*, 660 P.2d 590 (N.M. 1983); *Jackson Cnty. v. Swayney*, 352 S.E.2d 413 (N.C. 1987). Where all the parties were tribal members, however, *Swayney* concluded that the tribal courts had exclusive jurisdiction to determine the child's paternity.

<sup>88</sup> UIFSA § 102(26) (defining "State" to include "an Indian nation or tribe"). Congress required states to enact UIFSA 2008 to participate in the federal child support program. 42 U.S.C. § 666(f).

<sup>89</sup> 42 U.S.C. § 455(f); 45 CFR Part 309. *See also* U.S. Dep't of Health & Human Servs., Office of Child Support Enforcement, *Tribal Agencies*, <https://>

## 2. ICWA Cases in State Courts

Like uniform and federal legislation, including the UCCJEA, VAWA, and UIFSA, ICWA sets the parameters for jurisdiction in a subset of family law cases that might be heard in either state or tribal court. In contrast to these statutes, it is far more carefully tailored to the unique complications of family law cases that bridge state and tribal jurisdiction.

Congress carefully defined a zone of cases in ICWA that fall within the exclusive jurisdiction of tribal courts.<sup>90</sup> In states where a federal law such as P.L. 280 has vested civil adjudicatory jurisdiction in state courts, these cases may be subject to concurrent jurisdiction in state and tribal courts.<sup>91</sup> ICWA also requires that states extend full faith and credit to the “public acts, records, and proceedings of any Indian tribe applicable to Indian child custody proceedings” on the same basis that they would to another state.<sup>92</sup>

For adoption and child welfare cases that fall within the scope of ICWA but outside the zone of exclusive tribal jurisdiction, ICWA sets the ground rules for concurrent state and tribal jurisdiction.<sup>93</sup> Proceedings in state court involving an Indian child who is not domiciled on the reservation are subject to transfer to tribal court at the request of either the child’s parent or the tribe, unless the tribal court declines jurisdiction, the parent objects to the transfer, or the state court concludes that there is good cause to retain jurisdiction.<sup>94</sup>

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[www.acf.hhs.gov/css/child-support-professionals/tribal-agencies](http://www.acf.hhs.gov/css/child-support-professionals/tribal-agencies) (last visited May 11, 2022). States pursuing child support may need to file in tribal courts. *See, e.g.,* Jackson Cnty. *ex rel.* Smoker v. Smoker, 459 S.E.2d 789 (N.C. 1995).

<sup>90</sup> 25 U.S.C. § 1911(a). *See Mississippi Band*, 490 U.S. at 36, 42-53. *See supra* notes 55-57. On exclusive tribal jurisdiction, see also *supra* notes 32-40.

<sup>91</sup> *See Doe v. Mann*, 415 F.3d 1038, 1047-68 (9th Cir. 2005), *cert. denied* 547 U.S. 1111 (2006) (concluding that actions under California child dependency statute are within P.L. 280’s civil adjudicatory jurisdiction). ICWA authorizes tribes in P.L. 280-type states to reassume jurisdiction over child custody proceedings. 28 U.S.C. § 1918. *See also* Cross & Miller, *supra* note 58, at 17-18.

<sup>92</sup> 25 U.S.C. § 1911(d).

<sup>93</sup> 25 U.S.C. § 1911(b). *See generally* RESTATEMENT, *supra* note 1, at § 40.

<sup>94</sup> 25 U.S.C. § 1911(b); 25 C.F.R. § 23.118. *See generally* GAINES-STONER ET AL., *supra* note 3, at 84-99 (discussing transfer jurisdiction); RESTATEMENT, *supra* note 1, at § 44. Some state courts have refused to transfer cases that come

The content of this “good cause” standard has been disputed, particularly when courts have seemed to treat this as a purely discretionary best interests determination.<sup>95</sup> Since 1979, the Bureau of Indian Affairs guidelines for state courts have included a list of factors for determining when “good cause” exists to deny a transfer.<sup>96</sup> These guidelines were followed by binding regulations promulgated by the BIA in 2016.<sup>97</sup> Courts and legislatures in a number of states have made efforts to implement the BIA’s approach to the good cause determination,<sup>98</sup> though courts in several other states have opposed it.<sup>99</sup>

Procedurally, ICWA requires notice to “the parent or Indian custodian and the Indian child’s tribe” in any “involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved.”<sup>100</sup> The notice rule is an important component of the concurrent jurisdiction system that

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within ICWA but do not involve what they characterize as an “existing Indian family.” See *infra* notes 154-158 and accompanying text.

<sup>95</sup> ATWOOD, *supra* note 24, at 173-74.

<sup>96</sup> Bureau of Indian Affairs, Guidelines for State Courts, Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67591 (Nov. 26, 1979) (BIA Guidelines). These were updated in 2015 at 80 Fed. Reg. 10146 (Feb. 25, 2015).

<sup>97</sup> Final Rule, *supra* note 66. In *Brackeen* a majority of the *en banc* Fifth Circuit upheld most of the aspects of the Final Rule challenged under the Administrative Procedure Act. *Brackeen*, 994 F.3d at 269. A different majority held invalid portions of the Final Rule that implemented statutory provisions these judges also found to be invalid. See *infra* note 106.

<sup>98</sup> See *Interest of T.F.*, 972 N.W.2d 1, 13 (Iowa 2022) (noting the split and citing cases). In addition to Iowa, caselaw from Colorado, Illinois, Missouri, Nebraska, North Dakota, Utah, and Texas holds that a best interests determination is not appropriate at the jurisdictional stage, while cases from Montana and Oklahoma point in the other direction. See *id.* at 15-16. Cf. *Children of Shirley T.*, 199 A.3d 221 (Me. 2019); *Thompson v. Fairfax Cnty. Dep’t of Soc. Servs.*, 747 S.E.2d 838, 850-52 (Va. Ct. App. 2013).

<sup>99</sup> See *supra* note 98. An *en banc* majority of the Fifth Circuit concluded that the requirement in the Final Rule that good cause to transfer be established by clear and convincing evidence violated the APA. *Brackeen*, 994 F.3d at 429-31 (Duncan, J.) The United States did not seek certiorari on this issue. Petition for a Writ of Certiorari at 14 n. 1, *Haaland v. Brackeen*, No. 21-376 (Sept. 3, 2021).

<sup>100</sup> 25 U.S.C. § 1912(a); 25 CFR § 23.11. See generally GAINES-STONER ET AL., *supra* note 3, at 116-23. See also *In re Isaiah W.*, 373 P.3d 444 (Cal. 2016) (holding that a juvenile court has a continuing duty to inquire into a child’s Indian status).

Congress established. The statute also gives the child's Indian custodian and tribe a right to intervene at any point in the proceeding.<sup>101</sup> It provides protections for parental rights, including access to court-appointed counsel for an indigent parent or Indian custodian,<sup>102</sup> and the right to examine reports and documents.<sup>103</sup>

Beyond procedural protections, ICWA provides substantive protections, including a requirement that active efforts be made to prevent breakup of the Indian family before a state court may order a foster care placement or termination of parental rights.<sup>104</sup> There must be "clear and convincing evidence, including testimony of qualified expert witnesses" that "the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" before parental rights may be terminated.<sup>105</sup> These substantive protections and ICWA's notice requirement were challenged in *Brackeen* under the anticommandeering doctrine of the Tenth Amendment.<sup>106</sup> The challenged provisions have been defended by the United States as within the scope of federal power in Indian affairs and operating like any other federal law with preemptive effect, conferring substantive rights on private actors.<sup>107</sup>

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<sup>101</sup> 25 U.S.C. § 1911(c). *See generally* GAINES-STONER ET AL., *supra* note 3, at 123-24.

<sup>102</sup> 25 U.S.C. § 1912(b). *See generally* GAINES-STONER ET AL., *supra* note 3, at 125-26.

<sup>103</sup> 25 U.S.C. § 1912(c).

<sup>104</sup> 25 U.S.C. § 1912(d); 25 CFR § 23.120. *See generally* GAINES-STONER ET AL., *supra* note 3, at 128-35. *Cf.* 42 U.S.C. § 671(a)(15) (requiring states to make reasonable efforts to prevent or eliminate the need to remove children from their homes).

<sup>105</sup> 25 U.S.C. § 1912(e) & (f); 23 CFR §§ 23.121-122. *See generally* GAINES-STONER ET AL., *supra* note 3, at 135-41. *Cf.* *Santosky v. Kramer*, 455 U.S. 745 (1982) (requiring clear and convincing evidence for termination of parental rights).

<sup>106</sup> The United States asked for review on this question, after an *en banc* majority of the Fifth Circuit concluded that § 1912(a) (d) (e) & (f) violate the Tenth Amendment. *Brackeen*, 994 F.3d at 268-69. The Fifth Circuit was equally divided with respect to other provisions that the Supreme Court will also consider.

<sup>107</sup> Petition for a Writ of Certiorari at 16-20, *Haaland v. Brackeen*, No. 21-376 (Sept. 3, 2021), 2021 WL 4080795



As pointed out by the Supreme Court in the *Mississippi Band* case, state courts hearing cases within ICWA must follow the statute's placement preferences in the absence of good cause to the contrary. These give priority for adoptive or foster care placement of Indian children, to members of the child's extended family, to other members of the child's tribe, and to other Indian families.<sup>108</sup> Cases in a number of states have disputed the good cause standard for avoiding ICWA's placement preferences, with some state courts approaching this as a best interests determination,<sup>109</sup> and others rejecting this approach.<sup>110</sup> The central equal protection question in *Brackeen* concerns the third priority category: placement with other Indian families.<sup>111</sup>

Many state courts and legislatures have demonstrated strong support for ICWA, including through enactment of state-level ICWA statutes.<sup>112</sup> Most controversies under ICWA since the *Mississippi Band* ruling have involved cases that fall outside the tribes' exclusive jurisdiction, in state courts that have been reluctant to follow the other requirements of the statute.<sup>113</sup> Barbara Atwood has pointed out that judges seem more likely to hesitate

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<sup>108</sup> 25 U.S.C. § 1915 (a) & (b); 25 CFR §§ 23.129 – 23.132. See *Mississippi Band*, 490 U.S. at 40 n.13. See also ATWOOD, *supra* note 24, at 181-82.

<sup>109</sup> See ATWOOD, *supra* note 24, at 219-23; see generally GAINES-STONER ET AL., *supra* note 3, at 191-213.

<sup>110</sup> *In re Custody of S.E.G.*, 521 N.W.2d 357, 362 (Minn. 1994), *cert. denied sub nom.* Campbell v. Leech Lake Band of Chippewa Indians, 513 U.S. 1127 (1995); *In re C.H.*, 997 P.2d 776, 779-82 (Mont. 2000). Cf. *In re M.K.T.*, 368 P.3d 771, 787-88 (Okla. 2016) (“The ICWA placement preferences are designed to achieve the best interests of the child and they are consistent with state law.”). See ATWOOD, *supra* note 24, at 223-28.

<sup>111</sup> See *Brackeen*, 994 F.3d at 268 (the district court ruling striking these preferences was affirmed without precedential opinion by an equally divided en banc court). See *infra* part II.B. Note that other federal laws require states to give preference to placements with adult relatives in child welfare cases. See 42 U.S.C. § 671(a)(19) (listing requirements for state foster care and adoption assistance plans).

<sup>112</sup> E.g. CAL. WELF. & INST. CODE §§ 224-224.6 (2022); IOWA CODE §§ 232B.1-232B.14 (2022); MICH. COMP. LAWS §§ 712B.1712B.41 (2022); MINN. STAT. §§ 260.751-260.835 (2022); OKLA. STAT. tit. 10 §§ 40.1-40.9 (2022); WASH. REV. CODE §§ 13.38.010-13.38.190 (2022). See generally GAINES-STONER ET AL., *supra* note 3, at 27-28 & App. D (listing ICWA-related statutes in 36 states and the District of Columbia).

<sup>113</sup> See Mall, *supra* note 59, at 173-190 (discussing evolving ICWA case law in Arizona and South Dakota).

in transferring jurisdiction to the tribe or following the placement preferences in cases involving an Indian child who has lived for a significant period with a particular caregiver, and cases involving children of mixed heritage, who are often described as “part Indian.”<sup>114</sup> She and others have written about these flashpoints, including the position of some state courts that ICWA should be limited to situations involving the breakup of an “existing Indian family.”<sup>115</sup>

These tensions were clearly at play in the Supreme Court’s ruling in *Adoptive Couple v. Baby Girl*,<sup>116</sup> where Justice Alito’s majority opinion began by noting that the Indian child involved in the case had a small percentage of Cherokee ancestry, though there was no question that she qualified for membership under the rules of the Cherokee Nation.<sup>117</sup> The case involved a child born in Oklahoma to a non-Indian mother, who placed her for adoption with a couple in South Carolina, and a Cherokee biological father who objected to the adoption and sought custody. The state courts in South Carolina followed the requirements of ICWA, eventually denying the adoption and awarding custody to the child’s father.<sup>118</sup> The Supreme Court reversed, with a majority opinion that interpreted ICWA’s protections against involuntary termination of parental rights to exclude Indian parents who have “never had legal or physical custody of [the child] at the time of the adoption proceedings.”<sup>119</sup> This construction of the statutory language was strongly disputed by four of the Justices, however, including Justice Scalia,<sup>120</sup> and raised serious concerns from both a family law and Indian law perspective.<sup>121</sup>

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<sup>114</sup> See generally ATWOOD, *supra* note 24, at 167-69, 202, 221-23.

<sup>115</sup> See *infra* notes 154-158 and accompanying text.

<sup>116</sup> 570 U.S. 637 (2013).

<sup>117</sup> *Id.* See generally Berger, *supra* note 25, at 325-29.

<sup>118</sup> *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012). For important further details, see Berger, *supra* note 25, at 301-10.

<sup>119</sup> *Adoptive Couple*, 570 U.S. at 650.

<sup>120</sup> Justice Scalia agreed that the reading of the disputed sections of the statute in Justice Sotomayor’s dissent was “much more in accord with the rest of the statute,” and commenting that the majority opinion “needlessly demeans the rights of parenthood.” *Id.* at 2571-72 (Scalia, J., dissenting).

<sup>121</sup> See generally Berger, *supra* note 25.

## II. Equal Protection and Federal Indian Law

### A. *Equal Protection and Federal Indian Law*

One of the enduring ironies of federal Indian law is that the first equal protection case to reach the Supreme Court was brought by non-Indian employees of the Bureau of Indian Affairs, complaining about a statute giving employment preference in the BIA to qualified Indian employees.<sup>122</sup> In *Morton v. Mancari*, the United States was required to defend a rule that favored Native Americans, rather than its many actions harming Native communities.<sup>123</sup> In a unanimous opinion upholding the statute, the Supreme Court invoked the “unique legal status of Indian tribes under federal law and . . . the plenary power of Congress . . . to legislate on behalf of federally recognized Indian tribes.”<sup>124</sup> The Court wrote:

Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government would be jeopardized.<sup>125</sup>

The Court went on to reject the characterization of the employment preference as a racial one. It emphasized that the preference was narrowly targeted, “reasonably designed to further the cause of Indian self-government and make the BIA more responsive to its constituent groups.”<sup>126</sup> Moreover, the Court emphasized that the preference “is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA

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<sup>122</sup> *Morton v. Mancari*, 417 U.S. 535 (1974). See generally COHEN HANDBOOK, *supra* note 4, at 410-12; RESTATEMENT, *supra* note 1, at § 9.

<sup>123</sup> Note that this was also the Supreme Court’s first consideration of an affirmative action program, coming four years before its ruling in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

<sup>124</sup> *Morton*, 417 U.S. at 551.

<sup>125</sup> *Id.* at 552.

<sup>126</sup> *Id.* at 554.

in a unique fashion.”<sup>127</sup> Pointing to previous cases in which it had upheld “legislation that singles out Indians for particular and special treatment,” the Court concluded that the employment preference was reasonable and “rationally designed to further Indian self-government.”<sup>128</sup> It provided this guidance for future cases: “As long as the special treatment can be tied rationally to the fulfillment of Congress’s unique obligation toward the Indians, such legislative judgments will not be disturbed.”<sup>129</sup>

Within a few years, the Court had applied the *Morton* test in a series of cases.<sup>130</sup> One ground for its ruling in *Fisher v. District Court*<sup>131</sup> was that the Tribe’s exclusive adoption jurisdiction “does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law.”<sup>132</sup> Taking *Morton* a step further, the Court wrote: “Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.”<sup>133</sup>

With *United States v. Antelope*,<sup>134</sup> the Court extended *Morton* to uphold federal criminal jurisdiction in “Indian country,”<sup>135</sup> in a situation where the defendants would have faced less serious charges under state law.<sup>136</sup> The Court repeated its conclusion

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<sup>127</sup> *Id.* The Court quoted the criteria in a footnote: to be eligible for the preference in appointment, promotion, and training, “an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe.” *Id.* at 553 n.24.

<sup>128</sup> *Id.* at 555.

<sup>129</sup> *Id.*

<sup>130</sup> See generally Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165 (2010); Sarah Krakoff, *Inextricably Political: Race, Membership and Tribal Sovereignty*, 87 WASH. L. REV. 1041 (2012).

<sup>131</sup> 424 U.S. 382 (1976) (per curiam). See *supra* notes 52-53 and accompanying text.

<sup>132</sup> *Id.* at 390.

<sup>133</sup> *Id.* at 390-91 (citing *Morton*).

<sup>134</sup> 430 U.S. 641 (1977).

<sup>135</sup> See *supra* note 27.

<sup>136</sup> As enrolled tribal members charged with a crime committed within the boundaries of their reservation, the defendants were subject to the Major

that “federal regulation of Indian affairs” is not based on an impermissible racial classification, noting: “Indeed, respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d’Alene Tribe.”<sup>137</sup>

During the same term that it decided *Antelope*, the Supreme Court cited *Morton* in a case challenging Congress’s distribution of funds awarded by the Indian Claims Commission for breaches of an 1854 treaty with the Delaware nation. In *Delaware Tribal Business Committee v. Weeks*,<sup>138</sup> a group of Delaware descendants, whose ancestors had severed their relations with the tribe at the time of the treaty, challenged their exclusion from the fund distribution. After noting its precedents giving Congress broad power “to prescribe the distribution of property of Indian tribes,” the Court concluded that its distribution plan was “tied rationally to the fulfillment of Congress’s unique obligation toward the Indians.”<sup>139</sup>

*Morton* emphasized tribal membership (in a federally-recognized tribe) as the basis for classifications in federal statutes, describing this as “political” rather than “racial.”<sup>140</sup> Federal recognition reflects the government-to-government relationship between the United States and a Native nation, which may originate in a treaty relationship, an act of Congress, or another legal process.<sup>141</sup> Recognition of tribes and tribal members is a

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Crimes Act, 18 U.S.C. § 1153 rather than Idaho law. The federal statute includes a felony murder rule, which Idaho law does not. 430 U.S. at 642-44. See generally COHEN HANDBOOK, *supra* note 4, at § 9.02.

<sup>137</sup> *Id.* at 646. In a footnote, the Court noted but put off for another day the question of whether the Major Crimes Act could be applied constitutionally to a non-enrolled Indian defendant living on the reservation. *Id.* at 646 n.7. This is an enormously complex and important question. See Fletcher, *supra* note 14, at 512-13. Cf. *Oklahoma v. Wadkins*, No. 21-1193 (MCA case – cert pending, <https://www.supremecourt.gov/docket/docketfiles/html/public/21-1193.html>).

<sup>138</sup> 430 U.S. 73 (1977).

<sup>139</sup> *Id.* at 85. Although the Justices did not disagree as to the appropriate scrutiny, they were not all persuaded that the legislative classification was valid.

<sup>140</sup> *Morton*, 417 U.S. at 553-54.

<sup>141</sup> See generally COHEN HANDBOOK, *supra* note 4, at § 3.02; RESTATEMENT, *supra* note 1, at § 2. The process by which indigenous groups may petition for federal recognition is detailed at: Procedures for Federal Acknowledgment of Indian Tribes, 25 C.F.R. pt. 83 (2016). For the current list of federally-recognized tribes, see Indian Entities Recognized and Eligible to

political question, within the scope of Congress's powers in Indian affairs,<sup>142</sup> and the definition of "Indian" comes within this power.<sup>143</sup> The federal process of defining and recognizing tribes was closely tied historically to the process of extending control over Native people and their land and resources.<sup>144</sup>

Some writers have expressed discomfort with the fact that tribal membership criteria, and federal Indian law statutes, typically incorporate a genetic dimension in the form of a lineal descent rule or minimum blood quantum.<sup>145</sup> Scholars have explored the ways in which this aspect of membership rules is an artifact of federal policies and law, including Supreme Court decisions, that imposed racial classifications on Native Americans and defined tribes in explicitly racial (and racist) terms.<sup>146</sup> Under ICWA, Native descent is not sufficient to bring a child within the scope of the statute, which also requires that the child or a parent be a tribal member.<sup>147</sup>

The decisions in *Morton*, *Fisher*, and *Antelope* were all unanimous, and the Supreme Court has never questioned these precedents. In other contexts, however, the Court has declined to extend the *Morton* approach. For example, it concluded that *Morton* did not apply to state legislation challenged under the

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Receive Services from the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200 (Feb. 1, 2019). See also Sarah Krakoff, *They Were Here First: Tribes, Race and the Constitutional Minimum*, 69 STAN. L. REV. 491, 529-42 (2017).

<sup>142</sup> See Fletcher, *supra* note 14, at 499-500, 508-12.

<sup>143</sup> See *id.* at 512-16, 532-44. See also Gregory Ablavsky, "With the Indian Tribes:" Race, Citizenship, and Original Constitutional Meanings, 70 STAN. L. REV. 1025 (2018) (discussing understandings of the term "Indian" when the Constitution was drafted).

<sup>144</sup> See Krakoff, *supra* note 130.

<sup>145</sup> See generally Fletcher, *supra* note 14, at 513-14. Sarah Krakoff has pointed out that since *Mancari* the federal government has eliminated supplemental blood quantum requirements from its criteria for participation in federal programs. Krakoff, *supra* note 130, at 1083-85.

<sup>146</sup> *E.g.*, United States v. Sandoval, 238 U.S. 28, 46 (1913); United States v. Rogers, 45 U.S. 567 (1846). See generally Bethany R. Berger, "Power over This Unfortunate Race": Race, Politics and Indian Law in United States v. Rogers, 45 WM. & MARY L. REV. 1957 (2004); Fletcher, *supra* note 14, at 538-44; Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373 (2002). See also Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 969-74 (2011).

<sup>147</sup> See *supra* note 3. Enrollment requires an affirmative act. See also ATWOOD, *supra* note 24, at 192-93.

Fifteenth Amendment in *Rice v. Cayetano*.<sup>148</sup> In *United States v. Lara*,<sup>149</sup> dicta suggest that some members of the Court believe that tribes should not be permitted to exercise jurisdiction over nonmember Indians within their reservations on equal protection grounds, despite Congress's approval, in circumstances when the Court has determined that tribes cannot exercise jurisdiction over non-Indians.<sup>150</sup> Justice Alito's majority opinion in *Adoptive Couple v. Baby Girl* also included dicta signaling his belief that a different interpretation of the ICWA provision considered there "would raise equal protection concerns."<sup>151</sup> Ironically, the Court's language in *Adoptive Couple* suggests that several Justices allowed their perceptions of race and Indianness to influence their statutory construction.<sup>152</sup>

#### B. ICWA and Equal Protection

When it enacted ICWA, Congress included findings that clearly articulate the ways it understood the statute to fulfill its unique obligation to Indian tribes.<sup>153</sup> In the years that followed, however, courts in several states began to limit ICWA's application to cases in which the child had been "a member of an Indian home or culture."<sup>154</sup> Some courts rooted this "existing Indian family" rule in equal protection principles, suggesting that the

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<sup>148</sup> 528 U.S. 495, 514 (2000).

<sup>149</sup> *United States v. Lara*, 541 U.S. 193 (2004).

<sup>150</sup> *Id.* at 209; *see also* 211-14 (Kennedy, J., concurring). *See also* *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005).

<sup>151</sup> 570 U.S. 637, 656 (2013). *See also supra* notes 118-120 and accompanying text. Looking ahead, Justice Alito's opinion in *Adoptive Couple* was joined by two members of the current Court, Chief Justice Roberts and Justice Thomas. The dissenters included Justices Sotomayor and Kagan, and four new Justices will have joined the Court by the time *Haaland* is argued.

<sup>152</sup> *See Berger, supra* note 25, at 325-29, 332-33.

<sup>153</sup> 25 U.S.C. § 1901; *Mississippi Band*, 490 U.S. at 32-37.

<sup>154</sup> *E.g.*, *Matter of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982), *overruled by In re A.J.S.*, 204 P.3d 54 (Kan. 2009). Cases are collected in *ATWOOD, supra* note 24, at 204-09, and *Krakoff, supra* note 141, at 515 n.142. *See also GAINES-STONER ET AL.*, *supra* note 3, at 61-63. The *Mississippi Band* case, rejecting the state's argument that ICWA did not apply, seems clearly inconsistent with this reading of the law. *See In re Bridget R.*, 49 Cal. Rptr. 2d 507, 521-22 (Ct. App. 1996) *cert. denied sub nom. Cindy R. v. James R.*, 519 U.S. 1060 (1997) (holding that the ICWA applies even when the Indian child has not lived in an Indian family).

statute was only constitutional when applied to children whose parents had “a significant social, cultural, or political relationship with an Indian community.”<sup>155</sup>

There are many arguments against the doctrine, not least that it contradicts the plain language of the statute. Moreover, the suggestion that cases such as *Morton*, *Fisher*, and *Antelope* upheld classifications based on a social, cultural, or political status of “Indian” rather than on tribal membership seems impossible to square with the language in those decisions. As scholars have pointed out, courts taking this approach are imposing their own views as to whether a parent or child or family is sufficiently “Indian” to qualify for protection.<sup>156</sup> A majority of states have now rejected this approach by legislation<sup>157</sup> or judicial opinion.<sup>158</sup>

The broad constitutional challenges pressed in *Brackeen* reflect a longstanding effort by ICWA opponents to overturn the statute.<sup>159</sup> Plaintiffs’ initial complaint asked the federal district court to declare the entire statute facially unconstitutional, and

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<sup>155</sup> See *Bridget R.*, 49 Cal. Rptr. 2d at 527-28. California later enacted a statute rejecting the exception, see CAL. WELF. & INST. CODE §§ 170, 224, but its intermediate appellate courts remain divided. Compare *In re Santos Y.*, 112 Cal Rptr. 2d 692 (Cal. App. 2001) (applying the exception) with *In re Vincent M.*, 59 Cal. Rptr. 3d 321 (Cal. App. 2007) (rejecting the exception). See also Goldberg, *supra* note 146, at 1382-88, 1393.

<sup>156</sup> See, e.g., *Bridget R.*, 49 Cal. Rptr. 2d at 515-16. See generally Suzianne D. Painter-Thorne, *One Step Forward, Two Steps Back: How the “Existing Indian Family” Exception (Re)imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. 329, 371-80 (2009). The 2016 Final Rule provides that states may not consider these factors in determining whether ICWA applies to a proceeding. 25 C.F.R. § 23.103.

<sup>157</sup> See *supra* note 112.

<sup>158</sup> See, e.g., *Adoption of T.A.W.*, 383 P.3d 492, 505-06 (Wash. 2016). Beyond California, where appellate courts are divided, courts in twenty other states have rejected the doctrine, including Alaska, Arizona, Idaho, Illinois, Michigan, New Jersey, New York, Oklahoma, Oregon, South Dakota, Utah, and Washington. See *Atwood*, *supra* note 24, at 204 n.17. Courts in six states apply the doctrine in some circumstances, including Alabama, Kentucky, Louisiana, Missouri, Nevada, and Tennessee. See *id.* at 204 n.8. See also generally RESTATEMENT, *supra* note 1, at § 38 cmt. D.

<sup>159</sup> On this litigation campaign see Bethany R. Berger, *Savage Equalities*, 94 WASH. L. REV. 583, 625-26 (2019) (listing cases), and Caroline M. Turner, Note, *Implementing and Defending the Indian Child Welfare Act Through Revised State Requirements*, 49 COLUM. J. L. & SOC. PROBS 501, 514-16 (2016). See



the trial judge was sympathetic.<sup>160</sup> The *en banc* Fifth Circuit Court of Appeals subsequently reversed the lower court and rejected these broad claims. A majority of the court concluded that ICWA was within Congress's powers in Indian affairs,<sup>161</sup> and that the statutory definition of "Indian child," based on eligibility for tribal membership, did not violate the equal protection principle of the Fifth Amendment.<sup>162</sup>

Plaintiffs in *Brackeen* and similar cases have urged that classifications based on tribal membership should be treated as racial classifications and subjected to strict scrutiny for equal protection purposes. They point to the fact that tribal membership criteria typically incorporate a genetic dimension, based on lineal descent from an enrolled member or minimum blood quantum.<sup>163</sup> This was also true of the federal statutes considered in *Morton* and *Antelope*, however, and the *en banc* majority in *Brackeen* squarely rejected this argument.<sup>164</sup> As noted there, citizenship based on descent is a common feature of citizenship laws in many nations.<sup>165</sup>

The individual plaintiffs in *Brackeen* also pressed a more focused equal protection challenge to ICWA's placement preferences.<sup>166</sup> The *en banc* Fifth Circuit was equally divided on one aspect of this issue: placement provisions in ICWA that prioritize placement for Indian children with "other Indian families," or "Indian foster homes," when placement with another member of the child's family or tribe is not possible.<sup>167</sup> The Supreme Court agreed to consider this issue, subject to its determination of the plaintiffs' standing to challenge the statute.<sup>168</sup> Under *Morton*, the

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also *ATWOOD*, *supra* note 24, at 34-36; *Berger*, *supra* note 25, at 353-56; *Krakoff*, *supra* note 141, at 509-17.

<sup>160</sup> See *Brackeen v. Zinke*, 338 F. Supp. 3d 249 (N.D. Tex. 2018).

<sup>161</sup> *Brackeen*, 994 F.3d at 299-316.

<sup>162</sup> *Id.* at 332-45.

<sup>163</sup> *E.g. Brackeen*, 338 F. Supp. 3d at 533-34. See *supra* notes 145-147 and accompanying text. See generally *ATWOOD*, *supra* note 24, at 34-36; *Krakoff*, *supra* note 141, at 509-17.

<sup>164</sup> *Brackeen*, 994 F.3d at 336-40.

<sup>165</sup> *Id.* at 338 n.51.

<sup>166</sup> See *supra* notes 108-111 and accompanying text.

<sup>167</sup> These are 25 U.S.C. § 1915(a)(3); 25 U.S.C. § 1915(b)(iii).

<sup>168</sup> Compare *Brackeen*, 994 F.3d at 400-01 (Duncan opinion) with *Brackeen*, 994 F.3d at 340-345 (Dennis opinion). Although a substantial majority of

question is whether these preferences “are rationally related to legitimate government interests and therefore consistent with equal protection.”<sup>169</sup>

Congress’s determination in 1978 to extend the placement preferences beyond the child’s particular tribe reflected the artificial nature of the “tribe” as a construct and the realities of modern life. As is well known, the list of federally-recognized tribes often does not map cleanly onto the cultural and language groupings of Native people.<sup>170</sup> European explorers and colonists classified all the indigenous people they encountered as Indians, but Native communities were highly diverse and did not identify as part of a single culture or race.<sup>171</sup> While this diversity continues today, centuries of contact – and a legal regime that regulated and defined some people as “Indians” and some groups as “tribes” – also built a stronger sense of shared identity among Native people, shaped by common experiences such as reservation life, government-run boarding schools, and mass relocation to urban areas.<sup>172</sup>

Native communities are not insular, and there are significant rates of intermarriage among groups, with many families often having a kind of mixed tribal citizenship. For example, the *Santa Clara Pueblo* case involved children with a Navajo father and Santa Clara mother.<sup>173</sup> Reservation communities include many

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the en banc court concluded that the individual plaintiffs had standing to bring this challenge, a number of judges dissented. *See Brackeen*, 994 F.3d at 267. In addition, as noted *supra* note 106, the Court will consider the state plaintiffs’ argument that various requirements in ICWA violate the anticommandeering doctrine of the Tenth Amendment. A majority of the en banc Fifth Circuit sustained this challenge as to several provisions, and the court was equally divided with respect to other provisions. *Brackeen*, 994 F.3d at 268 (explaining the ruling and the lack of precedential effect).

<sup>169</sup> Petition for a Writ of Certiorari at 26-30, *Haaland v. Brackeen*, No. 21-376 (Sept. 3, 2021), 2021 WL 4080795

<sup>170</sup> *See* Goldberg, *supra* note 146, at 1381-82. Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC’Y REV. 1123, 1128 (1994), argues that non-Indian law powerfully shaped the forms of Indian group life including tribes, tribal governments, and tribal sovereignty, as well as supra- and intertribal coalition and cooperation.

<sup>171</sup> *See* Goldberg-Ambrose, *supra* note 170, at 1140.

<sup>172</sup> *Id.* at 1139-45.

<sup>173</sup> *See supra* notes 47-48 and accompanying text.

residents who are members of other tribes, and Congress has recognized this reality in other contexts such as tribal criminal jurisdiction over nonmember Indians.<sup>174</sup>

In *Brackeen*, the United States argued that ICWA's placement preferences satisfy the test in *Morton*, based on the federal government's "substantial interests in the welfare of Indian children and their parents, the integrity of Indian families, and 'the stability and security of Indian tribes,'"<sup>175</sup> and its "sound interest in 'protect[ing] the best interests of Indian children' by promoting the placement of those children in settings that are most likely to foster a connection with their Indian tribes and culture."<sup>176</sup> It pointed out that that "social, cultural, and political standards of an Indian community may transcend tribal lines," because many tribes that are now treated as separate political units share a common history and linguistic, cultural, and religious traditions.<sup>177</sup> Moreover, "because of intermarriage and social connections among tribal communities, it is not uncommon for an Indian child to have biological parents who are enrolled in different tribes."<sup>178</sup>

The United States argued that these factors provide the rational basis for Congress's conclusion that the preferences for placement in "other Indian families" and "Indian foster homes" would promote an Indian child's connection to those aspects of the child's own tribe.<sup>179</sup> Congress could rationally conclude that placing an Indian child with a member of another tribe would serve the purposes of the statute because the child "would be more likely to be surrounded by others – even if not members of the child's tribe – who had gone through the process of deciding whether to maintain a connection to their own tribe and who personally understood the importance of the decision."<sup>180</sup> For

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<sup>174</sup> This includes the 1990 *Duro-fix* legislation, amending 25 U.S.C. § 1301(4). See generally Fletcher, *supra* note 14, at 537-38.

<sup>175</sup> Petition for a Writ of Certiorari at 27, *Haaland v. Brackeen*, No. 21-376 (Sept. 3, 2021), 2021 WL 4080795 (citing 25 U.S.C. § 1902).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* See also *Brackeen*, 994 F.3d at 345 (Dennis, J.).

<sup>178</sup> Petition for a Writ of Certiorari at 27, *Haaland v. Brackeen*, 2021 WL 4080795.

<sup>179</sup> *Id.* at 27.

<sup>180</sup> *Id.* at 28.

their part, the *Brackeen* plaintiffs relied primarily on the argument that ICWA was facially unconstitutional.<sup>181</sup>

The tribal defendants and intervenors in the *Brackeen* litigation, and the tribes participating as amici, pointed to the history of abusive state child welfare practices that prompted Congress to enact ICWA.<sup>182</sup> They linked ICWA's preferences for placement with other Indian families to the role of extended families addressed in Congressional hearings, and emphasized the ways in which "[p]lacement with an Indian family, even one affiliated with a Tribe different from the child's Tribe," helps to protect and preserve the child's identity as an Indian.<sup>183</sup> The Tribes also argued that implementation of ICWA has improved state child welfare services for Indian families and fostered important tribal-state cooperation in these cases.<sup>184</sup> Notably, this includes the state of Texas, one of the *Brackeen* plaintiffs, which submitted favorable comments during the BIA's ICWA rulemaking process and enacted legislation to implement ICWA in 2015 with strong bipartisan support.<sup>185</sup>

Despite the fact that Indiana, Louisiana, and Texas sought to have ICWA declared unconstitutional, a much larger group of states supported the federal government and the Tribes.<sup>186</sup> The 25 amici states, "home to 86 percent of federally recognized Indian Tribes," described ICWA as a "critical tool for protecting Indian children and fostering state-tribal collaboration."<sup>187</sup> Their brief highlights child welfare agreements between tribes and

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<sup>181</sup> See Petition for a Writ of Certiorari at 19-24, *Texas v. Haaland*, No. 21-378 (Sept. 3, 2021); 2021 WL 4122397; Consolidated Brief in Opposition at 15-17, *Haaland v. Brackeen*, No. 21-376 (Dec. 8, 2021); 2021 WL 5983316.

<sup>182</sup> See Petition for Writ of Certiorari, *Cherokee Nation v. Brackeen*, No. 21-377 (Sept. 3, 2021); Brief of 180 Indian Tribes, et al. at 9-15, *Cherokee Nation v. Brackeen*, No. 21-377 (Oct. 8, 2021) 2021 WL 4817964 ("Tribal Amicus Brief").

<sup>183</sup> Tribal Amicus Brief, *supra* note 182, at 17.

<sup>184</sup> *Id.* at 17-24.

<sup>185</sup> *Id.* at 20-24.

<sup>186</sup> See Brief for the States of California et al. as Amici Curiae in Support of Petitioners, *Haaland v. Brackeen*, No. 21-376 (Oct. 8, 2021), 2021 WL 4803866 (amicus brief for 25 states and the District of Columbia supporting the US and Tribal parties) (State Amicus Brief). Ohio has supported the *Brackeen* plaintiffs. See Brief of Amicus Curiae State of Ohio Supporting Petitioners, *Texas v. Haaland*, No. 21-378 (Oct. 2021) 2021 WL 4594795.

<sup>187</sup> State Amicus Brief, *supra* note 186, at 1-9.

states including Alaska, Arizona, Minnesota, New Mexico, Utah, and Washington, expressly authorized by ICWA,<sup>188</sup> as well as specialized ICWA courts or procedures in Arizona, California, Montana, and New Mexico. Many of these states have also enacted statutes implementing or extending the protections ICWA provides.<sup>189</sup> The American Bar Association also supports full implementation of ICWA, and reaffirmed its support after the district Court's ruling in *Brackeen*.<sup>190</sup>

### III. Tribal Nations, States, and Family Law

The Supreme Court has upheld Congress's power to enact legislation with special application to Native people and nations for almost two centuries. Since *Morton v. Mancari*, the Court has required as a matter of equal protection that such legislation must be "tied rationally to the fulfillment of Congress's unique obligation toward the Indians."<sup>191</sup> With ICWA, Congress made the connection between its obligation and the statute explicit, after extensive hearings to establish the need for legislation. As recognized by the Fifth Circuit in *Brackeen*, ICWA clearly satisfies the traditional *Morton* test.

In *Haaland v. Brackeen*, equal protection analysis combines with another longstanding doctrine of federal Indian law: the rule of exclusive federal jurisdiction and preemption of state authority. Here as well, the Court has deferred to Congress, allowing Congress to define the boundaries of tribal and state authority.<sup>192</sup> There are clear parallels to international family law, another area in which important national interests have led Congress to ratify treaties with other governments and enact implementing legislation that is binding on states under the Supremacy Clause. Adop-

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<sup>188</sup> *Id.* at 7 (citing 25 U.S.C. § 1919(a)).

<sup>189</sup> *Id.* at 8. *See also supra* note 112 and accompanying text.

<sup>190</sup> American Bar Association, Resolution 115C (August 13, 2019), available at: <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/115c-annual-2019.pdf>. *See also* American Bar Association, *Indian Child Welfare Act Resolution* (August 2013) (advocating various measures to increase state-tribal collaboration and support tribal child protection programs, available at: [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/attorneys/indian-child-welfare-act-resolution/](https://www.americanbar.org/groups/public_interest/child_law/resources/attorneys/indian-child-welfare-act-resolution/)).

<sup>191</sup> *See supra* note 13.

<sup>192</sup> *See* COHEN HANDBOOK, *supra* note 4, at § 6.01[5].

tions in state courts must follow the rules of the Intercountry Adoption Act,<sup>193</sup> and private custody disputes may be subject to the International Child Abduction Remedies Act.<sup>194</sup>

The intersection of tribal and state authority in family law is complicated. State courts and legislatures have had to grapple with a third source of sovereignty, predating the Constitution, with similarities both to states and foreign nations. The puzzle is more difficult because conflict of laws principles are premised on a territorial definition of jurisdiction, and the territorial model has become increasingly difficult to apply to Native nations in the United States.<sup>195</sup>

Amid this complexity, ICWA has provided an essential framework for child welfare cases that cross jurisdictional borders. It has helped build the capacity of tribal courts and social services agencies, and fostered important collaborations between states and tribes.<sup>196</sup> There is clearly much more work to be done: Native American children are still more likely to be in state foster care systems than non-Native children.<sup>197</sup> Implementation depends on state cooperation, since ICWA has not provided tools to enforce compliance when a state is determined to resist.<sup>198</sup> Federal resources for family preservation under Title IV-E of the Social Security Act have been slow to reach tribal nations, which have depended on states for a share of federal funding for foster

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<sup>193</sup> International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 9001–9011 (2022) (implementing the Hague Convention on the Civil Aspects of International Child Abduction).

<sup>194</sup> Intercountry Adoption Act, 42 U.S.C. §§ 14901–14954 (2022) (implementing the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption).

<sup>195</sup> Modern rulings of the Supreme Court imposed limits on tribal jurisdiction over nonmembers, even within Indian country. *See supra* notes 64–65.

<sup>196</sup> *See* Le Anne E. Silvey, *A Decade of Lessons Learned: Advocacy, Education and Practice*, in *FACING THE FUTURE*, *supra* note 58, at 235 (describing experience with ICWA in Michigan); Carol L. Tebben, *The Constitution, Public Policy, and Pragmatism*, in *FACING THE FUTURE*, *supra* note 58, at 270, 280–85 (describing ICWA collaboration process in Wisconsin).

<sup>197</sup> *See* Final Rule, *supra* note 66, at 38, 784.

<sup>198</sup> *See, e.g.,* *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603 (8th Cir. 2018), *cert. denied*, 140 S. Ct. 105 (2019) (holding that the abstention doctrine barred the trial court’s order for injunctive and declaratory relief).

care and adoption assistance.<sup>199</sup> As these issues are slowly resolved, experts have recommended further steps state governments can take to improve child welfare outcomes for Native children.<sup>200</sup>

#### IV. Conclusion

Families have long been understood as central to the self-definition of communities, states, and nations. For citizens of tribal nations,<sup>201</sup> subject to the jurisdiction of the United States, due process and equal protection principles support the same right to bring family disputes to courts in their communities that other Americans enjoy. As the Supreme Court has recognized, access to courts is especially important in family law.<sup>202</sup> Fairness to tribal litigants also requires a significant level of comity and respect in family cases, analogous to the full faith and credit extended in interstate cases. Recognition of personal status has had a high priority in the conflict of laws generally,<sup>203</sup> and specifically with respect to Native communities.<sup>204</sup>

With the Indian Child Welfare Act, Congress gave shape and reality to these principles, reversing a century of federal policies that undermined Indian families and tribal self-determination. States were part of the problem that Congress identified, and ICWA has prompted greater collaboration and respect for tribal courts and governments. Despite the opposition of a handful of states, a far larger number have voiced their strong support

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<sup>199</sup> See B.J. Jones, *Differing Concepts of “Permanency”: The Adoption and Safe Families Act and the Indian Child Welfare Act*, in *FACING THE FUTURE*, *supra* note 58, at 127. Provisions for direct funding of tribal IV-E programs were first enacted in the Fostering Connections to Success and Increasing Adoptions Act of 2008, P.L. 110-351 (Oct. 7, 2008).

<sup>200</sup> See, e.g., Atwood, *supra* note 24, at ch. 6 (discussing alternative models of ASFA permanency); Courtney Lewis, *Pathways to Permanency: Enact a State Statute Formally Recognizing Indian Custodianship as an Approved Path to Ending a Child in Need of Aid Case*, 36 *ALASKA L. REV.* 23 (2019).

<sup>201</sup> See *supra* note 21.

<sup>202</sup> E.g. *Boddie v. Connecticut*, 401 U.S. 371 (1971); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

<sup>203</sup> See *Hilton v. Guyot*, 159 U.S. 113, 167 (1895) (discussing judgments affecting the status of persons).

<sup>204</sup> See *supra* notes 50-54.

for ICWA in *Haaland v. Brackeen*.<sup>205</sup> The challenge on equal protection grounds flies in the face of settled doctrine upholding federal legislation that fulfills Congress's obligations to tribal nations.

Beyond ICWA, there are important unanswered questions for tribes, states, and the lawyers who work with families that cross borders of geography and membership. States and tribes have opportunities to foster pragmatic solutions and good working relationships in other areas of family law, including child custody, child support, divorce, and domestic violence.<sup>206</sup> Congress and the Supreme Court share responsibility for the convoluted jurisdictional rules that complicate these cases, which have assumed either a complete separation between Indian and non-Indian people or the assimilation and disappearance of Native communities. In a world with strong tribal nations and more fluid boundaries between states and tribes, the path forward depends on comity and cooperation.

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<sup>205</sup> See *supra* notes 186-189 and accompanying text.

<sup>206</sup> See *supra* notes 73- 89 and accompanying text.



## ***Dobbs v. Jackson Women's Health* and the Post-Roe Landscape**

by  
Yvonne Lindgren\*

### **Introduction**

On June 24, 2022, the Supreme Court handed down its long awaited decision in *Dobbs v. Jackson Women's Health Organization*,<sup>1</sup> stating that *Roe* “was egregiously wrong from the start” and that “[i]t is time to heed the Constitution and return the issue of abortion to the people’s elected representatives.”<sup>2</sup> A draft of the opinion had been leaked nearly eight weeks earlier,<sup>3</sup> but that preview did little to blunt the impact of the Court’s ruling.<sup>4</sup> The decision, authored by Justice Alito, was made possible by the three newest Trump-appointed justices, Brett Kavanaugh, Neil Gorsuch, and Amy Coney Barrett who voted in the 6-3 conservative majority. Justices Thomas and Kavanaugh and Chief Justice Roberts filed concurring opinions. A jointly drafted dissent—a rarity in constitutional cases—was filed by Justices Breyer, Sotomayor, and Kagan.

The Supreme Court held that there is no constitutional right to abortion, reasoning that abortion is not specifically mentioned in the U.S. Constitution and that there is no other rationale for finding that such a right can be implied from the language of the Constitution because abortion is not rooted in the nation’s his-

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<sup>1</sup> 142 S. Ct. 2228 (2022).

<sup>2</sup> *Id.* at 2243.

<sup>3</sup> *Read Justice Alito's Initial Draft Abortion Opinion Which Would Overturn Roe v. Wade*, POLITICO (May 2, 2022), <https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504>.

<sup>4</sup> 142 S. Ct. at 2316 (Roberts, C.J., concurring) (describing the overturn of *Roe* and *Casey* as “a serious jolt to the legal system—regardless of how you view these cases.”).

tory and traditions and is not an essential component of “ordered liberty.”<sup>5</sup> As a result, the constitutional floor that has protected the abortion right for fifty years has been removed and states may now regulate, restrict, criminalize, or protect abortion at the state-level. The result will be a patchwork of state-level abortion laws across the nation. It is estimated that 26 states will ban abortion, either through trigger laws like Missouri’s that took effect immediately after the *Dobbs* decision,<sup>6</sup> or by enforcing pre-*Roe* era criminal abortion laws that are still on the books.<sup>7</sup> Sixteen states protect abortion in their own state constitutions or by judicial or legislative act.<sup>8</sup> The rest will be in-between, restricting but not outright banning the procedure.<sup>9</sup>

This Article examines some of the important takeaways of the decision itself and the likely reverberations it will have on other areas of law and reproductive healthcare more broadly. The Article proceeds in three parts. Part I examines the majority, concurring, and dissenting opinions to consider what they reveal about the new standard of review for abortion, the shift in power among the members of the Court itself, as well as what the opin-

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<sup>5</sup> *Id.* at 2242 (stating, “We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision. . .”).

<sup>6</sup> *13 States Have Abortion Trigger Bans—Here’s What Happens When Roe Is Overturned*, GUTTMACHER INST. (June 6, 2022), <https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned>.

<sup>7</sup> *See 26 States Are Certain or Likely to Ban Abortion Without Roe: Here’s Which Ones and Why*, GUTTMACHER INST. (Apr. 19, 2022), <https://www.guttmacher.org/article/2021/10/26-states-are-certain-or-likely-ban-abortion-without-roe-heres-which-ones-and-why>.

<sup>8</sup> Becky Sullivan, *With Roe Overturned, State Constitutions Are Now at the Center of the Abortion Fight*, NPR NEWS (June 29, 2022), <https://www.npr.org/2022/06/29/1108251712/roe-v-wade-abortion-ruling-state-constitutions> (noting that eleven states explicitly guarantee a right to privacy in their state constitutions, thereby providing the legal underpinning of *Roe*); *Abortion Policy in the Absence of Roe*, GUTTMACHER INST. (Aug. 1, 2022), <https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe> (describing that sixteen states and the District of Columbia have laws that protect the right to abortion).

<sup>9</sup> Sarah Ewall-Wice & Melissa Quinn, *With Roe Overturned, Which States Would Restrict or Protect Abortion Rights?*, CBS NEWS (Aug. 6, 2022), <https://www.cbsnews.com/news/roe-v-wade-overturn-trigger-laws-supreme-court-abortion-states-rights/>.

ion signals might come next. Part II explores the future of abortion in a post-*Roe* landscape as the abortion rights movement moves from the defensive to the offensive posture. The section briefly discusses emerging constitutional theories for sourcing the abortion right, as well as federal and state executive and legislative actions to protect abortion access. Part III briefly assesses the potential impact of the end of *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* on criminalization of abortion and self-managed care, the surveillance of pregnant people, and adjacent issues, including reproductive health and assisted reproductive technology.

## I. The Dobbs Opinion

The Mississippi law at the center of the *Dobbs* case banned abortion past fifteen weeks gestation except in cases of medical emergency or severe fetal anomaly.<sup>10</sup> The law presented a direct challenge to the holdings of *Roe v. Wade*<sup>11</sup> and *Planned Parenthood v. Casey*<sup>12</sup> because while those cases varied on the standard of review in abortion cases, they held a firm line that abortion could be *regulated* but could not be *banned* before fetal viability,<sup>13</sup> generally at 23-24 weeks gestation.<sup>14</sup> A fifteen week ban, therefore, directly challenged the central holding of abor-

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<sup>10</sup> MISS. CODE ANN. § 41-41-191 (providing that “[e]xcept in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.”).

<sup>11</sup> 410 U.S. 113 (1973).

<sup>12</sup> 505 U.S. 833 (1992).

<sup>13</sup> *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 869, 871 (1992) (holding that “[t]he woman’s right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.”); *see also Webster v. Reproductive Health Servs.*, 492 U.S. 490, 529 (1989) (O’Connor, J., concurring in part and concurring in the judgment) (stating that “viability remains the ‘critical point.’”); *June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2135 (Roberts, C.J., concurring in the judgment) (stating that *Casey* reaffirmed “the most central principle of *Roe v. Wade*, ‘a woman’s right to terminate her pregnancy before viability.’”).

<sup>14</sup> *Dobbs*, 142 S. Ct. at 2269-70 (citing Brief for Respondents at 8 and noting that viability has changed over time due to advances in technology of neonatal care and that “viability is not really a hard-and-fast line.” *Id.* at 2270).

tion precedent by banning abortion seven weeks before viability and opening the door to pre-viability bans in direct conflict with fifty years of precedent protecting the constitutional abortion right. The majority opinion penned by Justice Samuel Alito overruled *Roe* and *Casey*, explaining that “[t]he Constitution does not confer a constitutional right to abortion, *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.”<sup>15</sup>

The Supreme Court has held that the term “liberty” in the Due Process Clause of the Fourteenth Amendment may protect those rights that, while not specifically named in the Constitution, are implicit in its text because they are “deeply rooted in the Nation’s history and tradition” and “implicit in the concept of ordered liberty.”<sup>16</sup> The *Dobbs* Court notes that this very claim—that the Fourteenth Amendment protects substantive rights and not merely procedural rights, or substantive due process—is one that has long been “controversial.”<sup>17</sup> Nevertheless, the Court argues that applying the test of substantive due process, abortion is not a right deeply rooted in the nation’s history<sup>18</sup> and is not implicit in the concept of ordered liberty because there was no support in either federal or state law, for a constitutional right to abortion.<sup>19</sup> The Court’s historical analysis in the *Dobbs* decision is deeply contested, by the *Roe* Court’s own lengthy historical inquiry and by the dissent<sup>20</sup> and the analysis of legal historians in their amicus brief.<sup>21</sup> The *Dobbs* majority noted that abortion was

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<sup>15</sup> *Id.* at 2279.

<sup>16</sup> *Id.* at 2242 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

<sup>17</sup> *Id.* at 2246 (noting that the Court has been “reluctant” to recognize rights that are not specifically mentioned in the Constitution. *Id.* at 2247).

<sup>18</sup> *See id.* at 1148-54.

<sup>19</sup> *Id.* at 2242, 2251-54.

<sup>20</sup> *Id.* at 2324-25 (joint opinion of Breyer, Sotomayor, and Kagan, JJ., dissenting)(describing that common law authorities did not treat abortion as a crime before quickening and early American law followed the common law rule.).

<sup>21</sup> *Roe*, 410 U.S. at 140 (concluding that, for much of history and particularly during the nineteenth century “a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.”). *See, e.g.*, Brief for United States, at 26-27, *Dobbs v. Jackson Women’s Health* (describing that “at the Founding and for decades thereafter, women generally could terminate a pregnancy, at least in its early stages.”); Brief for Respondents at 21,

a crime in three-quarters of the states at the time the Fourteenth Amendment was adopted and thirty states banned all abortions at the time *Roe* was decided.<sup>22</sup> The Court argued that abortion jurisprudence has failed to adequately source the abortion right,<sup>23</sup> rejecting *Roe*'s reasoning that abortion flowed from a right of privacy<sup>24</sup> and the *Casey* Court's description that abortion falls within the "liberty" protected by the Fourteenth Amendment, and gestures in that case toward Equal Protection.<sup>25</sup> Further, the Court argued that the cases upon which *Roe* and its progeny have relied—those involving intimate sexual relations, contraception, and marriage—are inapplicable to the abortion context because abortion is unique in that it destroys "potential life."<sup>26</sup>

#### A. Health & Welfare Regulations and Rational Basis Review

The majority held that abortion is not a fundamental right, but a "health and welfare" regulation subject only to rational basis review.<sup>27</sup> Accordingly, abortion is not constitutionally protected at the federal level and the authority to regulate abortion must be returned to the people and their elected representa-

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*Dobbs v. Jackson Women's Health* (describing that "the common law permitted abortion up to a certain point in pregnancy, and many states maintained that common law tradition as of the late 1850s); Brief for American Historical Association, et al., as Amici Curiae *Dobbs v. Jackson Women's Health*. The *Dobbs* Court dismissed this analysis, saying simply that "*Roe* either ignored or misstated this history." *Dobbs*, 142 S. Ct. at 2249.

<sup>22</sup> *Id.* at 2241, 2253, 2260.

<sup>23</sup> *Id.* at 2245 (describing about the *Roe* opinion "its message seemed to be that the abortion right could be found *somewhere* in the Constitution and that specifying its exact location was not of paramount importance.") (emphasis in the original).

<sup>24</sup> *Roe*, 410 U.S. at 152-54.

<sup>25</sup> *Dobbs*, 142 S. Ct. at 2245 (holding that equal protection "is squarely foreclosed by our precedents" as a basis for protecting the abortion right."). *But see Casey*, 505 U.S. at 856 (observing that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.").

<sup>26</sup> *Dobbs*, 142 S. Ct. at 2241, 2258 (describing that because abortion alone destroys a "potential human life," "[n]one of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite.").

<sup>27</sup> *Id.* at 2284.

tives.<sup>28</sup> Abortion restrictions passed by state legislatures will be subjected to only rational basis review by courts, the lowest standard of review that gives “a strong presumption of validity” to state legislatures to regulate or ban the procedure requiring only that the regulation be rationally related to a legitimate governmental interest.<sup>29</sup> Under this standard, a law “must be sustained if there is a rational basis on which the legislature *could have thought* that it would serve legitimate state interests.”<sup>30</sup>

B. “[S]tare decisis is not a straitjacket”<sup>31</sup>

The Court engaged in a five-factor test to reach its decision to overturn fifty years of legal precedent and justify its failure to adhere to the guiding principle of *stare decisis*, or the rule that courts are bound to decide cases in a like manner to previous cases that present similar facts.<sup>32</sup> *Stare decisis* is designed to preserve the integrity of the Court and protect reliance and predictability of legal rights.<sup>33</sup> After applying the five-factor test to abortion jurisprudence, the opinion concluded that the underlying precedent was not sufficiently strong to bind the Court. First, the Court examined the nature of the Court’s error in the *Roe* and *Casey* decisions. Here the Court found that *Roe* was “egregiously wrong” from inception and “short-circuited the democratic process.”<sup>34</sup> Citing Justice Byron White’s dissent in *Roe*, the Court described the *Roe* decision as an “exercise of raw judicial

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<sup>28</sup> *Id.* at 2243.

<sup>29</sup> *Id.* at 2284 (stating that rational basis review requires that “[a] law regulating abortion, like other health and welfare laws, is entitled to a ‘strong presumption of validity.’” *Id.* (citing *Heller v. Doe*, 509 U.S. 312, 319 (1993))).

<sup>30</sup> *Dobbs*, 142 S. Ct. at 2284 (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)(emphasis added)).

<sup>31</sup> *Dobbs*, 142 S. Ct. at 2280.

<sup>32</sup> *Id.* at 39 (describing *stare decisis* as “requiring that like cases be decided in a like manner” but noting that “*stare decisis* is not an inexorable command.” *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 233 (2009))).

<sup>33</sup> *Dobbs*, 142 S. Ct. at 2262 (remarking that *stare decisis* “fosters ‘even-handed’ decisionmaking,” “contributes to the actual and perceived integrity of the judicial process,” and “restrains judicial hubris.” *Id.* (citing *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991))).

<sup>34</sup> *Dobbs*, 142 S. Ct. at 2243, 2265 (describing the *Roe* decision as “egregiously wrong and deeply damaging” and “on a collision course with the Constitution from the day it was decided.” *Id.* at 2265).

power.”<sup>35</sup> Second, the Court found that the quality of the *Roe* Court’s reasoning was not grounded in constitutional text, history, or precedent, and none of the cases relied upon by the *Roe* Court to find the right of privacy reflected the interest at stake in *Roe*, potential fetal life.<sup>36</sup> Instead, the majority described that the *Roe* decision read like legislation—with the trimester framework providing the prime example—rather than like a judicial decision.<sup>37</sup> Third, the abortion cases fail the workability test because *Casey*’s “undue burden” test has proven unworkable<sup>38</sup> since the “‘line between’ permissible and unconstitutional restrictions ‘has proved to be impossible to draw with precision.’”<sup>39</sup> Fourth, the *Roe* and *Casey* decisions have impacted negatively other areas of law.<sup>40</sup>

Fifth, and finally, according to the Court, overruling *Roe* will not upend the type of “concrete” reliance interests engaged by other types of holdings involving property and contractual rights<sup>41</sup> because abortion is not a planned for event and therefore can “take virtually immediate account of any sudden restoration of state authority to ban abortions.”<sup>42</sup> The Court dismissed as

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<sup>35</sup> *Id.* at 2241 (citing *Roe*, 410 U.S. at 222 (J. White dissenting)). .

<sup>36</sup> *Dobbs*, 142 S. Ct. at 2237-41.

<sup>37</sup> *Id.* at 2267 (describing that “without any grounding in the constitutional text, history, or precedent, [*Roe*] imposed on the entire country a detailed set of rules much like those that one might expect to find in a statute or regulation.” *Id.* at 2266.). The Court cited John Hart Ely’s famous law review article, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L. J.* 920, 926, 947 (1973)(calling the *Roe* decision one that would be drafted by a legislator).

<sup>38</sup> *See Dobbs*, 142 S. Ct. at 2271-75.

<sup>39</sup> *Id.* at 2274 (citing *Janus v. State, County, & Mun. Employees*, 585 U.S. \_\_\_ (2018) (slip opinion at 38)).

<sup>40</sup> *See Dobbs* at 2275-76 (saying that the abortion cases have “diluted” standards for constitutional facial challenges and third party standing, for example. *Id.* at 2276). Here the Court is signaling its willingness to entertain future challenges that abortion providers and individual doctors who provide abortion lack standing to sue to enjoin enforcement of a state’s restrictive abortion laws. *See Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582 (Thomas, J., dissenting)(describing that “This suit is possible only because the Court has allowed abortion clinics and physicians to invoke a putative constitutional right that does not belong to them—a woman’s right to abortion.”).

<sup>41</sup> *Dobbs* at 2276.

<sup>42</sup> *Id.* (citing *Casey*, 505 U.S. at 856).

“novel and intangible” the reliance interest famously expressed by the *Casey* Court in upholding *Roe*,

for two decades [people] have organized intimate relationships and made choices that define their views of themselves and their places in society . . . in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.<sup>43</sup>

Instead, the Court argued that while property and contract claims involved “concrete” reliance interests, abortion provided only an “intangible” form of reliance.<sup>44</sup> Several amici cited extensive social science research quantifying the impact of abortion access on women’s financial and educational attainment, with an amicus brief submitted by economists providing a powerful measure of the effect of abortion access on women’s birth rates, marriage, educational attainment, occupations, earnings, and financial stability.<sup>45</sup> Despite this extensive research, the Court stated “[t]hat form of reliance depends on an empirical question

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<sup>43</sup> *Casey*, 505 U.S. at 856.

<sup>44</sup> *Dobbs*, 142 S. Ct. at 2272.

<sup>45</sup> See Brief of Amici Curiae Economists in Support of Respondents 6-16 (using causal inference to measure the effects of abortion access on birth rates, marriage, educational attainment, occupations, earnings, and financial stability). See also Brief for Respondents, at 36-41 (exploring social science research and federal jurisprudence that proves that women’s economic stability depends upon access to abortion); Brief of Social Science Experts as Amici Curiae in Support of Respondents at 28-32; Christine Dehlendorf, et al., *Disparities in Abortion Rates: A Public Health Approach*, 103 AM. J. PUB. HEALTH 1772, 1775 (2013) (“[U]nintended childbirth is associated with decreased opportunities for education and paid employment . . . ”); Diana Greene Foster, et al., *Effects of Carrying an Unwanted Pregnancy to Term on Women’s Existing Children*, 205 J. PEDIATRICS 183–89 (2019); Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the U.S.*, 108 AM. J. PUB. HEALTH 407, 409, 412–13 (2018); Sarah Miller, *The Economic Consequences of Being Denied an Abortion*, NAT’L BUR. ECON. RES. WORKING PAPER 26662 (2020), <https://perma.cc/PB6H-4UEG>; Lauren J. Ralph et al., *A Prospective Cohort Study of the Effect of Receiving Versus Being Denied an Abortion on Educational Attainment*, 29 WOMEN’S HEALTH ISSUES 455–64 (2019) (among high school graduates, people denied a wanted abortion were less likely to complete postsecondary degrees compared to those who received a wanted abortion); Adam Sonfield, et al., *The Social and Economic Benefits of Women’s Ability to Determine Whether and When to Have Children* 14–15, GUTTMACHER INST. (Mar. 2013), <https://perma.cc/TKD3-6YV3>.



that is hard for anyone—and in particular for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women.”<sup>46</sup> Professors Kate Shaw and Steven Mazie responded to the argument in the majority opinion by providing concrete examples of how abortion access can constitute a “reliance interest.”<sup>47</sup> They describe two hypothetical examples: a couple that moves to Tulsa, Oklahoma and purchases a home with the expectation, “so engrained that [they] may not have even given it a thought,” that they would not be forced to bear a child in the event of a contraceptive failure; and a high-school senior who accepts admission at an Ohio liberal arts college before the *Dobbs* decision, when after the decision the Ohio legislature passes a total abortion ban and the student is now consigned to attend four years of college in a state where she will have no access to abortion in the event of a sexual assault or contraceptive failure.<sup>48</sup> These scenarios, the authors argue, are examples of a reliance interest on access to abortion.

### C. *The Future of Substantive Due Process*

The majority sought to cabin their opinion to overturn the abortion precedents while leaving intact the other lines of substantive due process cases upon which *Roe* relied and which relied on *Roe*. The majority opinion specifically stated that the decision would not affect other rights that are based upon substantive due process, like same sex marriage and contraceptives, arguing those precedents are not affected by this decision since *Roe* is unique because it alone involves “potential life” in balancing the state’s interest.<sup>49</sup> Justice Kavanaugh reiterated in his concurring opinion that the *Dobbs* decision would not impact other cases, stating, “I emphasize what the Court today states: Over-

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<sup>46</sup> *Dobbs*, 142 S. Ct. at 2277.

<sup>47</sup> See Kate Shaw & Steven Mazie, *There’s a Glaring Weakness in Justice Alito’s Case Against Roe v. Wade*, TIME (May 27, 2022).

<sup>48</sup> *Id.*

<sup>49</sup> *Dobbs*, 142 S. Ct. at 2277-78 (describing that “we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”). The Court argued that the dissent’s claim that the decision puts *Griswold*, *Wisconsin v. Yoder*, *Lawrence*, and *Obergefell* in jeopardy is incorrect because of the Court’s “unequivocal” assertion that the decision casts doubt on those precedents that do not involve abortion. *Id.* at 2280.

turning *Roe* does *not* mean the overruling of those precedents [*Griswold*, *Eisenstadt*, and *Obergefell*], and does *not* threaten or cast doubt on those precedents.”<sup>50</sup>

However, Justice Thomas’ concurrence calls this claim into question, arguing that substantive due process does not exist under the Constitution, explaining that “substantive due process is an oxymoron that lacks any basis in the Constitution.”<sup>51</sup> Because Justice Thomas believes that the Due Process Clause only extends procedural protections, not substantive protections, he argues that “in future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”<sup>52</sup> He describes that “any substantive due process decision is demonstrably erroneous” and therefore the Court has a duty to correct the error established in those precedents.<sup>53</sup> The dissent raised the same concerns, explaining that the constitutional right to abortion “does not stand alone,”<sup>54</sup> but rather its past rulings—*Griswold*, *Lawrence*, and *Obergefell*—“are all part of the same constitutional fabric.”<sup>55</sup> In short, the dissent points out that it is not possible to square the *Dobbs* decision with upholding other substantive due process cases. *Stare decisis* dictates that those cases cannot stand without the foundation of *Roe* because “the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation.”<sup>56</sup> The dissent provided an apt analogy, that the *Dobbs* decision is like a Jenga game in which one of the foundational blocks has been removed from the tower and the entire substantive due process architecture has been destabilized and is in peril of falling.<sup>57</sup> Just as the majority wrote about how abortion is not deeply rooted in the nation’s history or tradition, the same could be said of each of the other rights—“The majority could write just as long an opinion showing, for example, that until the mid-twentieth century, ‘there was no sup-

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<sup>50</sup> *Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring).

<sup>51</sup> *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Dobbs*, 142 S. Ct. at 2319 (joint opinion of Breyer, Sotomayor, and Kagan, JJ., dissenting).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 2330.

port in American law for a constitutional right to obtain [contraception].”<sup>58</sup>

#### A. Public Opinion and the Court’s Legitimacy

Chief Justice Roberts’ concurrence sought a “measured course”<sup>59</sup> that would “leave for another day whether to reject any right to an abortion at all”<sup>60</sup> but would instead uphold the Mississippi 15-week pre-viability ban. He argued for revising the legal standard applied in abortion cases from the previous “undue burden” test with a “reasonable opportunity test” that provides that states can ban abortion before viability so long as a woman has had a reasonable opportunity to obtain an abortion.<sup>61</sup> The previous test, the undue burden standard, provided that state laws that regulate pre-viability abortions are invalid if the purpose or effect of the law is to place a substantial obstacle in the path of a woman seeking abortion such that the state had imposed an undue burden on access to abortion.<sup>62</sup> Chief Justice Roberts’ attempt to reach a middle ground solidifies his role on the Court as a moderate incrementalist guided by the “fundamental principle of judicial restraint.”<sup>63</sup> Chief Justice Roberts’ decision to provide the fifth vote in a separate concurrence in *June Medical Services, L.L.C v. Russo*,<sup>64</sup> revealed his commitment to adhere to the precedent set in *Whole Woman’s Health v. Hellerstedt*,<sup>65</sup> a case in which he was in the dissent, to strike down a restrictive abortion law that was nearly identical to the provision struck down less than four years earlier in *Whole Woman’s*

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<sup>58</sup> *Id.* at 2319 .

<sup>59</sup> *Dobbs*, 142 S. Ct. at 2310 (Roberts, C.J. concurring).

<sup>60</sup> *Id.* at 2314.

<sup>61</sup> *Id.* at 2314-15.

<sup>62</sup> *Casey*, 505 U.S. at 877 (ruling that before viability, a State could regulate abortion but could not impose a “substantial obstacle” in the path of a woman seeking abortion); *Whole Women’s Health*, 579 U.S. at 589-90.

<sup>63</sup> *Dobbs*, 142 S. Ct. at 2311 (Roberts, C.J. concurring). See Marc Spindelman, *Embracing Casey: June Medical Services L.L.C. v. Russo and the Constitutionality of Reason-Based Abortion Bans*, 109 GEO. L. J. ONLINE 115 (2020).

<sup>64</sup> 140 S. Ct. 2103 (2020).

<sup>65</sup> 136 S. Ct. 2292 (2016).

*Health*.<sup>66</sup> In his *June Medical Services* concurrence he described, “I joined the dissent in *Whole Woman’s Health* and continue to believe that the case was wrongly decided. The question today however is not whether *Whole Woman’s Health* was right or wrong, but whether to adhere to it in deciding the present case.”<sup>67</sup>

On the eve of the *Dobbs* decision public confidence in the Supreme Court was at a historic low, with just 25% of Americans polled expressing confidence in the Supreme Court.<sup>68</sup> A Quinnipiac poll conducted in 2021 found that 61% of Americans believed the Supreme Court is motivated mainly by partisan politics—an opinion shared among respondents of both political parties, with 67% of Democrats and 56% of Republicans responding.<sup>69</sup> The majority opinion in *Dobbs* addressed the issue of public perception and confidence in the Court, explaining that “we cannot allow our decisions to be affected by any extraneous influences such as concern about the public’s reaction to our work.”<sup>70</sup> Rather, the Court described, the judicial branch must be guided by the Constitution and not public opinion.<sup>71</sup> Indeed, polling reveals that the majority of Americans, 61%, say that abortion should be legal in all or most cases,<sup>72</sup> with the percentage remaining relatively unchanged over a three-decade period.<sup>73</sup>

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<sup>66</sup> See Spindelman, *supra* note 62 (describing Chief Justice Robert’s concurrence in *June Medical* as expressing a jurisprudential commitment to stare decisis).

<sup>67</sup> *June Med. Servs.*, 140 S. Ct. at 2133, 2141-42 (Roberts, C.J., concurring).

<sup>68</sup> Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), <https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx> (noting that the 25% confidence reading is five percentage points below the previous record low).

<sup>69</sup> *Majority Say Supreme Court Motivated By Politics, Not the Law, Quinnipiac University National Poll Finds; Support for Stricter Gun Laws Fails*, QUINNIPIAC POLL (Nov. 19, 2021), <https://poll.qu.edu/poll-release?releaseid=3828>.

<sup>70</sup> *Dobbs*, 142 S. Ct. at 2278.

<sup>71</sup> *Id.*

<sup>72</sup> *Public Opinion on Abortion*, PEW RSCH. CTR. (May 17, 2022), <https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/>.

<sup>73</sup> Lydia Saad, *Americans Still Oppose Overturning Roe v. Wade*, GALLUP (June 9, 2021), <https://news.gallup.com/poll/350804/americans-opposed-overturning-roe-wade.aspx> (finding that 58% of Americans oppose overturning *Roe*

The dissent touched upon this aspect of the majority's opinion, observing that

[i]t makes radical change too easy and too fast, based on nothing more than the new views of new judges. The majority has overruled *Roe* and *Casey* for one and only one reason: because it has always despised them and now it has the votes to discard them. The majority thereby substitutes the rule by judges for the rule of law.<sup>74</sup>

With respect to the majority's decision not to follow precedent, the dissent argued that "the American public . . . should never conclude that its constitutional protections hung by a thread—that a new majority, adhering to a new 'doctrinal school,' could by 'dint of numbers' alone, expunge their rights."<sup>75</sup> Polling conducted in the wake of *Dobbs* found that 62% of Americans disapproved of the *Dobbs* decision overturning *Roe*.<sup>76</sup>

High profile battles in both judicial appointments and confirmations<sup>77</sup> under the Trump Administration and the pace at which significant cases were decided under the newly-comprised conservative majority, decreased public confidence in the High Court and added to the public perception that the Supreme Court is a political body, whose decisions are driven by ideology rather than objective legal analysis and judicial restraint.<sup>78</sup> The

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and that that support "roughly matches the overage over that three-decade period.").

<sup>74</sup> *Dobbs*, 142 S. Ct. at 2335 (joint opinion of Breyer, Sotomayor, and Kagan, JJ., dissenting).

<sup>75</sup> *Id.* at 2350 (citing *Casey*, 505 U.S. at 864).

<sup>76</sup> *Majority of Public Disapproves of Supreme Court's Decision to Overturn Roe v. Wade*, PEW RSCH. CTR. (July 6, 2022), <https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/>.

<sup>77</sup> Emerging evidence suggests that the FBI did not fully investigate allegations against Justice Kavanaugh during his confirmation process. Kate Kelly, *Details on F.B.I. Inquiry into Kavanaugh Draw Fire from Democrats*, N.Y. TIMES (July 22, 2021); Stephanie Kirchgaessner, *FBI Director Faces New Scrutiny over Investigation of Brett Kavanaugh*, GUARDIAN (Sept. 14, 2021) (describing investigations into statements made by the FBI director that the bureau lacked the authority to conduct a further investigation in the background of Brett Kavanaugh during its investigation of the nominee as part of his confirmation process).

<sup>78</sup> Jeffrey M. Jones, *Approval of U.S. Supreme Court Down to 40%, a New Low*, GALLUP (Sept. 23, 2021), <https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx> (suggesting that the steep decline in confidence in judiciary over a year ago was likely the result of political

Court's reputation had been tarnished by political maneuvering by Republicans that allowed President Donald Trump to nominate three conservative justices in his four-year term.<sup>79</sup> The first of President Trump's appointees was nominated after the Republican-led Senate refused to consider President Obama's nomination of Merrick Garland eight months before the 2016 election, citing the upcoming presidential election,<sup>80</sup> but then confirmed Amy Coney Barrett only one week before the 2020 election in a rushed confirmation process after the death of Justice Ruth Bader Ginsburg and with millions of election votes already cast.<sup>81</sup> The Court's low approval rating was also impacted by the swiftness with which the Court, newly comprised with Republican-appointed justices, made decisions in high-profile cases that included weakening the Voting Rights Act, the rights of labor unions, COVID lockdown orders, and the perceived over-use of the "shadow docket" in cases including the one to allow Texas' SB8 antiabortion civil bounty law to remain in effect.<sup>82</sup> The low

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maneuverings that allowed President Trump to nominate three conservative justices in four years after the Republican led Senate refused to hold hearings for President Obama's nominee citing the upcoming presidential election.).

<sup>79</sup> *Id.*

<sup>80</sup> President Obama nominated Merrick Garland in March 2016, upon the death of Antonin Scalia, but Senate Majority Leader Mitch McConnell declared that any appointment by a sitting president would be null and void and the new justice should be nominated by the winner of the presidential election taking place in eight months. The eleven Republican members of the Senate Judiciary Committee signed a letter saying they would not consent to a nominee by President Obama and no proceedings were held on Garland's nomination. See Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NPR NEWS (June 29, 2018), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now>.

<sup>81</sup> Jennifer Haberkorn, *Amy Coney Barrett Confirmed to Supreme Court by GOP Senators*, L.A. TIMES (Oct. 26, 2020)(describing it as "the most partisan confirmation vote for a justice in modern history" and the first time in U.S. history that a nominee has not received any votes from the opposing party); Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath*, NPR NEWS (Oct. 26, 2020), <https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court>.

<sup>82</sup> The shadow docket refers to emergency orders that the Court issues outside of its regular schedule and that permits only limited briefing, no oral arguments, and unsigned and limited opinions. See Adam Liptak, *Missing from Supreme Court's Election Cases: Reasons for Its Rulings*, N.Y. TIMES (Oct. 26,

approval and public confidence polling led several of the justices to address the issue in a series of speeches.<sup>83</sup> Standing on stage with Mitch McConnell at the McConnell Center at the University of Louisville, Justice Amy Coney Barrett told the audience that her goal was “to convince you that the Court is not composed of a bunch of partisan hacks.”<sup>84</sup>

#### E. *Selective Use of Equal Protection*

The Court held that equal protection “is squarely foreclosed by our precedents” as a basis for protecting the abortion right<sup>85</sup> but employed it instead to describe a legitimate state interest in preventing discrimination inherent in passing “reason-based” bans on abortion. The Court rejected *Casey*’s argument that the abortion right is necessary to ensure women’s equal participation as citizens.<sup>86</sup> By contrast, the dissent relied several times on equal protection arguments, stating, “Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.”<sup>87</sup> Several amicus briefs also raised the

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2020), <https://www.nytimes.com/2020/10/26/us/supreme-court-election-cases.html>. See also Steven Vladeck, *Symposium: The Solicitor General, the Shadow Docket, and the Kennedy Effect*, SCOTUSBLOG (Oct. 22, 2020), <https://www.scotusblog.com/2020/10/symposium-the-solicitor-general-the-shadow-docket-and-the-kennedy-effect/> (remarking that the Trump Administration filed 36 emergency applications to the Supreme Court in three and a half years, while the administrations of George W. Bush and Barak Obama filed just eight over sixteen years).

<sup>83</sup> Justice Samuel Alito delivered a speech at University of Notre Dame in which he implored that the Court is not “a dangerous cabal” that is “deciding important issues in a novel, secretive, improper way, in the middle of the night, hidden from public view.” *Alito Rebuffs Criticism of Supreme Court’s “Shadow Docket” and Says Justices Aren’t “Dangerous Cabal,”* CBS NEWS (Oct. 1, 2021), <https://www.cbsnews.com/news/samuel-alito-supreme-court-shadow-docket-dangerous-cabal/>.

<sup>84</sup> Melissa Quinn, *Amy Coney Barrett Says Supreme Court Justices Aren’t “Partisan Hacks,”* CBS NEWS (Sept. 13, 2021), <https://www.cbsnews.com/news/amy-coney-barrett-supreme-court-justices-partisan-hacks/>.

<sup>85</sup> *Dobbs*, 142 S. Ct. at 2245.

<sup>86</sup> *Casey*, 505 U.S. at 856 (stating that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”).

<sup>87</sup> *Dobbs*, 142 S. Ct. at 2317 (joint opinion of Breyer, Sotomayor, and Kagan, JJ).

argument of equal protection as a basis for sourcing the abortion right and the claim is one that had also long been championed by Justice Ruth Bader Ginsberg.<sup>88</sup> The majority opinion described that a state's regulation of abortion "is not sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications."<sup>89</sup> What is more, the majority went on to explain, society has changed in ways that do not require women to have access to abortion to participate equally in society because unwed motherhood is no longer stigmatized, bans on pregnancy discrimination in the workplace have been passed, and there is widespread availability of contraception, unpaid leave, and adoption.<sup>90</sup> The Court also reiterated a claim made by Justice Barrett during oral arguments,<sup>91</sup> that the availability of safe haven laws, that is laws that allow people to leave newborns at safe locations like fire stations without fear of legal consequences, is another way that women who are forced to carry a pregnancy to term can be relieved of the burden of parenting and still be able to fully participate in work and public life.<sup>92</sup>

While the Court rejected the long-standing argument that abortion should fall within the Equal Protection Clause, it

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<sup>88</sup> See, e.g., Brief for United States as Amicus Curiae at 24; Brief for Equal Protection Constitutional Law Scholars as Amici Curiae. See *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting)(describing that "[Le]gal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship."). Ginsburg had hoped to advance the equal protection argument for abortion rights in a case she was litigating as an ACLU lawyer, *Struck v. Secretary of Defense*, 409 U.S. 947 (1972), in which she represented an Air Force captain, Susan Struck, who when she learned she was pregnant was given only two options, to have an abortion or to quit the Air Force. Struck wanted to keep her job and the baby and Ginsburg hope to advance an equal protection argument but the case was rendered moot when the Air Force changed its policy. *Struck v. Secretary of Defense*, 409 U.S. 1071 (1972) (rendering the case moot in light of the government's new position).

<sup>89</sup> *Dobbs*, 142 S. Ct. at 2245.

<sup>90</sup> *Id.* at 2258-59.

<sup>91</sup> See Transcript of Oral Argument, *Dobbs v. Jackson Whole Women's Health* at 56-57, 141 S. Ct. 2619 (2021) (No. 19-1392) (Justice Barrett posed the following question to the attorney representing the Mississippi clinic, "*Roe* and *Casey* emphasize the burdens of parenting, . . . Why don't the safe haven laws take care of that problem?").

<sup>92</sup> *Dobbs*, 142 S. Ct. at 2259.



adopted a novel equal protection argument put forth by abortion opponents, that “reason based” bans such as prohibiting abortion based on sex, race, or disability, are a legitimate equal protection concern.<sup>93</sup> In the past, both Justices Amy Coney Barrett and Clarence Thomas have espoused the view that reason-based abortion bans prevent eugenics.<sup>94</sup> In his concurring opinion denying certiorari in *Box v. Planned Parenthood*, Justice Thomas argued that reason-based bans “promote a State’s compelling interest in preventing an abortion from becoming a tool of modern-day eugenics”<sup>95</sup> and maintained that the abortion right did not require the state to permit “eugenic abortions.”<sup>96</sup> The claim has been strongly rejected by members of the black community and the reproductive justice community.<sup>97</sup> Eugenics is state spon-

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<sup>93</sup> *Id.* at 2284 (saying that states may ban or restrict abortion based on legitimate interests that may include “the prevention of discrimination on the basis of race, sex, or disability.”).

<sup>94</sup> See *Box v. Planned Parenthood of Ind. & Ky.*, 139 S. Ct. 1780, 1782 (2019) (Thomas, J. concurring) (stating that when a woman aborts based on a fetus’ gender, disability, or race, she is engaging in eugenics); *Planned Parenthood of Ind. & Ky. v. Comm’r Ind. State Dep’t Health*, 917 F.3d 532, 536 (7th Cir. 2018) (J. Barrett dissenting) (dissenting from the denial of en banc review arguing that the law allows people to “[use] abortion to promote eugenic goals.” *Id.* at 536). See also *Little Rock Family Planning Servs. v. Rutledge*, 984 F.3d 682, 694 (8th Cir. 2021) (Judges Erickson and Shepherd framed the reason-based bans as anti-eugenics statutes); *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 536, 547, 549-50 (6th Cir. 2021) (en banc) (Judges Sutton, Griffin, and Bush arguing the prohibition on termination of pregnancies on the basis of Down syndrome is an anti-eugenics statute and furthers a compelling state interest).

<sup>95</sup> *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring) (*cert. denied*).

<sup>96</sup> *Id.* at 1792-93.

<sup>97</sup> See Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025 (2021) (maintaining that eugenics and equal protection arguments are designed to provide constitutionally permissible grounds for overturning *Roe*); see also Samuel R. Bagenstos, *Disability and Reproductive Justice*, 14 HARV. L. & POL’Y REV. 273, 276 (2020) (arguing that Justice Thomas’ *Box* concurrence distorts history and tries to “weaponize” disability rights against abortion); Adam Cohen, *Clarence Thomas Knows Nothing of My Work*, ATLANTIC (May 20, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/clarence-thomas-used-my-book-argue-against-abortion/590455/>. For further critiques of Justice Thomas’ concurring opinion equating abortion with eugenics, see Mary Ziegler, *Bad Effects: The Misuses of History in Box v. Planned Parenthood*, 105 CORNELL L. REV. 165, 196–202 (2020) (critiquing the historical arguments in Justice Thomas’s *Box* concurrence); see also Joanna L. Grossman & Lawrence M. Friedman,

sored reproductive oppression, when the state sterilizes people against their will, for example. Eugenics is not the state stripping people's rights to control their *own* reproductive destiny.

F. *“Potential Life” and “Unborn Human Beings”*: Signaling Fetal Personhood

The Court did not reach the issue of fetal personhood in *Dobbs*, specifically noting that “[o]ur opinion is not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests.”<sup>98</sup> However, the possibility of a fetal personhood law being passed at the federal level in a Congress under Republican party control casts a long shadow over the decision. As the dissent points out, “[m]ost threatening of all, no language in today’s decision stops the Federal Government from prohibiting abortions nationwide, once again from the moment of conception and without exceptions for rape or incest. If that happens, [t]he views of [an individual State’s] citizens will not matter.”<sup>99</sup> Justice Kavanaugh’s concurrence also noted this possibility, asserting that, “the Court’s decision today *does not outlaw* abortion throughout the United States.”<sup>100</sup> Critically, if fetal personhood is passed at the federal level, either by federal legislation or a Constitutional amendment, abortion could be banned across the nation.<sup>101</sup> Amici in *Dobbs* urged the Court to overturn *Roe* by finding that fetuses are protected persons under

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*Junk Science, Junk Law: Eugenics and the Struggle over Abortion Rights*, VERDICT: LEGAL ANALYSIS & COMMENTARY FROM JUSTIA (June 25, 2019), <https://verdict.justia.com/2019/06/25/junk-science-junk-law-eugenicsand-the-struggle-over-abortion-rights>.

<sup>98</sup> *Dobbs*, 142 S. Ct. at 2256.

<sup>99</sup> *Dobbs*, 142 S. Ct. at 2318 (joint opinion of Breyer, Sotomayor, and Kagan, JJ., dissenting).

<sup>100</sup> *Dobbs*, 142 S. Ct. at 2305 (Kavanaugh, J., concurring)(emphasis in the original).

<sup>101</sup> A federal fetal personhood bill, the Life at Conception Act, was introduced last year in both chambers of Congress that would extend a constitutional “right to life” at the moment of conception. H.R. 1011, Life at Conception Act, 117th Cong. (2021-2022), <https://www.congress.gov/bill/117th-congress/house-bill/1011/cosponsors>. See Madeleine Carlisle, *Fetal Personhood Laws Are the New Frontier in the Battle over Reproductive Rights*, TIME (June 28, 2022), <https://time.com/6191886/fetal-personhood-laws-ro-abortion/> (describing that the Life at Conception Act currently has 164 cosponsors in the House of Representatives).

the Fourteenth Amendment which could have outlawed abortion nationwide.<sup>102</sup> After the *Dobbs* decision was released, former Vice-President Mike Pence echoed the call for a national ban in all fifty states signaling the broader strategy of the antiabortion movement and that a fetal personhood initiative is the next goal.<sup>103</sup> Mitch McConnell, the Senate minority leader, has also stated that a national abortion ban is a possibility.<sup>104</sup>

Fetal personhood laws recognize fetuses as “persons” under the law, from the moment of fertilization, and vest fetuses with constitutional rights such that abortion is tantamount to murder.<sup>105</sup> Georgia, Arizona, and Alabama already has passed a fetal personhood law that will likely take effect now that *Roe* has been overturned.<sup>106</sup> In total, eight states have introduced laws banning abortion by establishing fetal personhood.<sup>107</sup> A bill recently defeated in Louisiana’s legislature, for example, would have allowed prosecutors to charge those having abortions with

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<sup>102</sup> Brief Amici Curiae for Scholars of Jurisprudence John M. Finnis and Robert P. George in Support of Petitioners, *Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619 (2021) (No. 19-1392).

<sup>103</sup> Nikki McCann Ramirez, *Mike Pence Calls for National Abortion Ban*, ROLLING STONE (June 24, 2022)(describing remarks by Pence after the *Dobbs* decision, that “we must not rest and must not relent until the sanctity of life is restored to the center of American law in every state in the land.”).

<sup>104</sup> Andrew Stanton, *National Abortion Ban Possible if Roe v. Wade Overturned: Mitch McConnell*, NEWSWEEK (May 7, 2022).

<sup>105</sup> See Lynn Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALBANY L. REV. 999, 1000 (1999).

<sup>106</sup> *State Legislation Tracker: Abortion Bans by Establishing Fetal Personhood*, GUTTMACHER INST. (Aug. 1, 2022), <https://www.guttmacher.org/state-policy>; see, e.g., The Alabama Human Life Protection Act, ALA. CODE § 26-23H-1-8 (2019) (enjoined by *Robinson v. Marshall*, 415 F. Supp. 3d 1053 (M.D. Ala. 2019)) redefines an “unborn child, child or person” as “[a] human being, specifically including an unborn child in utero at any stage of development, regardless of viability.” *Id.* at § 26-23H-3. Under the law, a doctor who performs an abortion could be criminally prosecuted and sentenced to as many as ninety-nine years in prison. *Id.* at § 26-23H-6. Regarding Georgia’s fetal personhood law, see Carlisle, *supra* note 100 (noting that Georgia’s fetal personhood law, HB 481, which includes language that states “natural persons include an unborn child,” was struck down in 2020, but after the *Dobbs* decision Georgia’s attorney general filed a notice requesting the decision be reversed).

<sup>107</sup> *State Legislation Tracker*, *supra* note 105. .

homicide.<sup>108</sup> The *Dobbs* opinion leaves the decision of passing fetal personhood laws to the states to legislate whether having an abortion itself is criminal activity.<sup>109</sup> Notably, the Supreme Court downgraded abortion from a fundamental right to a “health and welfare regulation” that can be regulated by the states and those regulations will receive only rational basis review if challenged in court.<sup>110</sup> Rational basis is the most deferential standard of review.

Fetal personhood is a significant change in the legal landscape of abortion. While fetal rights have gained some traction in other areas such as child abuse or tort law,<sup>111</sup> fetal personhood laws have frequently been rejected by voters because of their far-reaching impacts on criminalizing pregnant women themselves for poor pregnancy outcomes and the impact on assisted reproductive technology.<sup>112</sup> Abortion opponents have historically

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<sup>108</sup> See Caroline Kitchner, *Louisiana Republicans Advance Bill That Would Charge Abortion as Homicide*, WASH. POST (May 5, 2022) (discussing a bill that passed through a committee vote that would have amended the crime of homicide and the crime of criminal battery to enable the state to charge people, including the pregnant mother, at any stage of fertilization); Rick Rojas & Tariro Mzezewa, *After Tense Debate, Louisiana Scraps Plan to Classify Abortion as Homicide*, N.Y. TIMES (May 12, 2022).

<sup>109</sup> See *Dobbs*, 142 S. Ct. at 2257 (saying that voters “may wish to impose tight restriction based on their belief that abortion destroys an ‘unborn human being.’” *Id.* (citing MISS. CODE ANN. § 41-41-191(4)(b)).

<sup>110</sup> See *supra* discussion in text at notes 27-30.

<sup>111</sup> See Greer Donley & Jill Wieber Lens, *Abortion, Pregnancy Loss, & Subjective Legal Personhood*, 75 VAND. L. REV. \_\_ (forthcoming 2023) (manuscript at 8), <https://ssrn.com/abstract=4125492> at 8 (explaining the antiabortion strategy to establish fetal personhood across a broad range laws to establish fetal personhood under the Fourteenth Amendment); Kenneth De Ville & Loretta Kopelman, *Fetal Protection in Wisconsin’s Revised Child Abuse Law: Right Goal, Wrong Remedy*, 27 J.L. MED. & ETHICS 332, 335 (1999) (describing the “long term, end-game strategy of pro-life forces” to establish fetal personhood in child abuse and criminal homicide laws to secure recognition of fetal personhood under the Fourteenth Amendment).

<sup>112</sup> See Maya Manian, *Lessons from Personhood’s Defeat: Abortion Restrictions and Side Effects on Women’s Health*, 74 OHIO ST. L.J. 75, 78 (2013)(pointing out that personhood laws have been defeated in a number of states because reproductive rights advocates have successfully linked personhood with broader impacts on women’s health and access to assisted reproductive technology that would likely be outlawed by recognition of zygote personhood.).

adopted a strategy of enforcing abortion restrictions against providers and those who aid and abet abortion but have stopped short of imposing punishment on the abortion patients themselves.<sup>113</sup> However, with the new conservative majority on the Supreme Court, abortion opponents have begun to argue for prosecuting pregnant people who obtain abortion.<sup>114</sup> Fetal personhood laws would allow prosecutors to pursue criminal homicide charges against people seeking abortion. It would also likely embolden states to pass laws that prevent their pregnant residents from seeking out of state abortions on the claim that the state is protecting its fetal residents.<sup>115</sup>

#### G. *Dobbs and Future Interjurisdictional Abortion Battles*

Justice Kavanaugh's concurrence argued that while the decision was returning the issue of regulating abortion to state legislatures, "other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter."<sup>116</sup> However, as scholars have described, in the post-*Roe* legal landscape, states hostile to abortion may seek to ban abortions that have any relationship to their state and extend the reach of their abortion bans to prohibit their residents traveling to neighboring states to seek abortion.<sup>117</sup> Justice Kavanaugh dismissed this looming concern in his concurrence, asking, "May a state bar a resident from travelling out of state to obtain an abortion? In my view no because of the constitutional right to travel."<sup>118</sup> Legal

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<sup>113</sup> See J.C. Willke, *The Woman Should Not Be Punished*, NAT'L RIGHT TO LIFE NEWS 3 (June 6, 1989); Mary Ziegler, *Some Form of Punishment: Penalizing Women for Abortion*, 26 WM. & MARY BILL RTS. J 735, 738 (2018)(explaining that in the 1980's, the pro-life strategy changed to be "woman protective" and pro-lifers emphasized punishing providers but not women.).

<sup>114</sup> See Caroline Kitchner, *Louisiana Republicans Advance Bill That Would Charge Abortion as Homicide*, WASH. POST (May 5, 2022)(discussing a bill that passed through a committee vote that would have amended the crime of homicide and the crime of criminal battery to enable the state to charge people, including the pregnant mother, at any stage of fertilization.)

<sup>115</sup> See David Cohen, Greer Donley, & Rachel Rebouché, *The New Abortion Battleground*, 124 COLUM. L. REV. \_\_\_ (2023) (Aug. 4, 2022 draft) (manuscript at 25-26), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4032931](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4032931).

<sup>116</sup> *Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring).

<sup>117</sup> Cohen, Donley, & Rebouché, *supra* note 114, at \_\_\_ (manuscript at 17-18).

<sup>118</sup> *Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring).

scholars have argued that this question is much more unsettled than Justice Kavanaugh's concurrence suggests. There are instances when a state can criminally prosecute a resident for activity that happens wholly beyond its borders, even if that activity was legal in the other state.<sup>119</sup> Missouri was on the forefront of those looming battles by trying twice to ban out-of-state-abortions on Missouri residents.<sup>120</sup> Both bills died in committee, but these are just the most recent examples of the challenging legal landscape presented by the post-*Roe* landscape.<sup>121</sup> States supportive of abortion are gearing up to confront this future reality by passing laws to protect their providers from legal sanctions for helping out-of-state residents from obtaining care. For example, Connecticut and New York have passed laws that prohibit state agencies and courts from participating in any out of state prosecutions or lawsuits.<sup>122</sup> Other states are considering similar laws that will refuse to cooperate with antiabortion lawsuits, including refusing to enforce damage awards or extraditing defendants to face trial or imprisonment.<sup>123</sup> The refusal of one state to honor court orders and legal proceedings in other states strikes at the heart of interstate cooperation that is foundational to our federalist system.<sup>124</sup> And several jurisdictions have passed or are con-

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<sup>119</sup> Cohen, Donley, & Rebouché, *supra* note 114, at \_\_\_ (manuscript at 17-20).

<sup>120</sup> See, S.B. 603, 101st Gen. Assemb., Reg. Sess. (Mo. 2021) (applying all Missouri abortion restrictions to conduct occurring “[p]artially within and partially outside this state.”); HB 2012, 102d Gen. Assemb., Reg. Sess. (Mo. 2022)(creating the possibility of civil liability on anyone who either performs an abortion on a Missouri resident or who helps Missouri citizens travel out of state for an abortion).

<sup>121</sup> See Kaia Hubbard, *New Patchwork of Abortion Access Begins to Take Shape in States*, U.S. NEWS (June 27, 2022 2:47 PM), <https://www.usnews.com/news/national-news/articles/2022-06-27/new-patchwork-of-abortion-access-begins-to-take-shape-in-states>. See also *State Policies on Abortion*, GUTTMACHER INST. (Aug. 1, 2022), <https://www.guttmacher.org/united-states/abortion/state-policies-abortion>.

<sup>122</sup> Conn. Pub. Act No. 22-19 §§ 2, 3 (July 1, 2022); Keshia Clukey & Joyce E. Cutler, *New York Abortion Law Shields Patients and Providers from Lawsuits*, BLOOMBERG (June 13, 2022 11:58 AM CDT), <https://www.bloomberg.com/news/articles/2022-06-13/new-york-abortion-laws-shield-patients-providers-from-suits>.

<sup>123</sup> Clukey & Cutler, *supra* note 121.

<sup>124</sup> Politically conservative and politically liberal actors have switched hats in this debate about federalism and the power of the federal government versus

sidering creating a new cause of action allowing people to sue anyone who interferes with reproductive rights and access, including by bringing an SB8 style lawsuit against them.<sup>125</sup> Oregon and New York have announced funds to support abortion patients, including those traveling from out of state because their home state has banned the procedure.<sup>126</sup> Mobile abortion clinics are preparing to sit just across state borders to deliver medication abortion to residents crossing state lines, to meet patients where they are.<sup>127</sup> The dissent described that the *Dobbs* ruling will result in interstate conflicts and a series of novel constitutional questions, concluding that “[f]ar from removing the Court from the abortion issue, the majority puts the Court at the center of the coming ‘interjurisdictional abortion wars.’”<sup>128</sup> Thus, a post-*Roe* world will involve travel for abortion care and the coming abortion battles will be fought between states in interjurisdictional abortion battles that will strain interstate comity and the foundations of our federalist system of government.

#### H. *The Dissent*

Justices Kagan, Sotomayor, and Breyer authored a powerful joint dissenting opinion, which is unusual as traditionally one author drafts an opinion that is signed on to by the others. The

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the rights of the states. Those who want to push back against the Trump Administration’s enforcement efforts that try to harness the states are arguing for a limited power on the part of the federal government and broader states’ rights. Conservatives want to assert broad federal power to punish states refusing to cooperate in enforcement, which seems contrary to their traditional views on federalism. Andrew F. Moore, *Introduction to the Symposium on Sanctuary Cities: A Brief Review of the Legal Landscape*, 96 U. DET. MERCY L. REV. 1, 17 (2018).

<sup>125</sup> See, e.g., The Freedom from Interference with Reproductive and Endocrine Health Advocacy and Travel Exercise Act, S9039A §§ 2, 70-b(1) & (2) (May 4, 2022), <https://www.nysenate.gov/legislation/bills/2021/S9039>.

<sup>126</sup> Casey Parl, *States Pour Millions into Abortion Access*, WASH. POST (May 13, 2022 12:22 PM EDT), <https://www.washingtonpost.com/dc-md-va/2022/05/13/oregon-new-york-funding-abortion/>.

<sup>127</sup> Michela Moscufo & Brad Mielke, *Mobile Abortion Clinics Ramp Up Operations as Roe v. Wade Is Overturned*, ABC NEWS (June 29, 2022 6:43 PM), <https://abcnews.go.com/US/mobile-abortion-clinics-ramp-operations-roe-wade-overturned/story?id=85789069>.

<sup>128</sup> *Dobbs*, 142 S. Ct. at 2337 (joint opinion of Breyer, Sotomayor, and Kagan, JJ., dissenting)(citing Cohen, et al., *supra* note 114, at 1).

dissent called into question the majority's originalist interpretation of the Constitution in striking down the abortion right. Noting that at the time of passage of the Fourteenth Amendment—the period to which the majority looks to determine if a right is deeply rooted in the nation's history—women were not viewed as equals and did not have rights to vote, own property, or control their bodies. Thus, “[w]hen the majority says that we must read our foundational charter as viewed at the time of ratification . . . it consigns women to second-class citizenship.”<sup>129</sup> Instead, the dissent argues, that the Framers drafted the Constitution in broad language that would allow it to endure the ages and respond to changing times.<sup>130</sup> Citing Chief Justice John Marshall's 1819 opinion in *McCulloch v. Maryland*, “our Constitution is ‘intended to endure for ages to come,’ and must adapt itself to a future ‘seen dimly’ if at all.”<sup>131</sup> The majority's “pinched” view of the Constitution constrains it from responding to new societal understandings and conditions, especially with respect to “construing the majestic but open-ended words of the Fourteenth Amendment—the guarantee of ‘liberty’ and ‘equality’ for all.”<sup>132</sup>

The dissent described:

Today's decision strips women of agency over what even the majority agrees is a contested and contestable moral issue. It forces her to carry out the state's will, whatever the circumstances, and whatever the harm it will wreak on her and her family, it takes away her liberty. After today young women will come of age with fewer rights than their mothers and grandmothers had.<sup>133</sup>

The dissent also offered a glimpse of the future, writing that “whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights and their status as free and equal citizens. A state can thus transform what, when freely undertaken, is a wonder, birth, into what when forced is a nightmare.”<sup>134</sup> They close with “With sorrow—for this Court, but more, for the many millions of American women who

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<sup>129</sup> *Id.* at 2325.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 2325, 2326.

<sup>133</sup> *Id.* at 2346.

<sup>134</sup> *Id.* at 2318.



have today lost a fundamental constitutional protection—we dissent.”<sup>135</sup>

## II. The Future of Abortion in a Post-Roe Landscape

In the wake of *Dobbs*, legal scholars, advocates, and policy-makers are developing new strategies to protect abortion access. To be sure, the loss of *Roe* and *Casey* is devastating for those who support abortion access because those cases provided a constitutional floor of protection. As advocates and attorneys shift tack from a defensive to an offensive position, they are forging novel constitutional arguments and advancing ways to protect access through federal and state law. This section examines some of the emerging strategies taking place at the federal, state, and municipal levels.

### A. Emerging Constitutional Theories for Sourcing the Abortion Right

As described earlier, the majority opinion rejected the precedent of *Roe* and *Casey* that sourced the constitutional right of abortion in the “liberty” clause of the Fourteenth Amendment. The Court went further, to reject equal protection as a basis for the abortion right, thus preemptively foreclosing a claim that has not only been asserted for decades by legal scholars<sup>136</sup> and jus-

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<sup>135</sup> *Id.* at 2350.

<sup>136</sup> See, e.g., LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-10, pp. 1353-59 (2d ed. 1988); Susan Frelich Appleton, *Doctors, Patients and the Constitution: A Theoretical Analysis of the Physician’s Role in “Private” Reproductive Decisions*, 63 WASH. U. L.Q. 183, 197-201 (1985); Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984) (arguing that abortion restrictions create unconstitutional gender-based discrimination); Catharine MacKinnon, *Reflections on Sex Equality Under the Law*, 100 YALE L.J. 1281, 1308-24 (1991); Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 273-79 (1992); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007); Cass Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 31-44 (1992).

tices,<sup>137</sup> but that has long been a significant rationale for overturning precedent.<sup>138</sup> With both equal protection and substantive due process foreclosed, novel constitutional arguments have been advanced for providing constitutional protection to the abortion right, including First Amendment, Thirteenth and Fourteenth Amendments, and the Takings Clause.<sup>139</sup>

Two cases filed in Florida brought by faith groups argue that the state's fifteen-week abortion ban violates constitutional rights related to religious freedom.<sup>140</sup> In *Pomerantz et al. v. Florida*—a case brought on behalf of religious groups including Reform Judaism, Buddhism, the Episcopal Church, the United Church of Christ, and the Unitarian Universalist Church—the complaint argues that Florida's 15-week ban violates freedom of speech, free exercise of religion, and the separation of church and state.<sup>141</sup> A separate suit filed in Florida by a South Florida Jewish Congrega-

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<sup>137</sup> Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN'S RTS. L. REP. 143, 143-44 (1978); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199-1200 (1992) (“The idea of the woman in control of her destiny and her place in society was less prominent in the *Roe* decision itself, which coupled with the rights of the pregnant woman the free exercise of her physician's medical judgment. The *Roe* decision might have been less of a storm center had it homed in more precisely on the women's equality dimension of the issue.” (citations omitted)).

<sup>138</sup> See Murray, *supra* note 96 (arguing that eugenics and equal protection arguments for upholding reason-based abortion bans are designed to provide constitutionally permissible grounds for overturning *Roe*).

<sup>139</sup> See generally David S. Cohen, Greer Donley, & Rachel Rebouche, *Rethinking Strategy After Roe*, 75 STAN. L. REV. ONLINE (July 8, 2022 draft) (calling upon scholars and advocates to take the offensive from the antiabortion playbook that took novel legal theories “from laughable to legitimate” and test novel legal theories in court—including “privileges and immunities, the right to travel, religious liberty, federal preemption, dormant commerce clause, uncompensated takings, procedural due process, federal jurisdiction, health justice, and vagueness.” *Id.* at \*6.).

<sup>140</sup> Complaint, *Pomerantz et al. v. Florida*, No. 154464609 (11th Cir. Aug. 1, 2022), [https://jayaramlaw.com/wp-content/uploads/2022/08/Complaint\\_1.pdf](https://jayaramlaw.com/wp-content/uploads/2022/08/Complaint_1.pdf); *South Florida Group Challenges State's Abortion Law*, CBS NEWS (June 14, 2022), <https://www.cbsnews.com/miami/news/south-florida-group-challenges-states-abortion-law/> (describing a lawsuit filed in Leon County circuit court arguing that Florida's 15-week abortion ban violates religious freedom).

<sup>141</sup> Complaint, *Pomerantz et al.*, No. 154464609.

tion claims that the state's 15-week abortion ban violates the state constitution's protection of religious freedom.<sup>142</sup> The complaint describes that, "In Jewish law, abortion is required if necessary to protect the health, mental or physical well-being of the woman, or for many other reasons not permitted under the act. As such, the act prohibits Jewish women from practicing their faith free of government intrusion and thus violates their privacy rights and religious freedom."<sup>143</sup> The complaint also argues that imposing the laws of other religions upon Jewish women violates the separation of church and state and the Jewish family and Jewish people.<sup>144</sup> Members of the Satanic Temple asserted religious liberty arguments under the Religious Freedom Restoration Act to seek religious exemption from Texas' SB8, the civil bounty law that banned abortion at six weeks.<sup>145</sup> The Temple sent a letter to the Food and Drug Administration (FDA) seeking a religious exemption to SB8 so that the religion's members could access medication abortion pills, describing that bodily autonomy and science are sacrosanct beliefs in their religion and the medication is necessary to perform religious abortion rituals.<sup>146</sup>

Scholars have advanced the argument that both the Thirteenth and Fourteenth Amendments—Reconstruction Era amendments passed to abolish slavery and extend equal protection under the law—protect bodily autonomy and reproductive freedom.<sup>147</sup> Professor Michele Goodwin, for example, argues

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<sup>142</sup> *South Florida Group Challenges State's Abortion Law*, *supra* note 139.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Nicole Goodkind, *Why Satanists May Be the Last Hope to Take Down Texas' Abortion Bill*, FORTUNE (Sept. 3, 2021), <https://fortune.com/2021/09/03/why-satanists-may-be-the-last-hope-to-take-down-texas-abortion-bill/>. *See also* David S. Cohen, *How the Satanic Temple Could Bring Abortion Rights to the Supreme Court*, ROLLING STONE (Aug. 24, 2020).

<sup>146</sup> *Id.*

<sup>147</sup> *See, e.g.*, Andrew M. Koppelman, *Forced Labor: A Thirteenth Amendment Defense to Abortion*, 84 NW. U. L. REV. 480, 483-84 (1990) (arguing that the Thirteenth Amendment provides a constitutional abortion right because to deny a person the right to an abortion subjects them to "involuntary servitude" in service of the fetus); Michele Goodwin, *Opinion: No Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022), <https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html>; *See also* Peggy Cooper Davis, *Overturning Abortion Rights Ignores Freedoms Awarded After Slavery's End*, ECONOMIST (June 13,

that the Thirteenth Amendment’s prohibition on involuntary servitude included reproductive autonomy because the rape and forced reproduction of enslaved women was a central component of slavery.<sup>148</sup> She argues that it is impossible to disentangle reproductive autonomy and justice from the Reconstruction Amendments because “[e]nding the forced sexual and reproductive servitude of Black girls and women was a critical part of the passage of the 13th and 14th Amendments.”<sup>149</sup> Those amendments, she argues, did more than simply free Black women from forced labor, but also from rape and forced reproduction.<sup>150</sup>

Drawing comparisons between U.S. law and the regulation of abortion in constitutional democracies around the world, Professor Julie Suk argues that the future of protecting abortion lies in transforming it from a *private* right as it was conceptualized by the *Roe* opinion, to a *public* concern that examines the state’s constitutional duties to its citizens who experience unplanned pregnancies.<sup>151</sup> Under this public theory of abortion protections, the right of abortion should be sourced in the Thirteenth Amendment’s prohibition on involuntary servitude as well as the Takings Clause based on the argument that forced reproduction is a form of regulatory takings by the state.<sup>152</sup> Professor Suk argues that abortion restrictions are illegitimate “because they manifest the government’s failure to properly value the shared public benefit of human reproduction . . . [which] spawn[s] its next generation of citizens and workers to the enrichment of society as a

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2022), <https://www.economist.com/by-invitation/2022/06/13/overturning-abortion-rights-ignores-freedoms-awarded-after-slaverys-end-says-peggy-cooper-davis>; Peggy Cooper Davis, *A Response to Justice Amy Coney Barrett*, HARV. L. REV. BLOG (June 14, 2022), <https://blog.harvardlawreview.org/a-response-to-justice-amy-coney-barrett/> (recounting that the Reconstruction Amendments aspired to a “new birth of freedom” for formerly enslaved people that included freedoms denied them as slaves as parents, partners, and laborers, that included freedom with respect to marriage, procreation, and parentage).

<sup>148</sup> Goodkind, *supra* note 144.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* (mentioning that “Justice Samuel Alito’s claim, that there is no enumeration and original meaning in the Constitution related to involuntary sexual subordination and reproduction, misreads and misunderstands American slavery . . . and legal history.”).

<sup>151</sup> Julie C. Suk, *A World Without Roe: The Constitutional Future of Unwanted Pregnancy*, \_\_ WM. & MARY L. REV. \_\_ (forthcoming 2022)(draft).

<sup>152</sup> *Id.* (manuscript at 3-4).

whole.”<sup>153</sup> Unlike other members of society who are compensated for defending and enriching the state, pregnant people are disproportionately forced to absorb the risks, burdens, and costs of reproduction that benefits society as a whole.<sup>154</sup>

In addition to the emerging constitutional theories and legal challenges, policymakers are developing new approaches to protecting abortion through federal and state laws. The next sections highlight the emerging legal landscape of federal, state, and even municipal laws being considered and passed to protect abortion and shield residents from civil and criminal liability in courts in neighboring states. The emerging legal landscape reveals the types of federal-state preemption issues and interstate conflicts that will strain the foundations of federalism and interstate comity in the post-*Roe* legal landscape.

#### B. *Federal Action to Protect Abortion*

When the draft of the *Dobbs* decision was leaked, Democratic members of Congress sought to resurrect the Women’s Health Protection Act of 2021 which would codify the central holding of *Roe* that states may regulate but not ban abortion before fetal viability and *Casey*’s ruling that states may not unduly burden abortion access.<sup>155</sup> Many are calling on President Biden to temporarily remove the filibuster’s sixty-vote threshold in order to pass the Women’s Health Protection Act as well as other federal legislation protecting abortion.<sup>156</sup> However, while President Biden has signaled that suspending the filibuster is a move he may be willing to undertake, it is unlikely that Democrats have the sixty votes necessary to suspend the filibuster so such a strategy at the federal level will depend on future Democratic election successes.<sup>157</sup>

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<sup>153</sup> *Id.* (manuscript at 3).

<sup>154</sup> *Id.*

<sup>155</sup> H.R. 3755 Women’s Health Protection Act, 117th Congress (2021-2022), H.R. 3755 - 117th Congress (2021-2022), <https://www.congress.gov/bill/117th-congress/house-bill/3755>.

<sup>156</sup> Rebecca Shabad, *Biden Says He Supports an “Exception” to the Senate’s Rules to Allow Democrats to Pass Abortion Protections*, NBC NEWS (June 30, 2022), <https://www.nbcnews.com/politics/white-house/biden-says-supports-exception-senate-filibuster-allow-democrats-pass-a-rcna36108>.

<sup>157</sup> See Sahil Kapur, *Democrats Wrestle with How Aggressively to Respond to the End of Roe*, NBC NEWS (June 28, 2022 3:16 PM CDT), <https://www.nbcnews.com/politics/white-house/democrats-wrestle-with-how-aggressively-respond-to-the-end-of-roe-rcna36108>.

Other proposals by scholars and progressive Democrats to protect abortion rights through federal action include declaring a public health emergency as a means of expanding access to medication abortion and over-the-counter access to birth control,<sup>158</sup> using executive orders to make abortion available on federal lands in states where it is outlawed,<sup>159</sup> and adding justices to the Supreme Court to dilute the voting power of the conservative majority.<sup>160</sup> So far the Biden Administration has not been willing to undertake these more aggressive tactics.<sup>161</sup> Democrats are also in the process of drafting federal laws to protect reproductive health data because while HIPAA provides privacy rules for doctors and healthcare organizations in the handling of patient medical records, it does not extend to information collected by healthcare apps.<sup>162</sup> There are at least two federal data privacy laws currently being proposed to address the lack of protection

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[www.nbcnews.com/politics/politics-news/democrats-wrestle-aggressively-respond-end-roe-v-wade-rcna35776](https://www.nbcnews.com/politics/politics-news/democrats-wrestle-aggressively-respond-end-roe-v-wade-rcna35776) (stating that while all fifty Senate Democrats have called for protecting abortion by codifying it in federal law, two of the Democratic Senators, Joe Manchin of West Virginia and Kyrsten Sinema of Arizona, have indicated their support of the filibuster.).

<sup>158</sup> Spencer Kimball, *Biden Could Declare a Public Health Emergency to Expand Abortion Access, But It Would Face a Tremendous Legal Fight*, CNBC NEWS (July 15, 2022), <https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment> (describing that more than eighty House Democrats want the President to use the government's emergency public health powers which would unlock resources and authority that states and the federal government can use to meet the surge in demand for reproductive health services).

<sup>159</sup> Cohen, Donley, & Rebouché, *supra* note 114, at \_\_\_ (manuscript at 63-70) (describing that in certain circumstances federal land is not bound by state law but governed exclusively by federal law.).

<sup>160</sup> See Kevin Breuninger, *Biden Commission on Supreme Court Reform Is Split on Adding Justices*, CNBC (Oct. 14, 2021 6:25 PM EDT), <https://www.cnbc.com/2021/10/14/supreme-court-reform-biden-commission-split-on-adding-justices.html>.

<sup>161</sup> The White House rejected the idea of using federal lands to provide abortion, calling the idea “well-intentioned” but observing that it would “put women and providers at risk.” The Biden Administration has also signaled that expanding the number of justices on the Supreme Court “is not something that he wants to do.” The Biden Administration’s tepid response has caused conflict with more progressive members of the Democratic party. See Kapur, *supra* note 156.

<sup>162</sup> See Cristiano Lima, *Period Apps Gather Intimate Data, A New Bill Aims to Curb Mass Collection*, WASH. POST (June 2, 2022); Celia Rosas, *The*

of patient health care data on apps.<sup>163</sup> Federal lawmakers are also drafting bills to codify the right to travel for reproductive healthcare.<sup>164</sup>

The Biden Administration's guidelines for abortion care under the Emergency Medical Treatment and Labor Act (EMTALA)<sup>165</sup> clarify that existing federal law requires that hospitals provide treatment to any person who presents at their emergency room with an emergency medical condition.<sup>166</sup> The guideline memo issued by the Department of Health and Human Services reiterates the obligations of hospitals under federal law to "provide the stabilizing necessary" for patients experiencing a medical emergency related to pregnancy and pregnancy loss *regardless* of state laws. The guidelines require hospitals to provide abortion care if necessitated by the emergent situation, including in cases of miscarriage and ectopic pregnancy.<sup>167</sup> The state of Texas has sued the federal government challenging the EMTALA guide-

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*Future Is Femtech: Privacy and Data Security Issues Surrounding Femtech Applications*, 15 HASTINGS BUS. L.J. 319 (2019).

<sup>163</sup> See S.24, Protecting Personal Health Data Act, 117th Congress (2021-2022), <https://www.congress.gov/bill/117th-congress/senate-bill/24/text> (this legislation would promulgate rules regulating mobile health technologies and health-related apps to allow users to review, change, and delete health data collected by the app companies); the My Body My Data Act, a bill introduced as part of the larger federal data privacy bill being negotiated by lawmakers, would require that technology companies that develop apps that track sexual health to only collect and retain reproductive health information that is "strictly needed" to provide their services unless they have obtained specific informed consent from the user. Lima, *supra* note 161 (explaining that the bill is supported by both Planned Parenthood and the Electronic Frontier Foundation.).

<sup>164</sup> See letter by House Speaker Nancy Pelosi, *Dear Colleague on Legislative Response to Supreme Court Overturning Roe* (June 22, 2022), <https://www.speaker.gov/newsroom/62722-0>.

<sup>165</sup> Dept. of Health & Human Services, *Reinforcement of EMTALA Obligations Specific to Patients Who Are Pregnant or Experiencing Pregnancy Loss* (July 11, 2022), <https://www.cms.gov/medicareprovider-enrollment-and-certification/surveycertification/geninfopolicy-and-memos-states-and/reinforcement-emtala-obligations-specific-patients-who-are-pregnant-or-are-experiencing-pregnancy-0>.

<sup>166</sup> 1867 of the Social Security Act, 42 U.S.C. § 1395dd. See Greer Donley & Kimberley Chernoby, *How to Save Women's Lives After Roe*, ATLANTIC (June 13, 2022), <https://www.theatlantic.com/ideas/archive/2022/06/roe-v-wade-overturn-medically-necessary-abortion/661255/>.

<sup>167</sup> See *infra* discussion in text at notes 214-220.

lines, claiming that the emergency guidelines impose an abortion “mandate” on states as a matter of federal law and in violation of state sovereignty.<sup>168</sup>

Other actions that can be taken at the federal level include expanding access to medication abortion through the Food and Drug Administration.<sup>169</sup> The *Dobbs* majority argued that there have been significant changes in technology of neonatal care, and viability is no longer a workable standard in light of this new technology that keeps shifting viability earlier.<sup>170</sup> But it is also important to note that the technology of abortion care has also changed dramatically in the last twenty years and abortion care is no longer tethered to either states’ borders or to doctors. The FDA approved medication abortion in 2000, a two drug regimen that can safely and effectively terminate a pregnancy up to ten weeks gestation.<sup>171</sup> At least twenty-two states permit medication abortion to be prescribed by telehealth providers. The Biden Administration permanently lifted the in-person dispensing requirements in 2021 which has allowed for the medication to be sent through the mail and to pharmacies without an in-person visit to a clinic.<sup>172</sup> Antiabortion legislatures have passed restrictions on the use of telemedicine for abortion and now restrict medication

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<sup>168</sup> *Texas v. Becerra*, No. 5:22-CV-185 (N.D. Tex. (July 14, 2022)), [https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/20220714\\_1-0\\_Original%20Complaint%20Biden%20Admin.pdf](https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/20220714_1-0_Original%20Complaint%20Biden%20Admin.pdf).

<sup>169</sup> See generally Greer Donley, *Medication Abortion Exceptionalism*, 107 CORNELL L. REV. 627 (2022); Cohen, Donley, & Rebouché, *supra* note 114, at \_\_\_ (manuscript at 70-79).

<sup>170</sup> *Dobbs*, 142 S. Ct. at 2269-70 (stating that the “obvious problem” with viability is that it is constantly changing and “[d]ue to the development of new equipment and improved practices, the viability line has changed over the years.”).

<sup>171</sup> See *Questions and Answers on Mifeprex*, FOOD & DRUG ADMIN. (DEC. 16, 2021), <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifeprex>.

<sup>172</sup> See *FDA v. ACOG*, 141 S. Ct. 578 (2021) (reinstating the in-person dispensing requirement for Mifepristone, one of the two drugs in the medication abortion regimen, after its in-person dispensing requirement was challenged by providers during the COVID 19 pandemic). The Biden Administration temporarily and then permanently lifted the in-person dispensing requirement in response to ample research of the safety of sending the medication through the mail and dispensing by pharmacies. Donley, *supra* note 168, at 650.



abortion by state law. Texas and Louisiana have made it a crime to mail the pills in the states, and other states could follow.<sup>173</sup> Arguments are being advanced that FDA regulation in this area constitutes federal preemption and states cannot advance competing or stricter laws because federal law preempts state regulation with respect to FDA labelling.<sup>174</sup> Merrick Garland, the U.S. Attorney General, issued a statement that medication abortion is regulated by the FDA whose experts have certified its safety and in so doing he seems to be advancing an argument about federal preemption.<sup>175</sup> The conflict between the states and federal governments—with federal FDA approval of a drug that has been banned or made available at the state level—reveals the types of federal-state conflicts that will occur in the post-*Roe* legal landscape.

### C. State-Level Actions to Protect Abortion

In the wake of *Dobbs*, the abortion fight will move to state courts and legislatures.<sup>176</sup> State supreme courts will be the new battleground on which abortion rights will be fought, with Florida, Michigan, and Kentucky being the first states in which state supreme courts will be asked to determine if abortion is protected under the state's constitution.<sup>177</sup> In 2019 the Kansas Supreme Court held that abortion was protected under the Kansas constitution and in August abortion opponents put the issue on the ballot, asking Kansas voters to approve an amendment that would specifically provide that abortion was not protected under

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<sup>173</sup> Oriana Gonzalez, *Louisiana Governor Signs into Law Bill to Make Mailing Abortion Pills a Crime*, AXIOS (June 21, 2022), <https://www.axios.com/2022/06/03/louisiana-mail-abortion-pill-crime>; Ashley Lopez, *Texas Toughens Ban on Medication-by-Mail Abortions with Jail Time and Hefty Fine*, KHN (Dec. 6, 2021), <https://khn.org/news/article/texas-medication-abortion-criminal-penalties/>.

<sup>174</sup> Cohen, Donley, & Rebouché, *supra* note 114, at \_\_\_ (manuscript at 40-63).

<sup>175</sup> *Attorney General Merrick B. Garland Statement on Supreme Court Ruling in Dobbs v. Jackson Women's Health Organization*, DEP'T JUSTICE (June 24, 2022), <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-statement-supreme-court-ruling-dobbs-v-jackson-women-s>.

<sup>176</sup> Michael Wines, *Next Front Line in the Abortion Wars: State Supreme Courts*, N.Y. TIMES (July 6, 2022).

<sup>177</sup> *Id.*

the state's constitution.<sup>178</sup> In a surprising upset, voters in Kansas—one of the most red states in the country—voted down the amendment in a landslide victory.<sup>179</sup> When the Iowa Supreme Court ruled in 2018 that abortion was protected under the state's constitution, the legislature revised the judicial nomination process to grant greater control to the Republican governor and Governor Kim Reynolds stacked the court with conservative justices<sup>180</sup> who overturned the 2018 decision only a week before the *Dobbs* ruling.<sup>181</sup> Five other states have abortion on their ballots in the upcoming election.<sup>182</sup> Michigan and Vermont are working toward statewide votes to create constitutional protections for reproductive freedom to essentially override legislatures that do not represent the will of the majority of residents.<sup>183</sup> Missouri also allows residents to put constitutional amendments directly on the ballot and that possibility, of protecting abortion in the state's constitution, is being explored.<sup>184</sup> The *Dobbs* Court returned the issue of abortion to the electorate, to “allow[ ] women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, vot-

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<sup>178</sup> See, Dylan Lysen, Laura Ziegler, & Blaise Mesa, *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, NPR NEWS (Aug. 3, 2022), <https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment>;

<sup>179</sup> *Id.*

<sup>180</sup> David Pitt, *Iowa Supreme Court Rulings Turn Conservative After Reynolds' Appointments—and It May Be Just the Beginning*, DES MOINES REG. (July 3, 2019), <https://www.desmoinesregister.com/story/news/crime-and-courts/2019/07/03/iowa-supreme-court-rulings-turn-conservative-after-governor-kim-reynolds-appointments/1638881001/>.

<sup>181</sup> *Planned Parenthood of the Heartland, Inc. v. Reynolds*, 975 N.W.2d 710 (Iowa June 17, 2022), *reh'g denied* (July 5, 2022).

<sup>182</sup> Grace Panetta, *The States Where Abortion Access Will Be on the Ballot in 2022*, BUS. INSIDER (June 28, 2022 11:32 AM), <https://www.businessinsider.com/which-states-have-abortion-ballot-measures-in-2022-2022-5>.

<sup>183</sup> Tessa Weinberg, *GOP Eyes Amending Missouri Constitution to Ensure no Right to Abortion Exists Post-Roe*, MO. INDEPENDENT (May 3, 2022 3:49 PM), <https://missouriindependent.com/2022/05/03/gop-eyes-amending-missouri-constitution-to-ensure-no-right-to-abortion-exists-post-ro/>.

<sup>184</sup> Summer Ballentine, *Missouri High Court: Referendum Laws Hinder Voters' Rights*, AP NEWS (Feb. 8, 2022), <https://apnews.com/article/voting-rights-abortion-health-legislature-missouri-362a4066bfb8766d486cec24c59ab9b9> (describing *No Bans on Choice v. Ashcroft*, 638 S.W.3d 484 (Mo. 2022)).

ing, and running for office.”<sup>185</sup> In the new state-level battlegrounds elections will be crucial in determining abortion access, in races for governor, legislators, and judicial retention votes. Voter suppression and gerrymandering will likely also become significant tools wielded by both parties to secure outcomes that shape courts and legislatures.

States are protecting access to abortion by expanding the use of telehealth for abortion. Online providers like Abortion on Demand operate in twenty-two states and provide abortion medication through telehealth and through the mail, even offering overnight shipping.<sup>186</sup> Massachusetts recently passed a law that expands the state’s telehealth rules to allow its providers to care for patients in other states via telehealth, including in states that ban abortion.<sup>187</sup> The new law allows for out-of-state residents to receive telehealth abortion care from a Massachusetts provider—including minors because Massachusetts does not have a parental consent law—and receive medication abortion pills through the mail.<sup>188</sup> States are also passing laws that expand the types of providers who can perform abortions. Advance Practice Registered Nurses (APRNs) are already providing abortion care in California, Illinois, Montana, and New Hampshire.<sup>189</sup> APRNs are less expensive than seeking care from a physician and are often already serving underserved populations that cannot afford to seek care from a private physician.

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<sup>185</sup> *Dobbs*, 142 S. Ct. at 65.

<sup>186</sup> ABORTION ON DEMAND, *Frequently Asked Questions*, <https://abortionondemand.org/faq/>,

<sup>187</sup> An Act Expanding Protections for Reproductive and Gender Affirming Care, Ch. 127, 192nd General Court of the Commonwealth of Massachusetts (2022), <https://malegislature.gov/Laws/SessionLaws/Acts/2022/Chapter127>.

<sup>188</sup> *Id.* See Carrie N. Baker, *Groundbreaking Massachusetts Law Protects Telemedicine Abortion Providers Serving Patients Located in States Banning Abortion*, Ms. MAG. (Aug. 18, 2022), [https://msmagazine.com/2022/08/18/massachusetts-abortion-law/?fbclid=IWAR2m9KD8RukAQicVlywjiH\\_sdRJHNTc3nwEuT-Di68\\_IM7EhQvN32S-t0jw](https://msmagazine.com/2022/08/18/massachusetts-abortion-law/?fbclid=IWAR2m9KD8RukAQicVlywjiH_sdRJHNTc3nwEuT-Di68_IM7EhQvN32S-t0jw).

<sup>189</sup> Tracy A. Weitz et al., *Safety of Aspiration Abortion Performed by Nurse Practitioners, Certified Nurse Midwives, and Physician Assistants Under a California Legal Waiver*, 103 AM. J. PUB. HEALTH 454 (Mar. 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3673521/>.

Finally, states are passing laws to try to extend their state's abortion laws beyond their state's borders.<sup>190</sup> For example, Missouri introduced legislation in 2022 that would have allowed citizen enforcement suits against any person who provides an abortion to a Missouri resident or aids and abets a person to travel out of state for an abortion.<sup>191</sup> Conversely, the state of New York passed a law designed to protect both abortion patients and providers and includes an exception to extradition rules for abortion-related offenses and prohibits courts and law enforcement from cooperating in out-of-state civil and criminal cases that stem from abortion-related offenses, prohibits professional misconduct charges against healthcare providers for providing reproductive healthcare services for a patient who resides in a state where such services are illegal, prohibits medical malpractice companies from taking adverse action against providers who perform abortions on patients who reside in a different state, and allows abortion providers and patients to enroll in the state's address confidentiality program.<sup>192</sup> Connecticut passed a law that went into effect on July 1, 2022 that prohibits any covered entity from disclosing any communications or information related to a patient's reproductive health care in any civil action unless the patient consents in writing to such disclosure.<sup>193</sup> The law also prohibits any court from issuing a subpoena for reproductive health records pursuant to an out-of-state civil or criminal action involving the provision of reproductive health care or aiding and abetting the same if the lawsuits involve actions that are legal in the state of Connecticut.<sup>194</sup> A bill introduced in California, the Reproductive Privacy Act, similarly enhances privacy protections for medical records relating to reproductive health by prohibiting covered entities from disclosing information related

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<sup>190</sup> Cohen, Donley, & Rebouché, *supra* note 114, at \_\_\_ (manuscript at 17-20); David S. Cohen, Greer Donley, & Rachel Rebouché, *States Want to Ban Abortions Beyond Their Borders. Here's What Pro-Choice States Can Do*, N.Y. TIMES (Mar. 13, 2022), <https://www.nytimes.com/2022/03/13/opinion/missouri-abortion-roe-v-wade.html>.

<sup>191</sup> HB 2012, 102nd Gen. Assemb., Reg. Sess. (Mo. 2022).

<sup>192</sup> The Freedom from Interference with Reproductive and Endocrine Health Advocacy and Travel Exercise Act, S9039A § 2 (May 4, 2022), <https://www.nysenate.gov/legislation/bills/2021/S9039>.

<sup>193</sup> Conn. Pub. Act No. 22-19 § 2.

<sup>194</sup> *Id.* §§ 3 and 4(b).

to reproductive health to out-of-state third parties seeking to enforce abortion bans in courts in other states.<sup>195</sup> Recognition and enforcement of out-of-state lawsuits and damage awards is a foundation of interstate comity that is being undermined with these state laws.<sup>196</sup>

#### D. Municipal Actions to Protect Abortion

Municipalities are also engaging on the issue of abortion at the city-level through passage of resolutions and ordinances on the model of so-called “sanctuary cities.”<sup>197</sup> While long a tool of abortion opponents, in the aftermath of *Dobbs*, city councils in red states have taken a page from the antiabortion playbook and passed resolutions to decriminalize abortion within the city limits and defund and deprioritize enforcement of abortion restrictions.<sup>198</sup> The city of St. Louis was sued by the Missouri Attorney

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<sup>195</sup> California AB 2091, Assemb. Bill, California 2021-2022 Reg. Sess., [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=202120220AB2091](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2091).

<sup>196</sup> Cohen, Donley, & Rebouché, *supra* note 114, at \_\_\_ (manuscript at 40).

<sup>197</sup> See, e.g., Jennifer Brinkley, *Sanctuary Cities and Counties for the Unborn: The Use of Resolutions and Ordinances to Restrict Abortion Access*, 401 N. ILL. L. REV. 63, 64-65 (2020-2021) (explaining that antiabortion sanctuary cities ban abortion services and the sale of Plan B within the city limits, declare abortion murder and create private civil causes of action that allow private citizens to enforce abortion bans within the city). Christopher N. Lasch, et al., *Understanding “Sanctuary Cities,”* 59 B.C. L. REV. 1703 (2018) (describing the rise of immigration sanctuary cities designed to defy immigration enforcement under the Trump Administration); The San Clemente city council in abortion supportive California removed a resolution to become a “sanctuary for life” city after outcry by residents. *San Clemente City Council Rules Out Proposed Abortion Ban Amid Citizen Outrage*, MSN NEWS (Aug. 7, 2022), <https://mynews1a.com/orange-county/2022/08/07/san-clemente-council-votes-to-drop-proposed-abortion-ban/>.

<sup>198</sup> Nicole Narea, *How Blue Cities in Red States Are Resisting Abortion Bans*, VOX (June 29, 2022), <https://www.vox.com/policy-andpolitics/2022/6/29/23188737/abortion-bans-austin-cincinnati-phoenix-tucsonraleigh>; Scott Wilson, *Democratic Cities in Republican States Seek Ways Around Abortion Bans*, WASH. POST (July 13, 2022), <https://www.washingtonpost.com/nation/2022/07/13/abortion-bans-blocked-cities/>. The Austin City Council passed the Guarding the Right to Abortion Care for Everyone Act (GRACE Act) that prohibits city funds to be used to collect or share information with governmental agencies who seek information about abortion for criminal investigations and that inves-

General after it used \$1.5 million dollars of federal American Rescue Plan Act relief funding to create an abortion fund—the Reproductive Equity Fund—to help fund logistical support for people who are forced to travel out of state for abortion.<sup>199</sup> The City Council of New York City recently introduced a municipal law that creates a private right of action for interference with reproductive medical care which would allow a person to bring a claim when a lawsuit has been brought against them on the basis of seeking reproductive care in the city that is legal in New York City.<sup>200</sup>

### **III. Broader Implications: Criminalization, Surveillance, and Impacts on Reproductive Health and Assisted Reproductive Technology**

As abortion is banned in states, more people will turn to self-managed abortion like in the pre-*Roe* era,<sup>201</sup> but medication

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tigations into abortions would be “the lowest priority for enforcement.” See Garrett Brnger, *City Council Passes Resolution Supporting Abortion Access*, KSAT.COM (Aug. 2, 2022), <https://www.ksat.com/news/local/2022/08/03/city-council-passes-resolution-supporting-abortion-access/> (the policy recommends against spending city money — outside of what is “clearly required” by state and federal law — to catalog, collect or share with other government agencies information on instances of abortion strictly to pursue criminal investigations.); Morgan Severson, *Austin City Council Passes GRACE Act to Decriminalize Abortion Despite Statewide Ban*, DAILY TEXAN (July 25, 2022), <https://www.fox7austin.com/news/austin-city-council-passes-grace-act-to-decriminalize-abortion>.

<sup>199</sup> Katelynn Richardson, *St. Louis Sued After Mayor Signs Bill Using COVID Relief to Fund Abortion Travel Costs*, MSN (July 25, 2022), <https://www.msn.com/en-us/news/politics/st-louis-sued-after-mayor-signs-bill-using-covid-relief-to-fund-abortion-travel-costs/ar-AAZWSEu?li=BBnbcA1> (explaining that the funding could be used for funding childcare, travel expenses, and other logistical support needs.).

<sup>200</sup> See Cause of Action Related to Interference with Reproductive or Endocrine Medical Care, Int. 0475-2022, N.Y. City Council (June 2, 2022), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=5669027&GUID=0DE4E63E-3943-471A-8934-872506189B31&Options=&Search=>.

<sup>201</sup> The TexPep study found that as many as two hundred thousand people in Texas attempted to self-manage their abortion in the wake of Texas’ HB2 that shuttered almost all of the state’s abortion clinics. See DANIEL GROSSMAN ET AL., TEX. POL’Y EVALUATION PROJECT RESEARCH BRIEF: KNOWLEDGE,

abortion pills make it safer to self-manage abortion than in the pre-*Roe* era of surgical abortion.<sup>202</sup> Access to the internet and the permeability of state borders means it will be easier for people seeking abortion to access it in neighboring states or to obtain it from friends and relatives living in abortion protective states. Evidence of an emerging “abortion underground” suggests that informal groups of community “providers” are getting medication abortion pills to people in abortion restrictive states despite abortion bans.<sup>203</sup> Online sites like Plan C direct patients to international pharmacies that will ship abortion pills to patients in the United States, even in states that ban abortion.<sup>204</sup> In 2018, an international organization, Aid Access, began offering U.S. women access to medication abortion pills through the mail after an online consultation with a doctor, even if they are living in states with abortion bans, and people can order medication abortion pills whether or not they are pregnant, to have them

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OPINION AND EXPERIENCE RELATED TO ABORTION SELF-INDUCTION IN TEXAS 1, 2 (2015) (finding that in the wake of Texas’ passage of HB2, one of the most restrictive abortion laws in the country, there has been an increase in the use of self-induction abortion through medication, and estimating that between 100,000 and 240,000 women have attempted to end their own pregnancies); see also Erica Hellerstein, *The Rise of the DIY Abortion in Texas*, ATLANTIC (June 27, 2014), <https://www.theatlantic.com/health/archive/2014/06/the-rise-of-the-diy-abortion-in-texas/373240/> (describing that in 2015 there were more than 700,000 Google searches using terms related to self-induced abortion in the United States.)

<sup>202</sup> The 2022 World Health Organization Guidelines on the current evidence and best practices for quality abortion care, includes for the first time self-management of medication abortion as a fully recommended model of abortion care. Caitlin Gerdtts, et al., *Beyond Safety: The 2022 WHO Abortion Guidelines and the Future of Abortion Safety Measures*, BMJ GLOBAL HEALTH (2022). See also Yvonne Lindgren, *When Patients Are Their Own Doctors: Roe v. Wade in an Era of Self-Managed Care*, 107 CORNELL L. REV. 151 (2021).

<sup>203</sup> Jessica Bruder, *The Abortion Underground Is Preparing for the End of Roe v. Wade*, ATLANTIC (Apr. 4, 2022) (describing a covert network of community providers helping individuals self-manage abortion).

<sup>204</sup> See *About Us*, PLAN C, <https://www.plancpills.org/about>; see also Patrick Adams, *Spreading Plan C to End Pregnancy*, N.Y. TIMES (Apr. 27, 2017), <https://www.nytimes.com/2017/04/27/opinion/spreading-plan-c-to-end-pregnancy.html> (discussing the campaign by Francine Coeytaux and others to increase awareness that pills can be used safely at home to terminate a pregnancy).

available if they need them later.<sup>205</sup> But because it is illegal, people seeking to self-manage abortion and those who aid and abet them risk criminal prosecution for accessing abortion care. Legal defense helplines and funds are being created for people seeking information about self-managed abortion and legal advice for those facing possible criminal prosecution for managing their abortion or assisting others to self-managed abortion.<sup>206</sup>

Texas was the first state to deploy the use of a civil enforcement mechanism to enforce a state's abortion ban through private civil suits. Texas' SB8 provides that any person can sue any person who induces or aids and abets a person to have an abortion after six-weeks, thereby deputizing private citizens to enforce the state's restrictive abortion law.<sup>207</sup> The statute provides for \$10,000 in statutory damages plus attorneys' fees.<sup>208</sup> Since that time, two other states have passed antiabortion civil bounty laws<sup>209</sup> and antiabortion lawmakers in at least half a dozen states have signaled their intention to pass SB8-style civil bounty laws in their states.<sup>210</sup> While antiabortion civil enforcement provisions

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<sup>205</sup> *Who Are We*, AIDACCESS, <https://aidaccess.org/en/page/561> (last visited Aug. 19, 2022).

<sup>206</sup> REPRO LEGAL HELPLINE, <http://www.reprolegalhelpline.org/>(last visited Aug. 19, 2022).

<sup>207</sup> S.B. 8, 87 Leg., Reg. Sess. (Tex. 2021) (codified as TEX. HEALTH & SAFETY CODE ANN. § 171.208 (2021)).

<sup>208</sup> SB8 § 171.208 (b) (providing for “statutory damages in an amount not less than \$10,000 for each abortion that the defendant performed or induced” in violation of the statute plus costs and attorneys’ fees).

<sup>209</sup> See IDAHO CODE ANN. § 18-8807(1) (2022) (allowing a suit by “any female upon whom an abortion has been attempted or performed, the father of the preborn child, a grandparent of the preborn child, a sibling of the preborn child, or an aunt or uncle of the preborn child” against “the medical professionals who knowingly or recklessly attempted, performed, or induced the abortion” for not less than \$20,000, and costs and attorneys’ fees); OKLA. STAT. 63 § 1-745.35 (2022) (allowing “any person” to “bring a civil action against any person” who “aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise” and providing statutory damages of a minimum of \$10,000)

<sup>210</sup> See Meryl Kornfield, et al., *Texas Created a Blueprint for Abortion Restrictions. Republican-Controlled States May Follow Suit*, WASH. POST (Sept. 3, 2021) (reporting that Republican leaders in Arkansas, Florida, South Carolina, South Dakota, Kentucky, and Louisiana have indicated that they are going to try to copy the Texas legislation); Daniel Politi, *At Least Seven GOP-Controlled States Look to Mimic Texas Anti-Abortion Law*, SLATE (Sept. 5, 2021) (stating



are aimed at providers and those who aid and abet a pregnant person seeking abortion, these civil bounty laws will result in increased surveillance of pregnant people by family, friends, co-workers, and disapproving neighbors.<sup>211</sup> The post-*Roe* legal landscape will see a rise in the use of civil suits brought by individuals whose reproductive privacy has been violated by third parties who have been incentivized by antiabortion bounty provisions. New York's governor signed into law a bill that provides a civil cause of action for unlawful interference with reproductive health care to New York residents as well as those who travel to New York for reproductive healthcare.<sup>212</sup> The law allows individuals to sue a person or entity that brings a cause of action in any court in the United States based on allegations that the party accessed or aided and abetted another to access reproductive health care in New York.<sup>213</sup>

Abortion restrictions in the post-*Roe* landscape have already begun to impact the practice of reproductive health care.<sup>214</sup> It is impossible to isolate abortion care from other areas of women's reproductive healthcare, including miscarriage management and treatment for ectopic pregnancies.<sup>215</sup> Abortion is medically indicated when a woman has an ectopic pregnancy, that is a preg-

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that as many as a quarter of states are expected to introduce SB8-style abortion restrictions). A template of the SB8-style Heartbeat Act was issued by the National Association of Christian Lawmakers for state lawmakers to follow, [https://christianlawmakers.com/wp-content/themes/nacl-simple-theme/assets/docs/20210722\\_NACL\\_NLC\\_Heartbeat\\_Model.pdf](https://christianlawmakers.com/wp-content/themes/nacl-simple-theme/assets/docs/20210722_NACL_NLC_Heartbeat_Model.pdf).

<sup>211</sup> See Yvonne Lindgren & Nancy Levit, *Civil Law's Potential to Protect Reproductive Privacy*, [https://papers.ssrn.com/so13/papers.Cfm?abstract\\_id=4200590](https://papers.ssrn.com/so13/papers.Cfm?abstract_id=4200590).

<sup>212</sup> The Freedom from Interference with Reproductive and Endocrine Health Advocacy and Travel Exercise Act, S9039A § 2 (May 4, 2022), <https://www.nysenate.gov/legislation/bills/2021/S9039>.

<sup>213</sup> *Id.* § 70-b(1) & (2). The cause of action for interference with reproductive health care does not preclude the party from also seeking recovery under other common law claims. *Id.* § 5.

<sup>214</sup> See, Wendy Bach, Naomi Cahn & Maxine Eichner, *Opinion: Conflicting Abortion Laws Are Making Women's Reproductive Care a Quagmire*, THE HILL (July 27, 2022), <https://thehill.com/opinion/healthcare/3574897-conflicting-abortion-laws-are-making-womens-reproductive-care-a-quagmire/> (noting that "with clashing state and federal laws, doctors are worried they might get sued over life-saving care, even in states where abortion is still legal.").

<sup>215</sup> Maya Manian, *The Consequences of Abortion Restrictions on Women's Healthcare*, 71 WASH. & LEE L. REV. 1317, 1319 (2014).

nancy that implants in the fallopian tubes or some other location outside of the uterus.<sup>216</sup> An ectopic pregnancy cannot be carried to term, despite fertilization, and if left untreated can rupture or hemorrhage which could be fatal.<sup>217</sup> Approximately one in fifty pregnancies is ectopic and ectopic pregnancy is the leading cause of death for pregnant people in the first trimester.<sup>218</sup> Doctors are unclear if treatment for ectopic pregnancy falls within the vaguely worded “emergency exception” in abortion laws.<sup>219</sup> The lack of clarity has been compounded by the fact that lawmakers have sought to criminalize treatment for ectopic pregnancy under state abortion bans. A Missouri lawmaker introduced a bill that would have made it a felony for a doctor to perform an abortion “on a woman who has an ectopic pregnancy.”<sup>220</sup> A similar Ohio bill would require doctors to “reimplant an ectopic pregnancy” into a woman’s uterus, which is not a procedure that exists in medical science.<sup>221</sup>

Abortion is also the treatment for an incomplete miscarriage to prevent infection and stop patients from hemorrhaging. Re-

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<sup>216</sup> *Tubal Ectopic Pregnancy*, 193 ACOG CLINICAL PRACTICE BULL. (Mar. 2018), [https://www.acog.org/clinical/clinical-guidance/practice-bulletin/articles/2018/03/tubal-ectopic-pregnancy?utm\\_source=redirect&utm\\_medium=web&utm\\_campaign=otn](https://www.acog.org/clinical/clinical-guidance/practice-bulletin/articles/2018/03/tubal-ectopic-pregnancy?utm_source=redirect&utm_medium=web&utm_campaign=otn).

<sup>217</sup> Anne Marie Nybo Andersen et al., *Maternal Age and Fetal Loss: Population Based Register Linkage Study*, 320 BMJ 1708 (June 24, 2000).

<sup>218</sup> Julia Ries, *Ectopic Pregnancies Are Dangerous, Will They Be Affected by Abortion Bans?*, HEALTHLINE (May 11, 2022), <https://www.healthline.com/health-news/ectopic-pregnancy-and-abortion-laws-what-to-know>.

<sup>219</sup> Missouri law describes medical emergency as a condition requiring “immediate abortion” to prevent death “or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman.” Arkansas and Oklahoma define medical emergency as when the pregnant person’s “life is endangered by a physical disorder, physical illness, or physical injury,” while Texas has a medical emergency exception but does not define the term. Olivia Goldhill, “*A Scary Time*”: *Fear of Prosecution Forces Doctors to Choose Between Protecting Themselves or Their Patients*, STAT (July 5, 2022), <https://www.statnews.com/2022/07/05/a-scary-time-fear-of-prosecution-forces-doctors-to-choose-between-protecting-themselves-or-their-patients/>.

<sup>220</sup> HB 2810, 101st Gen. Assemb., 2d Reg. Sess., <https://house.mo.gov/billtracking/bills221/hlrbillspdf/5798H.01I.pdf>.

<sup>221</sup> H.B. 182, 133rd Gen. Assemb. Reg. Sess. (2019-2020), [https://searchprod.lis.state.oh.us/solarapi/v1/general\\_assembly\\_133/bills/hb182/IN/00?format=pdf](https://searchprod.lis.state.oh.us/solarapi/v1/general_assembly_133/bills/hb182/IN/00?format=pdf).

search on Catholic hospitals reveals that restrictions on abortion in Catholic-owned hospitals forced doctors to delay care or transport miscarrying patients to non-Catholic owned hospitals when fetal heart tones were still present.<sup>222</sup> There was a wide degree of interpretation among Catholic hospital ethics committees about how close to death a woman must be before the abortion procedure would be permissible to preserve the life of the woman.<sup>223</sup> Only days after Texas' SB8 took effect that outlawed abortion after six weeks, a woman in Texas went into premature labor at 19 weeks gestation.<sup>224</sup> Her doctors considered performing an abortion since the pregnancy could not be saved and they feared sepsis if they delayed, but concluded that they could not treat her under Texas' new law because fetal heart tones were still detectable.<sup>225</sup> They found a provider in Colorado and the patient boarded a plane while miscarrying and flew to Colorado to obtain the care she needed.<sup>226</sup> Miscarriage management and treatment of ectopic pregnancy are but two examples of how the *Dobbs* decision, which returns the issue of abortion to the states, recasts essential abortion related healthcare—what the *Roe* Court described as “inherently, and primarily, a medical decision”<sup>227</sup>—into a political question to be negotiated by state legislatures through a political process.

The legal terrain is fraught for doctors treating people suffering from reproductive health complications such as miscarriage and ectopic pregnancy. For example, Missouri's law imposes criminal liability for doctors who violate the state's ban and healthcare providers in the state are unclear about the scope of the law's “medical emergency” exception.<sup>228</sup> In the weeks af-

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<sup>222</sup> Lori R. Freedman et al., *When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, 98 AM. J. PUB. HEALTH (Oct. 2008).

<sup>223</sup> *Id.*

<sup>224</sup> Sarah McCammon & Lauren Hodges, *Doctors' Worst Fears About the Texas Abortion Law Are Coming True*, NPR NEWS (Mar. 1, 2022), <https://www.npr.org/2022/02/28/1083536401/texas-abortion-law-6-months>.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Roe*, 410 U.S. at 166.

<sup>228</sup> MO. REV. STAT. § 188.017 Right to Life of the Unborn Child Act, Title XII Public Health & Welfare (June 24, 2022), <https://revisor.mo.gov/main/OneSection.aspx?section=188.017&bid=47548>. Missouri's law describes medical emergency as a condition requiring “immediate abortion” to prevent death “or

ter Missouri's trigger law took effect, St. Luke's Health System, which operates seventeen hospitals and clinics in the Kansas City area, announced that it would stop providing emergency contraception for fear it violated the state's abortion ban, and then changed course the following day when Missouri's Attorney General Eric Schmidt's office clarified that the law does not prohibit Plan B or other forms of contraception.<sup>229</sup> Emergency contraception is primarily offered by health care providers to patients who have been victims of sexual assault. A large health system in Virginia where abortion remains legal through the second trimester paused prescribing and filling prescriptions for methotrexate, a drug that can be used for abortion but is also a treatment for patients with arthritis, and is standard off-label medication for autoimmune conditions such as lupus.<sup>230</sup> Physicians fear repercussions for prescribing or filling prescriptions if the drug inadvertently causes pregnancy loss in patients taking the drug as a rheumatology treatment.<sup>231</sup> The steep criminal penalties for providers who violate a state's abortion ban means that providers are erring on the side of caution so as not to be prosecuted by a zealous prosecutor eager to make a name for themselves as a champion of fetal life.<sup>232</sup> These are not idle concerns, as an Indiana prosecutor publicly vowed to prosecute an Indiana doctor who provided an abortion to a ten-year old rape victim from Ohio who had to cross state lines to obtain abortion

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for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman.” Jan van Dis, a professor of obstetrics and gynecology at University of Rochester Medical Center in New York, tweeted that doctors in Missouri were now waiting to treat ectopic pregnancies until their patients had falling hemoglobin levels — an indication of blood loss — or unstable vital signs before they would treat them for fear of criminal liability. Jan van Dis, TWITTER (June 28, 2022), <https://t.co/HwYEMz67su> / Twitter. .

<sup>229</sup> Johnathan Shorman, *Kansas City Area Health System Stops Providing Plan B in Missouri Because of Abortion Ban*, KC STAR (July 1, 2022), <https://amp.kansascity.com/news/politics-government/article262988028.html>.

<sup>230</sup> Goldhill, *supra* note 218.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* (remarking that because state abortion laws are often vague about what constitutes a medical emergency, this places providers and hospitals at risk of being second-guessed by prosecutors. As one health care attorney for a Missouri hospital described, “This is a scary time. If you have a state that wants to set an example, they’re looking for cases to prosecute.”).

care that was foreclosed by Ohio's total abortion ban that lacked a rape or incest exception.<sup>233</sup> In Missouri, every abortion must be reported to the state, and prosecutors can request a court order to examine records and confirm a medical emergency was present.<sup>234</sup> With a criminal abortion ban in place, doctors have had to turn to lawyers and ethicists instead of to colleagues and trusted medical texts, when determining treatment decisions.<sup>235</sup> As the American College of Obstetricians and Gynecologists has described, the uncertainty may result in delays in life-saving treatment while doctors seek legal advice for fear of criminal prosecution.<sup>236</sup>

The impact of abortion restrictions on assisted reproductive technology is also causing reverberations in states that ban abortion.<sup>237</sup> Fertility doctors sometimes need to do a "selective reduction" procedure to reduce the number of implanted embryos to a safe number in rare instances where hormone therapy has resulted in multiple fetuses, a procedure that would likely fall

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<sup>233</sup> Alice Mirand Ollstein, *Indiana AG Eyes Criminal Prosecution of 10-Year-Old Rape Victim's Abortion Doc*, POLITICO (July 14, 2022 3:37 PM EDT), <https://www.politico.com/news/2022/07/14/indiana-abortion-rape-ohio-00045899>.

<sup>234</sup> MO. REV. STAT. § 188.052 (Aug. 29, 2019); 19 C.S.R. 30-30.060 (3)(A)-(D) Standards for the Operation of Abortion Facilities – Records and Reports; Goldhill, *supra* note 218 (describing the Missouri law that requires abortion reporting and the right of prosecutors to review medical records to confirm medical emergencies.). See generally *Abortion Reporting Requirements*, GUTTMACHER INST. (Aug. 1, 2022), <https://www.guttmacher.org/state-policy/explore/abortion-reporting-requirements>.

<sup>235</sup> Goldhill, *supra* note 218 (reviewing the case of a doctor whose patient was experiencing an ectopic pregnancy and needed immediate surgery because it was in danger of rupturing, but the doctor discovered she would have to present her case to a hospital ethics committee before she could proceed with surgery).

<sup>236</sup> ACOG Practice Management, *Questions to Help Hospital Systems Prepare for the Widespread and Devastating Impacts of a Post-Roe Legal Landscape* (June 24, 2022), <https://www.acog.org/news/news-articles/2022/06/questions-to-help-hospital-systems-prepare-for-the-widespread-and-devastating-impacts-of-a-post-ro-e-legal-landscape>.

<sup>237</sup> See May Manian, *Lessons from Personhood's Defeat*, 74 OHIO ST. L.J. 75, 91-93 (2013) (discussing the impact of fetal personhood laws on infertility treatment).

within a state's abortion ban.<sup>238</sup> Fertility treatments like IVF likely are not impacted by the current trigger laws that are in effect because while the laws define an “unborn child” as beginning at fertilization, the laws define abortion as an action on a pregnant woman and apply only in the context of abortion.<sup>239</sup> However, fertility treatments such as in vitro fertilization could be banned in states that may pass future fetal personhood laws.<sup>240</sup> As described earlier, the dissent raised the possibility of a federal fetal personhood law being passed in the post-*Roe* future.<sup>241</sup> If an embryo is granted full constitutional rights of personhood, then genetic testing and destroying unused embryos would be illegal.<sup>242</sup> As described earlier, the *Dobbs* decision left open the possibility of states passing fetal personhood laws and at least eight states are considering such laws.<sup>243</sup> People storing frozen embryos in fertility clinics in abortion restrictive states are considering moving them to abortion protective states because of fears that a fetal personhood amendment or a broad interpretation of an abortion ban may prohibit them from destroying unused embryos in the future.<sup>244</sup>

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<sup>238</sup> Myah Ward, *How Abortion Bans Might Affect IVF*, POLITICO (May 23, 2022), <https://www.politico.com/newsletters/politico-nightly/2022/05/23/how-abortion-bans-might-affect-ivf-00034409> (quoting Professor Seema Mohapatra explaining that selective reduction would likely meet the definition of abortion in states like Texas and Oklahoma.).

<sup>239</sup> See *State Abortion Trigger Laws' Potential Implications for Reproductive Medicine*, AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE (July 1, 2022), <https://www.asrm.org/news-and-publications/asrms-response-to-the-dobbs-v-jackson-ruling/dobbs/state-law-summaries/>.

<sup>240</sup> Michelle Jokisch Polo, *Infertility Patients Fear Abortion Bans Could Affect Access to IVF Treatment*, NPR NEWS (July 21, 2022), <https://www.npr.org/sections/health-shots/2022/07/21/1112127457/infertility-patients-fear-abortion-bans-could-affect-access-to-ivf-treatment> (quoting Professor Judith Daar on the potential impact of fetal personhood on outlawing IVF, “If the legislature does view the unborn human life at its earliest moments as something worthy of protection . . . then laws could move forward that are restrictive of in vitro fertilization.”).

<sup>241</sup> See *supra* text at notes 67-68.

<sup>242</sup> Polo, *supra* note 239.

<sup>243</sup> See *State Legislation Tracker*, *supra* note 105.

<sup>244</sup> Dominique Mosbergen, *Fertility Doctors Move Embryos, Expecting Abortion Law Changes*, WALL ST. J. (June 24, 2022), <https://www.wsj.com/articles/fertility-doctors-move-embryos-to-other-states-in-case-of-roe-v-wade-impact-11656063000> (reporting that fertility doctors in abortion restrictive states

## Conclusion

As the *Dobbs* Court observed, the judicial branch has no army with which to enforce its decisions, but rather its commands are followed because of the confidence that the American people place in the institution.<sup>245</sup> The *Dobbs* decision was handed down at a moment when confidence in the Supreme Court was at a historic low.<sup>246</sup> Not only did the American people express the lowest confidence in the Court since polling began, but a majority of people—representing both political parties—believe that the Court is primarily motivated by political agendas. In the wake of the *Dobbs* decision, scholars, lawyers, and policymakers have begun to forge new strategies for protecting abortion now that they have moved from a defensive to an offensive posture. New legal theories including religious freedom, Takings Clause, and reproductive justice implicit in the Reconstruction Amendments, have advanced abortion as a more capacious right than the original cramped vision set forth in *Roe*. Arguments are beginning to emerge that federal laws like EMTALA and FDA rulings preempt state laws that conflict with federal law. In the patchwork of state abortion laws that has come at *Roe*'s end, conflicts between states are emerging as states seek to enforce their abortion laws beyond their own state's borders and states seek to shield their own residents from liability by refusing to cooperate or recognize warrants, subpoenas, and damage awards from neighboring states. In the legal vacuum left when the federal floor protecting abortion was removed, states, municipali-

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had already begun to move embryos in anticipation of *Roe* being overturned); Polo, *supra* note 239 (describing that patients and clinics in abortion restrictive states are considering closing clinics or moving frozen embryos for fear of the impact of future fetal personhood laws.); *see also* Aria Bendix, *States Say Abortion Bans Don't Affect IVF. Providers and Lawyers Are Worried Anyway*, NBC NEWS (June 29, 2022), <https://www.nbcnews.com/health/health-news/states-say-abortion-bans-dont-affect-ivf-providers-lawyers-worry-rcna35556> (mentioning that “in states where abortion is outlawed, some clinics are considering moving embryos to places where they can discard them without legal questions” but are concerned with facing liability under a future fetal personhood law for transporting embryos across state lines to discard them.).

<sup>245</sup> *Dobbs*, 142 S. Ct. at 2278 (quoting Alexander Hamilton, that the judiciary has “neither Force nor Will” but rather the judiciary’s sole authority is to exercise its judgment.).

<sup>246</sup> *See supra* text at notes 67-73.

ties, and even individuals charged with enforcing the law, have vowed to chart their own course regardless of the new laws of their states.

The Court in *Dobbs* argued that the *Roe* decision had thrown American law into chaos,<sup>247</sup> but the chaos of the post-*Roe* world is only beginning to emerge.<sup>248</sup> Struggles over state sovereignty versus federal preemption strike at the foundation of the country's federalist system. Interstate conflicts between abortion restrictive and abortion protective states strain interstate comity.<sup>249</sup> Municipalities are breaking away from their state's abortion laws to provide "sanctuary" to those living within their city limits. Some scholars have observed that deputizing private citizens to enforce abortion bans and the level of conflict between states over the issue of abortion have not been seen since the days of fugitive slave laws.<sup>250</sup> Others have observed that the best analogy to post-*Roe* America is the era of Prohibition, in which Americans who agreed with the notion of temperance as a moral and religious mandate nonetheless bristled at being commanded by law to abide by morality imposed by the state.<sup>251</sup> Then, like now, entire states and municipalities openly flaunted

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<sup>247</sup> *Dobbs*, 142 S. Ct. at 2274-75 (describing the undue burden standard as unworkable, generating a long list of circuit conflicts, and describing issues on which the courts disagree).

<sup>248</sup> *Dobbs*, 142 S. Ct. at 2337 (joint opinion of Breyer, Sotomayor, and Kagan, JJ., dissenting) (citing Cohen, Donley, & Rebouché, *supra* note 114, at \_\_\_ (manuscript at 2)).

<sup>249</sup> Cohen, Donley, & Rebouché, *supra* note 114, at \_\_\_ (manuscript at 40).

<sup>250</sup> See Michael Hiltzik, *Threats to Criminalize Out-of-State Abortions Are a Scary Reminder of 1850s Americas*, L.A. TIMES (July 12, 2022 1:58 PM PDT), <https://www.latimes.com/business/story/2022-07-12/threats-to-criminalize-out-of-state-abortion>; Aziz Z. Huq, *What Texas's Abortion Law Has in Common with the Fugitive Slave Act*, WASH. POST (Nov. 1, 2021), <https://www.law.uchicago.edu/news/aziz-huq-finds-historical-parallels-texas-abortion-law>; Isabella Oishi, *Legal Vigilantism: A Discussion of the New Wave of Abortion Restrictions and the Fugitive Slave Acts*, 23 GEO. J. OF GENDER & THE LAW ONLINE (Spring 2022), <https://www.law.georgetown.edu/gender-journal/legal-vigilantism-a-discussion-of-the-new-wave-of-abortion-restrictions-and-the-fugitive-slave-acts/>.

<sup>251</sup> Michael Kazin, *Opinion: Even if Republicans Outlaw Abortion, Americans Will Soon Rebel*, N.Y. TIMES (July 11, 2022), <https://www.nytimes.com/2022/07/11/opinion/republicans-abortion-prohibition.html>.



the law.<sup>252</sup> All eyes are on the coming midterm elections to determine what impact the overturn of *Roe* will have on Americans' willingness to have the state dictate their private family lives.<sup>253</sup> If the Kansas constitutional amendment vote is a harbinger, those with deeply held beliefs that abortion is wrong under most circumstances may bristle at the state overreach that strips reproductive decisionmaking from its people.

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<sup>252</sup> *Id.* (describing that when the constitutional amendment passed, Catholic immigrants and their priests openly defied the law, and several cities, including San Francisco and New York, vowed not to enforce it in their cities, and Franklin Roosevelt was elected in part on a campaign promise to repel Prohibition).

<sup>253</sup> Katie Gueck and Shane Goldmacher, "Your Bedroom Is on the Ballot:" *How Democrats See Abortion Politics After Kansas*, N.Y. TIMES (Aug. 3, 2022), <https://www.nytimes.com/2022/08/03/us/politics/democrats-abortion-kansas.html>; Maggie Haberman & Michael Bender, *Trump, the Man Most Responsible for Ending Roe Fears It Could Hurt His Party*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/2022/06/24/us/politics/abortion-ruling-trump.html> (quoting former President Trump as saying that the overturn of *Roe v. Wade* could result in the Republican Party losing the support of suburban women voters).



## The Revised MMPI-3 and Forensic Child Custody Evaluations: A Primer for Family Lawyers

by  
Chris Mulchay\*

### INTRODUCTION

The Minnesota Multiphasic Personality Inventory (MMPI) is the most frequently used objective psychological test of personality, with many adherents and critics.<sup>1</sup> As the MMPI was increasingly used in child custody evaluations to evaluate parental capacity or fitness, the debate about the scope and application of the test became the source of disagreement among forensic psychologists, including articles recently published in this Journal.<sup>2</sup> This article, however, is not an attempt to resolve that debate since it is unlikely to be resolved any time soon. Assuming the criteria for qualification and admissibility of forensic expert opinion, and the use of testing data, meet state law requirements,<sup>3</sup> the

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<sup>1</sup> See Edward Helmes & John R. Reddon, *A Perspective on Developments in Assessing Psychopathology: A Critical Review of the MMPI and MMPI-2*, 113 PSYCHOL. BULL. 453, 467 (1993) (“For those who were critical of the original MMPI, the commonality of MMPI-2 with the original will bar its acceptance. For devotees of the MMPI, much that is new will be welcomed, and some that has been changed will be mourned.”).

<sup>2</sup> See Benjamin D. Garber & Robert A. Simon, *Individual Adult Psychometric Testing and Child Custody Evaluations: If the Shoe Doesn’t Fit, Don’t Wear It*, 30 J. AM. ACAD. MATRIM. LAW. 325 (2018); Sol R. Rappaport et al., *Psychological Testing Can Be of Significant Value in Child Custody Evaluations: Don’t Buy the Anti-Testing, Anti-Individual, Pro-Family Systems Woozle*, 30 J. AM. ACAD. MATRIM. LAW. 405 (2018).

<sup>3</sup> Federal and state courts have regularly approved of these tests as meeting the reliability prong of the *Daubert* test. See, e.g., *Jacquety v. Baptista*, 538 F. Supp. 3d 325, 372 (S.D.N.Y. 2021) (“Also of little significance, Petitioner faults Dr. Cling for not administering a test known as the MMPI to assess whether Geraldine was malingering, even though Petitioner’s questioning acknowledged that the MMPI is only “sometimes” used for that purpose. And Dr. Favaro tentatively testified that the MMPI “can contribute to the tool set” and

MMPI remains an accepted means of data collection for forensic evaluations in child custody cases.<sup>4</sup>

The purpose of this article, therefore, is to provide family court attorneys with information concerning the newest version of the MMPI, abbreviated as the MMPI-3. The MMPI-3 is principally coauthored by Yossef Ben-Porath and Auke Tellegen, and is a 335-item self-report inventory, and an immediate revision of the MMPI-2-RF.<sup>5</sup> Although the MMPI-3 is a very similar inven-

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“could have been useful,” but did not say that Dr. Cling’s decision not to use it nullified her methodology or her conclusions.”); *United States v. Ganadonegro*, 805 F. Supp. 2d 1188 (D. N.M. 2011) (accepting the expert’s use of the MMPI and the Rorschach tests as methodologically reliable); *Stokes v. Xerox Corp.*, No. 05-71683, 2008 WL 275672, at \*11 (E.D. Mich. Jan. 28, 2008) (rejecting the argument that the expert’s methodology was unreliable under *Daubert*, and finding that “the MMPI consists of data that is reasonably relied upon by experts in psychiatry in forming opinions”) (internal quotation marks and citation omitted).

<sup>4</sup> See, e.g., *In re K.L.R.*, 162 S.W.3d 291, 304 (Tex. 2005) (“According to Burress, she administered the Minnesota Multiphasic Personal Inventory (“MMPI”) to Carla. Burress agreed that the MMPI provides several sources of behavior and symptomatic hypotheses about the person taking the test. Further, she conducted an interview with Carla and observed K.L.R. at home, at her office, and at school. Nowhere does Burress state that her testimony properly relied upon and/or utilized principles involved in her field.”). The court noted that under Texas law,

Where, as here, the trial court must address a field of study aside from the hard sciences, such as the social sciences or a field based primarily upon experience and training as opposed to the scientific method, the requirement of reliability applies but with less vigor than to the hard sciences.

*Id.* at 303. The court went on to state that,

Burress described her qualifications, stated her opinions regarding K.L.R. and Carla, and related the bases of her opinions. Burress testified that she had a bachelor’s and master’s degree in counseling and a doctorate in counseling and student personnel guidance. Nowhere did Burress state that counseling is a legitimate field nor can such a statement be implied from her testimony.

*Id.*

<sup>5</sup> The internal debates among psychologists concerning the MMPI remains robust. See Yossef S. Ben-Porath & Auke Tellegen, *Leone, Mosticoni, Ianella, Biondi, and Butcher’s (2018) Effort to Compare the MMPI-2-RF with the MMPI-2 Falls Well Short*, 8 ARCHIVES ASSESSMENT PSYCHOL. 23, 28 (2018) (“This body of peer-reviewed MMPI-2-RF research, coupled with the unparalleled quantity and quality of empirical correlate data reported in the Technical

tory to the MMPI-2-RF, the MMPI updates include its normative data, as well as improved items, and improved scales. Attorneys need to understand the strengths and limitations of the MMPI-3 in the context of forensic parenting evaluations and how the new version may apply to clients and courts. Part 1 provides a history of the MMPI. In Part II, the article describes the new features of the MMPI. Part III addresses *Daubert* criteria. Part IV addresses the controversy of using psychological testing in family court evaluations, while Part V specifically addresses the use of the MMPI-3 in family court evaluations. The article closes with challenges to the MMPI-3.

## I. History

The MMPI was developed by Starke Hathaway and J. Charnley McKinley with the goal of obtaining more accurate diagnoses of hospitalized patients.<sup>6</sup> Yet their diagnostic system was very different from the contemporary model. The authors were guided by a Kraepelinian descriptive diagnostic classification system.<sup>7</sup> The key to the original MMPI was the authors' focus on comparing a patient's answer to groups of patients who answered in a similar manner. Although the authors used empirical keying to create eight clinical scales, the scales did not perform as planned. Instead of a straightforward analysis of elevated scores equating to specific diagnoses, the research eventually demonstrated that the MMPI was best used by examining empirical correlates to scales and profile configurations.

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Manual provides a comprehensive and modern empirical foundation linking the MMPI-2-RF to contemporary concepts and constructs in the fields of personality and psychopathology, and it can guide use of the inventory in empirically informed and conceptually grounded interpretation. Nothing comparable is available for the MMPI-2.”)

<sup>6</sup> See Starke J. Hathaway & J. Charnley McKinley, *A Multiphasic Personality Schedule (Minnesota): I. Construction of the Schedule*, 10 J. PSYCHOL. 249 (1940). For a summary of the MMPI's history, see Robert C. Colligan, *History and Development of the MMPI*, 15 PSYCHIATRIC ANN. 524 (1985).

<sup>7</sup> Kraepelin was guided by observations, which worked in many practical applications. However, there was also a focus on “natural entities” which has not aged well. See Hannah S. Decker, *How Kraepelinian Was Kraepelin? How Kraepelinian Are the Neo-Kraepelinians?—From Emil Kraepelin to DSM-III*, 18 HIST. PSYCHIATRY 337 (2007).

A new normative sample led to the MMPI-2 in the 1980s. The MMPI-2 maintained the original clinical scales to preserve the research and clinical familiarity of the inventory.<sup>8</sup> The MMPI-2 had 167 scales, many of which psychologists did not focus on.<sup>9</sup> The MMPI-2 was updated and restructured in 2008 with the MMPI-2-RF.<sup>10</sup> This 2008 version did not have new norms and it maintained the original item content. Yet, the item content was more efficient since it was trimmed from 567 items to 338 items. A few major changes included improved psychometric properties, nongendered norms, and the integration of new, still groundbreaking models of psychopathology.

## II. New Features of the MMPI-3

### A. New Items and Scales

There are 72 items that are brand new to the MMPI-3. They have updated or revised awkward language in 43 items. There are five new scales: Combined Response Inconsistency, Eating Concerns, Compulsivity, Impulsivity, and Self-Importance. There are new content areas that assess eating concerns, impulsivity, and self-importance.

The new norms are impressive. The English-language normative sample was selected to approximate the 2020 census projections for race, ethnicity, education, and age. New to the MMPI-3 is a Spanish normative sample.

Most interesting, the MMPI-3 continues to use non-gender T scores, just like the MMPI-2-RF. This is important in some evaluations in which the federal Civil Rights Act of 1991 would prohibit the use of gendered norms in testing in some evaluations, such as personnel screenings.<sup>11</sup> For family court evaluations, this means that the mother's and the father's scores are not compared against their gender.

Most noteworthy for attorneys, the MMPI-3 has a number of comparison groups: Outpatient, Community Mental Health

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<sup>8</sup> See Ben-Porath & Tellegen, *supra* note 5.

<sup>9</sup> ROGER L. GREENE, THE MMPI-2/MMPI-2-RF: AN INTERPRETIVE MANUAL (2011).

<sup>10</sup> YOSSEF S. BEN-PORATH & AUKE TELLEGEN, MINNESOTA MULTIPHASIC PERSONALITY INVENTORY – 2 RESTRUCTURED FORM (2008).

<sup>11</sup> YOSSEF S. BEN-PORATH, INTERPRETING THE MMPI-2-RF (2012).

Center; Outpatient, Private Practice; Sexual Addiction Treatment Evaluator; Spine Surgery/Spinal Cord Stimulator Candidate; College Counseling Clinic; College Student; Forensic, Disability Claimant; Prison Inmate; Personnel Screening, Police Candidate; Personnel Screening, Corrections Officer Candidate; Personnel Screening, Dispatcher Candidate; Personnel Screening, Firefighters; Bariatric Surgery Candidate. Missing from this list are the Forensic, Child Custody Litigant and Forensic, Parental Fitness Evaluator comparison groups that exist for the MMPI-2-RF. Data is being collected for the child custody comparison group now.

#### B. *What's Included in the MMPI-3*

Five of the MMPI-2 RF scales were discontinued. The MMPI-3 has 52 scales, 10 validity scales, 3 higher-order scales, 8 restructured content scales, 26 specific problem scales (4 somatic/cognitive scales, 10 internalizing scales, 7 externalizing scales, and 5 interpersonal scales), and 5 Psy-5 Scales.

A key component of the MMPI-3 for forensic use is its 10 validity scales. While most forensic evaluators are likely to look for overreporting of symptoms in these validity scales, family court evaluators look closely at underreporting of symptoms in these validity scales because parents in family court often try to look good. Recent research has demonstrated that the MMPI-3 is very effective at identifying attempts to appear well-adjusted.<sup>12</sup>

The remaining 42 scales measure substantive clinical content. The 42 scales are organized in a hierarchical fashion with higher-order scales on top of this interpretive hierarchy. The three higher-order scales assess for broad-based domains of dysfunction that have been well-established in the psychopathology literature.<sup>13</sup> The higher-order scales differentiate among emotional/internalizing problems, thought dysfunction, and externalizing/behavioral problems.

At the mid-tier of the hierarchy are the eight restructured clinical scales: Demoralization, Somatic Complaints, Low Positive Emotions, Antisocial Behavior, Ideas of Persecution, Dys-

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<sup>12</sup> Megan R. Whitman et al., *Criterion Validity of MMPI-3 Scores in Pre-employment Evaluations of Public Safety Candidates*, 33 *PSYCHOL. ASSESSMENT* 1169 (2021).

<sup>13</sup> Martin Sellbom et al., *Mapping MMPI-3 Scales onto the Hierarchical Taxonomy of Psychopathology*, 33 *PSYCHOL. ASSESSMENT* 1153 (2021).

functional Negative Emotions, Aberrant Experiences, and Hypomanic Activation.

At the bottom of the interpretive hierarchy, there are 26 specific problem scales that are narrow in focus and measure specific maladaptive traits, symptoms, or constructs.

There are five personality psychopathology (PSY-5 Scales) which are meant to reflect dimensional models of personality disorders.<sup>14</sup> These domains are reflective of the trend toward more dimensional approaches, such as the factorial analysis-based on the Hierarchical Taxonomy of Psychopathology (HiTOP) model. The HiTOP model improves the organization and description of psychopathology by using empirical research to structure mental health symptoms into components or traits.

### *C. The Foundation of the MMPI-3 Has Been Subjected to Published Peer Reviews*

The test authors set out to create the MMPI-3 in a manner that “would allow test users to continue to rely on the empirical foundations of the MMPI-2-RF, including forensic population studies.”<sup>15</sup> Since this was a goal throughout the creation of the test, the authors conducted analyses to ensure that reliability and validity were maintained.

The MMPI-3 manual and the authors of the test are clear: the MMPI-2-RF research findings apply to the MMPI-3. The researchers looked at 38,850 correlations between the MMPI-2-RF and the MMPI-3. The researchers did this by comparing the scales that overlap between the MMPI-2-RF and the MMPI-3. The correlations can be found in Appendix E of the technical manual. Therefore, the extensive body of peer-reviewed publications on the MMPI-2-RF can be applied to the MMPI-3,<sup>16</sup> ad-

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<sup>14</sup> See, e.g., Allan R. Harkness et al., *The Personality Psychopathology-Five (PSY-5): Recent Constructive Replication and Assessment Literature Review*, 24 *PSYCHOL. ASSESSMENT* 432 (2012).

<sup>15</sup> Yossef S. Ben-Porath et al., *Using the MMPI-3 in Legal Settings*, 104 *J. PERSONALITY ASSESSMENT* 162 (2021).

<sup>16</sup> The five new scales on the MMPI-3 do not have MMPI-2-RF comparison scales. Attorneys interested in the literature on the peer-reviewed publications of the MMPI-2-RF can find a summary here: *MMPI-3 References by Topic* (Fall 2021), <https://www.upress.umn.edu/test-division/MMPI-2-RF/mmpi-2-rf-references>.



addressing the *Daubert* factor of whether a test has been subjected to peer review and publication.

That does not mean that the more than five hundred publications on the MMPI-2-RF apply to family court evaluations, if only because many of those studies do not address the issues before the family court judge. There still are important studies that do apply:

For instance, MMPI scales “L-r and K-r are able to differentiate between individuals instructed to underreport from those who responded to standard (honest) instructions to the test.”<sup>17</sup> Another study “showed consistency between T score elevations typically found on MMPI-2 Validity Scales L and K with scales L-r and K-r on the MMPI-2-RF.”<sup>18</sup> Another study identified that “the MMPI-2 scales for measuring IM (i.e., L, Mp, Wsd, and Od), discriminated in line with their model predictions, that is, higher scores in the sample where IM responding was suspected, that is, higher in child custody litigants than in normal individuals.”<sup>19</sup>

There is evidence that moderate mean T-score elevations on MMPI-2 scale Pa and MMPI-2-RF RC6 are both relatively common among child custody litigants as many aspects of the litigation may lead the litigant to endorse items that ask if they feel persecuted.<sup>20</sup> In comparing custody cases that involved child maltreatment to custody cases that did not involve child maltreatment, maltreatment profiles showed elevations five to seven points higher on “scales L-r, THD, RC3, RC6, and FML,” and “about four points higher on scales RC4, RC8, PSYC, and JCP.”<sup>21</sup> As noted above, due to the common feeling that their ex-spouse seeks to harm their reputation as a parent, “elevations were most likely to occur on RC6 compared to the other RC

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<sup>17</sup> Martin Sellbom & R. Michael Bagby, *Validity of the MMPI-2-RF (Restructured Form) L-r and K-r Scales in Detecting Underreporting in Clinical and Nonclinical Samples*, 20 *PSYCHOL. ASSESSMENT* 370 (2008).

<sup>18</sup> Cassandra M. Kauffman et al., *An Examination of the MMPI-2-RF (Restructured Form) with the MMPI-2 and MCMI-III of Child Custody Litigants*, 12(2) *J. CHILD CUSTODY* 129 (2015).

<sup>19</sup> Ramón Arce et al., *Assessing Impression Management with the MMPI-2 in Child Custody Litigation*, 22 *ASSESSMENT* 769 (2015).

<sup>20</sup> Elizabeth M. Archer et al., *MMPI-2-RF Characteristics of Custody Evaluation Litigants*, 19(1) *ASSESSMENT* 14 (2012).

<sup>21</sup> Terry B. Pinsoneault & Frank R. Ezzo, *A Comparison of MMPI-2-RF Profiles Between Child Maltreatment and Non-Maltreatment Custody Cases*, 12 *J. FORENSIC PSYCHOL. PRACT.* 227, 233 (2012).

Scales in a child custody sample. Specifically, 43% of the sample elevated RC6 at or above a T score of 55 and 14% elevated the Scale in the clinical range (T>65).”<sup>22</sup>

### **III. Psychological Testing in Family Court Evaluations**

#### *A. Psychological Tests and the Best Interests of the Child*

An ongoing debate has centered on the question of whether or not psychological testing, including the MMPI family of tests, are helpful in determining the best interests of the child in the context of child custody laws. First, testing of any kind is one of many data points that a qualified forensic evaluator should obtain.<sup>23</sup> Second, the interpretation of the data must be relevant as,

Psychologists strive to identify the psychological best interests of the child. To this end, they’re encouraged to weigh and incorporate such overlapping factors as family dynamics and interactions, cultural and environmental variables, relevant challenges, and aptitudes for all examined parties and the child’s educational, physical and psychological needs.<sup>24</sup>

In family court evaluations, the considerations of psychiatric diagnosis and psychopathology are only important to the extent that they might impact a parent’s ability to meet the best interest of the child. As has been articulated by David Martindale, and by me and my colleagues in Benjamin Garber et al., a mental disorder or evidence of psychopathology does not disqualify anyone from being a parent.<sup>25</sup>

Evaluators use psychological testing to develop hypotheses to explore the degree to which mental health difficulties might impact the parent’s ability do their job as a parent. Psychological

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<sup>22</sup> Kauffman et al., *supra* note 18, at 145.

<sup>23</sup> Marc J. Ackerman et al., *Child Custody Evaluation Practices: Where We Were, Where We Are, and Where We Are Going*, 52 *PROF. PSYCHOL.: RES. & PRAC.* 406 (2021); Mark L. Goldstein, *Ethical Issues in Child Custody Evaluations*, *HANDBOOK OF CHILD CUSTODY* 3 (2016).

<sup>24</sup> American Psychological Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, *AM. PSYCHOLOGIST* 863-67 (2010). <https://doi.org/10.1037/a0021250>.

<sup>25</sup> Benjamin Garber, Dana E. Prescott, & Chris Mulchay, *A PRACTICAL FIELD GUIDE TO UNDERSTANDING AND RESPONDING TO HIGH CONFLICT FAMILY RELATIONSHIPS: DYNAMICS NOT DIAGNOSES* (2021).

testing is frequently used in child custody evaluations, with the MMPI being the most popular, used in 75% of evaluations.<sup>26</sup>

Concerns about the use of testing in CCEs have been consistently raised for the past 35 years. The use of psychological testing in child custody evaluations was most recently criticized by using Timothy Tippins and Jeffrey Wittmann's 2005 level analysis:

Tippins and Wittmann provide precisely this degree of well-informed caution with regard to the conduct of CCEs in general.<sup>27</sup> They advise that the data obtained in the course of conducting a child custody evaluation should be understood at four distinct levels. At level I, the evaluator reports direct observations (e.g., Mother told Billy to clean up). At level II, the evaluator ties direct observations to established scientific constructs (e.g., Mother is authoritarian). At level III, the evaluator ties these inferences to the question before the court (e.g., Billy will benefit from an authoritarian parent's care). At level IV, the evaluator leaps from inference to address the ultimate question, that is, the future allocation of parenting rights and responsibilities (e.g., Billy should be placed primarily in his mother's care).

Borrowing from Tippins and Wittman, we recommend that testing data must be understood similarly. It is perfectly reasonable to report direct observations about how a parent behaved when taking a test and his or her specific responses (level I). It may even be reasonable to generate hypotheses about those behaviors as they may be relevant generic constructs such as parenting or co-parenting (level II). However, we strongly believe that leaping from these generic constructs to draw inferences about how the child's needs might best be served (level III) and how the ultimate question before the court should be resolved (level IV) is statistically, empirically, and ethically untenable.<sup>28</sup>

A hypothesis is a "tentative explanation" based on an observation and inferences.<sup>29</sup> "People are not very good at judging other people objectively, and most 'non-test' assessment proce-

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<sup>26</sup> Nicole Mathby & Marc Ackerman, *Guidelines, Research, and Daubert: How They Work Together and When They Differ*, Association of Family and Conciliation Courts 13th Symposium on Child Custody Evaluations, Denver, CO, United States (Nov. 8-10, 2018).

<sup>27</sup> See Timothy M. Tippins & Jeffrey P. Wittmann, *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 FAM. CT. REV. 193 (2005).

<sup>28</sup> Garber & Simon, *supra* note 2, at 325.

<sup>29</sup> John Y. Campbell, *Understanding Risk and Return*, 104 J. POL. ECON. 298 (1996).

dures involve subjective judgment.”<sup>30</sup> It is the “fallibility of human judgment” that has led to the increase in psychological testing. Sol Rappaport, Jonathan Gould, and Milfred Dale wrote “we believe psychological testing is the part of the evaluative process where the profession actually has the most empirical information, which is why we believe there is an appropriate place for psychological testing in custody evaluations.”<sup>31</sup>

When used in an evaluation, psychological testing is one method of data gathering in a multi-method approach. A multi-method examination includes interviews, observations, record review, and collateral contacts. It may also include psychological testing. If and when psychological testing is used, it should be guided by the standards for educational, and psychological testing, which was most recently released in 2014.<sup>32</sup>

Jonathan Gould and David Martindale provided attorneys with questions that might be useful in examining the relevance and reliability of a child custody evaluator’s selection, administration, scoring, and interpretation of psychological tests:

1. Upon what theoretical or rational basis was the test selected for use in the present evaluation?
2. Did each objective test possess the psychometric characteristics suggested by Otto and Edens (2003)? If not, why not?
3. Did the evaluator explain in the body of the report why each test was chosen and how its results would be used?
4. Has the evaluator reviewed and referenced in their report the peer-reviewed literature describing the use of this test in child custody assessment?
  - a. What literature supports its use?
  - b. What literature does not support its use?
5. Was each psychological test administered in a manner consistent with ethical standards and professional practice guidelines?
6. Was the specific test administered in a manner consistent with its standardized administration as described in the test manual?
7. Did the evaluator explain how test response style/bias was interpreted?
8. Did the evaluator seek external support from collateral sources to lend support to their interpretation of test scores?

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<sup>30</sup> CECIL R. REYNOLDS, ET AL., *MASTERING MODERN PSYCHOLOGICAL TESTING* 26 (2021).

<sup>31</sup> Rappaport et al., *supra* note 2, at 427.

<sup>32</sup> Richard Phelps, *Extended Comments on the Draft Standards for Educ. and Psychol. Testing*, 7 *NONPARTISAN EDUC. REV.* 1 (2011).

9. Was the choice of each objective test clearly relevant to answering the psycholegal questions that are the focus of the evaluation? [This may include explaining how one or more tests were chosen for the purpose of obtaining information concerning the test-taker's general mental/emotional functioning, as opposed to obtaining information that bears specifically on the psycholegal questions identified either in the court order or in the pleadings.]
  - a. If not, what is the justification for this choice?
10. Was the indirect relationship between choice of objective tests and the psycholegal questions clearly explained in the report?
11. Did the evaluator clearly identify the hypotheses drawn from the psychological test data?
12. Did the evaluator examine the support from other independent data sources for each of these hypotheses?
13. Did the evaluator compare discrete sources of data drawn from the objective test data and compare them to information obtained from third-party collateral sources?<sup>33</sup>

#### B. *The MMPI-3 in Family Court Evaluations*

Attorneys may be interested to know that the MMPI-3 does not directly address the psycho-legal issue. MMPI-3 results do not address specific psycho-legal questions in any type of forensic evaluation. Instead, the test results can be used to identify psychological dysfunction that might be relevant to the psycho-legal question.

The MMPI-3 does not directly measure functional parenting and it does not directly inform about an individual's ability to parent. To be clear, there is no research on predictive validity of actual parenting outcomes. Therefore, the MMPI-3 cannot be used to make any prediction of future parenting. The MMPI data indicate how a parent scored similarly to other people with research-based characteristics.<sup>34</sup>

The MMPI-3 validity scales can assist with identification of possible under-reporting.

A parent may deny or minimize challenges in an effort to look better than they functionally are on a day-to-day basis. "The MMPI-3 Validity Scales (particularly L and K) can play an important role in determining how the parent approached the test, which can, in turn, inform

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<sup>33</sup> Jonathan W. Gould & David A. Martindale, *Child Custody Evaluations: Current Literature and Practical Applications*, 11 HANDBOOK PSYCHOL. 101 (2013).

<sup>34</sup> Personal communication with Jay Flens, PhD. Jan. 4, 2022.

the examiner about how the individual may have approached the entire evaluation.<sup>35</sup>

The MMPI-3 can assess a parent's psychological functioning. During a custody evaluation, the test can provide an objective source of data regarding psychopathology and maladaptive personality traits. It is the evaluator's job to explain how the data on the MMPI-3 are related to the parenting issues before the court.

The MMPI-3 is focused on current psychological functioning.

Used within a multi-method approach to data gathering, psychological testing often helps evaluators develop hypotheses about the parties' behavioral tendencies, mental health issues, and psychological functioning as they may affect parenting, parent-to-parent communication, and other custody-related areas of concern.<sup>36</sup>

The MMPI-3 may be helpful when there are concerns that a parent's maladaptive personality is negatively impacting the children. Recent research has demonstrated associations between MMPI-3 substantive scale scores and the DSM-5 personality disorders.<sup>37</sup> Many attorneys and family court evaluators may hear one parent's allegations that the other parent has narcissism. Recent research links the MMP-3 Self-Importance scale to features of grandiose narcissism.<sup>38</sup>

#### **IV. Challenges to the MMPI-3**

The use of "the MMPI 'in court' may best be understood as a psychological test with relevance to the legal proceeding and psychometric reliability and validity used as part of a larger evaluative process."<sup>39</sup> The MMPI-3 can be used to assess the parent's response style, particularly whether they underreported symp-

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<sup>35</sup> Ben-Porath et al., *supra* note 15, at 168.

<sup>36</sup> Rappaport et al., *supra* note 2, at 405.

<sup>37</sup> Tiffany A. Brown & Martin Sellbom, *Associations Between MMPI-3 Scale Scores and the DSM-5 Personality Disorders*, 77 *J. CLINICAL PSYCHOL.* 2943 (2021).

<sup>38</sup> Martin Sellbom, *Examining the Criterion and Incremental Validity of the MMPI-3 Self-Importance Scale*, 33 *PSYCHOL. ASSESSMENT* 363 (2021); See Megan R. Whitman & Yossef S. Ben-Porath, *Distinctiveness of the MMPI-3 Self-Importance and Self-Doubt Scales*, 103 *J. PERSONALITY ASSESSMENT* 613 (2021).

<sup>39</sup> Ben-Porath et al., *supra* note 15, at 168.

toms. It can also be used to address symptoms of psychological functioning that may relate to parenting. This is a hypothesis-driven process that can inform the evaluator's next steps.

Multiple articles and books have addressed the MMPI's admissibility in *Frye* and *Daubert* jurisdictions. Most recent analysis of what happens to the MMPI in court can be found in articles by Ben-Porath et al.<sup>40</sup> and Neal et al.<sup>41</sup> Ben Porath et al. identified custody cases in which the MMPI data was noteworthy:

*In re B.M.*, 682 A.2d 477 (Vt. 1996) (the MMPI results were pertinent but could not be the sole justification for termination of parenting rights).

*Williams v. Williams*, 656 So.2d 325 (Miss. 1995) (The court properly relied on psychologist's evaluations of parentings, including MMPI).

*In re C.N.*, 2017 WL 571265 (Vt. 2017) (the MMPI results are relevant to parent fitness without total reliance).

Ben Porath et. al. also reviewed appellate cases in which the MMPI was limited. They found "virtually all decisions for limiting the MMPI focused on cases in which it had been used improperly."<sup>42</sup> Neal et al. reviewed both trial court and appellate cases.<sup>43</sup> These two articles may be helpful to attorneys interested in understanding when and why courts restricted the use of the MMPI.

The studies suggest "challenging the use of this measure on cross-examination is unlikely to be successful when the measure is used appropriately by a qualified evaluator."<sup>44</sup> As the debate continues regarding the use of psychological tests in CCEs, it is clear that if the MMPI-3 is to be used, it should be as part of a multi-method approach that includes interviews, behavioral observations, collateral interviews, and record reviews.

## V. Conclusion

The MMPI-3 is likely to become a widely used psychological test in family court evaluations. Given the authors' efforts to de-

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<sup>40</sup> See Ben-Porath et al., *supra* note 15.

<sup>41</sup> See Tess Neal, et al., *Psychological Assessments in Legal Contexts: Are Courts Keeping "Junk Science" Out of the Courtroom?*, 20 *Psychological Science in the Public Interest* 135 (2019).

<sup>42</sup> *Id.* at 8.

<sup>43</sup> Neal et al, *supra* note 41.

<sup>44</sup> Ben-Porath et al., *supra* note 15, at 173.

velop the test to withstand a *Daubert* challenge, attorneys are encouraged to focus their challenges on the methodology employed by the evaluator instead of the test itself. The results of the MMPI-3 do not address specific psycho-legal questions in any type of forensic evaluation. Instead, they can be used to identify psychological dysfunction that might be relevant to the psycho-legal question. Evaluators should use the test as a hypothesis generator in a multimethod multi-source approach to data gathering.



# Changing Norms in the United States for Resolving Custody Disputes Between a Parent and a Non-Parent

by  
J. Thomas Oldham\*

## I. Introduction

In the United States, a “parent” historically is a person who either has a genetic connection with a child or has adopted a child. This article discusses how various states decide a custody dispute between a legal parent and another person who is not a legal parent but who has a significant connection with the child. During the late twentieth century, many states adopted a strong parental presumption to resolve such custody disputes. Pursuant to the strong parental presumption, in a custody dispute between a parent and a third party, the parent is awarded custody unless the third party can establish that the parent is unfit or had abandoned the child.<sup>1</sup>

This strong parental presumption has more recently been increasingly criticized for a number of reasons in those situations where the third party contesting custody has established a strong bond with the child.<sup>2</sup> A number of states have modified the strong parental presumption referred to above in those situations where the third party desiring custody has become a “de facto parent” or “psychological parent” of the child.<sup>3</sup> This article will

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<sup>1</sup> See Susan E. Lawrence, *Substantive Due Process and Parental Rights: From Meyer v. Nebraska to Troxel v. Granville*, 8 J. L. & FAM. STUD. 71, 103 (2006).

<sup>2</sup> See generally Anne L. Alstott, Anne C. Dailey & Douglas NeJaime, *Psychological Parenthood*, 106 MINN. L. REV. \_\_\_\_ (forthcoming 2022); Courtney G. Joslin & Douglas NeJaime, *How Functional Parenthood Functions*, \_\_\_\_ COLUM. L. REV. \_\_\_\_ (forthcoming 2023).

<sup>3</sup> See, e.g., Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1 (2013).

survey the various approaches that have been adopted in different states to govern custody disputes where the dispute is between a parent and a third party who could be described as a de facto parent or psychological parent. In this article, I am generally critical of proposals to abolish the parental presumption when the non-parent is a de facto parent.

These disputes commonly arise in three different scenarios. The first is when a romantic partner or stepparent lives with the parent and the child for a period and then the relationship ends. The second instance arises when the romantic partner or stepparent lives with the primary caregiver and his or her child for a substantial period and then the parent dies. The third situation arises when the parent leaves the child with a friend or a family member for a significant time period and then desires to have the child live with the parent again.

A number of cases involve custody disputes between lesbian couples when they break up. In many instances, one member of the couple is the birth parent and the other is not a legal parent, normally because she never adopted the child. These cases present more complicated issues and are not addressed in any detail in this article.<sup>4</sup> Part II of this article discusses the rationale for the strong parental presumption and how it can be rebutted. Part III discusses the compromise position where there is a parental preference unless compelling circumstances exist. Section IV describes jurisdictions where no parental presumption is applied in custody disputes between a parent and a defacto parent or psychological parent. Part V evaluates the strengths and weaknesses of the various approaches. Finally, Part VI discusses the extent to which parents' constitutional rights are impacted by these approaches.

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<sup>4</sup> There is a rich literature on this specific topic. See generally Jessica Feinberg, *Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?*, 81 MO. L. REV. 331 (2016); Colleen Marea Quinn, *Riding the Storm Out After the Stonewall Riots: Subsequent Waves of LGBT Rights in Family Formation and Reproduction*, 54 U. RICH. L. REV. 733 (2020).

## II. The Strong Parental Presumption

### A. Rationale for the Strong Parental Presumption

The strong parental presumption in custody disputes between a “legal” parent and a non-parent is based on a few policy judgments. First, as a policy matter, courts generally express a desire to place a child with a legal parent rather than a third party. Most legal parents are genetically related to their child. As a result, compared to a non-parent, it is assumed that a parent on balance would have a stronger connection with, and interest in, the child. In addition, some commentators argue that a parent has a constitutional right to the custody of his or her child, unless it can be shown that placing the child with the parent presents a substantial risk of harm to the child.

### B. Rebutting the Strong Parental Presumption

As a result of the strong parental presumption approach, the parent normally will prevail in any custody dispute with a non-parent. This is true even in circumstances where it might be clear that the non-parent desiring custody appears to be a “better” parent.<sup>5</sup> One way a third party can rebut the strong parental presumption is to show that something about the lifestyle or parental skills of the parent would present a significant risk of harm to the child if primary custody would be awarded to the parent. If the third party cannot establish this, however, under the strong parental presumption approach, the parent generally prevails. A best interest analysis is not conducted.

In a custody dispute between a parent and a non-parent, the Massachusetts Supreme Judicial Court applied a strong parental presumption. The court ruled that, to rebut the parental presumption, the other party had to show that the parent was unfit. The court stated that the inquiry should be whether the parent or parents are “unsuitable or ill-adapted to serve [as parent] under the existing circumstances.”<sup>6</sup> The court discussed various situations where a parent might be considered unfit. Here the court

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<sup>5</sup> See *Lewelling v. Lewelling*, 796 S.W.2d 164, 167 (Tex. 1990).

<sup>6</sup> *R.D. v. A.H.*, 912 N.E.2d 958, 966 (Mass. 2009)(*quoting* *Hirshon v. Gormley*, 82 N.E.2d 811, 813 (Mass. 1948)).

did not find that the parent was unfit, so custody was awarded to the parent.<sup>7</sup>

A Mississippi case involved a custody dispute between a father and a stepfather after the mother (who had primary custody of the child) died. To rebut the parental presumption in Mississippi, the third party must show that the parent abandoned the child, engaged in immoral behavior detrimental to the child, or is unfit. The stepfather could not prove any of those three things, so the court awarded custody to the father.<sup>8</sup> Note that when applying a strong parental presumption, it is not relevant whether in this situation the stepfather would be considered a better custodian of the child. The stepfather could not rebut the parental presumption based on factors accepted in Mississippi, so the parent was granted custody, without a best interest analysis.

A Utah case involved a custody dispute between a lesbian couple when their relationship ended. One of the partners was the birth mother, while the other had assumed a parenting role but had not adopted the child. When their relationship ended, the woman who was not the birth mother sued for visitation. The Utah Supreme Court applied the strong parental presumption approach, ruling that the court cannot apply a best interest analysis to the custody issue unless the court first finds the mother was unfit. Because the trial court made no such finding, the court dismissed the custody petition. The court declined to adopt the *de facto* parent or the psychological parent doctrine to allow the former partner to seek visitation.<sup>9</sup>

In a similar Louisiana case, a female partner lived with the birth mother and her child for four years but did not adopt the child. When the romantic relationship between the birth mother and her partner ended, the partner sued for visitation. The Louisiana Supreme Court ruled that, before a court could engage in a best interest analysis, the partner would have to show that placing the child with the birth mother would substantially harm the child.<sup>10</sup>

A Virginia court also applied a strong parental presumption approach to a dispute between a lesbian couple when their rela-

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<sup>7</sup> *Id.* at 968.

<sup>8</sup> *Neely v. Welch*, 194 So.3d 149, 158 (Miss. Ct. App. 2016).

<sup>9</sup> *Jones v. Barlow*, 154 P.3d 808 (Utah 2007).

<sup>10</sup> *Cook v. Sullivan*, 330 So.3d 152 (La. 2021).

tionship ended. During their relationship, one partner gave birth. The other actively parented the child, but did not adopt it. When they separated, the woman who was not the birth mother sued for custody. The court of appeals rejected the de facto parent concept, which will be discussed in more detail below, and found that there was no basis for rebutting the parental presumption. The court rejected the custody claim by the partner, concluding that she had not established that the birth mother was unfit or had abandoned or voluntarily relinquished the child, and found that there was no proof of any extraordinary reason for placing the child with anyone other than the birth mother.<sup>11</sup>

Note that, pursuant to the strong parental presumption approach, courts generally do not focus on whether the child has established a strong bond and a stable family situation with a third party, which would be disrupted by awarding custody to the parent.

In Texas, if there is a custody dispute between a parent and a non-parent, the parent is to be awarded custody, unless the third party can establish that such an award would “significantly impair the child’s physical health or emotional development.”<sup>12</sup> Texas courts have not agreed regarding what types of evidence can rebut this parental presumption. Some courts have focused upon whether there is something about the lifestyle of the parent or lack of parenting ability that would likely harm the child if the child would be placed with the parent. For example, one court stated that relevant evidence could include evidence of physical abuse by the parent, severe neglect, abandonment, drug or alcohol abuse, immoral behavior, parental irresponsibility, mental disorders, frequent moves, bad judgment, and an unstable, disorganized, and chaotic lifestyle.<sup>13</sup>

Other Texas courts have considered other types of evidence when deciding whether the third party has rebutted the parental presumption. In another Texas case, the dispute was between the child’s mother and his stepmother.<sup>14</sup> As mentioned above, Texas generally applies the parental presumption.<sup>15</sup> In this case, the

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<sup>11</sup> Hawkins v. Grese, 809 S.E.2d 441 (Va. Ct. App. 2018).

<sup>12</sup> TEX. FAM. CODE ANN. § 153.131 (West 2021).

<sup>13</sup> *In re S. T.*, 508 S.W.3d 482, 492 (Tex. App. 2015).

<sup>14</sup> *In re R.T.K.*, 324 S.W.3d 896 (Tex. App. 2010).

<sup>15</sup> See TEX. FAM. CODE ANN. § 153.131 (West 2021).

mother and the father divorced when the child was two years old. The father remarried when his child was three. After the divorce of the mother and the father, the child lived with the father (and, beginning a year later, with his stepmother also). The father died when the child was nine. A custody dispute arose between the stepmother and the mother. The child testified that he wanted to keep living with the stepmother, and reacted very badly when temporarily placed with the mother. The trial court awarded primary custody to the stepmother, finding that placing the child with the mother would “significantly impair his emotional development”<sup>16</sup> (a finding that rebuts the parental presumption in Texas). This ruling was affirmed.

Note that the grounds accepted in this Texas case for rebutting the parental presumption had nothing to do with the parenting skills or lifestyle of the parent. The court focused upon whether placing the child with the parent would disrupt a stable family situation that had been established between the child and the third party. This is not generally accepted grounds for rebutting a strong parental presumption but, as will be seen below, would be accepted as a reason to rebut the parental presumption pursuant to other approaches toward this issue that have more recently been accepted. .

One way a third party can rebut the parental presumption under the strong parental presumption standard is to show that the parent “abandoned” the child. It frequently is not clear what needs to be shown to prove this. A few states have tried to clarify the standard. A Texas statute provides that there is no parental presumption if the parent has “voluntarily relinquished” actual care, control, and possession of the child to a non-parent for at least one year, and a portion of this period occurred within 90 days of the date of the filing of the custody petition.<sup>17</sup> A court concluded that this was established when the mother allowed the child to live with another family member for 14 months and gave the family member a power of attorney to enroll the child in school and to make medical decisions for the child.<sup>18</sup>

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<sup>16</sup> *R.T.K.*, 324 S.W.3d at 903.

<sup>17</sup> TEX. FAM. CODE ANN. § 153.373 (West 2021).

<sup>18</sup> *In re S.A.H.*, 420 S.W.3d 911, 923-24 (Tex. App. 2014).

Similar to the Texas statute, a New York statute provides that the parental presumption does not apply if the parent voluntarily relinquishes the care and control of a child so that the child lives with a grandparent, and the voluntary relinquishment lasts for a “prolonged period,” which is defined as at least 24 months.<sup>19</sup> A New York case considered what constitutes “voluntary relinquishment.” In this case, the child lived with the grandparent, but the parent had some contact with the child. The parent signed three documents giving the grandparent the right to make certain decisions regarding the child. The court concluded that, because in this instance the grandparent was essentially acting as a parent with primary physical custody, a voluntary relinquishment under the statute had occurred, despite the fact that the parent had some contact.<sup>20</sup>

The Idaho Supreme Court similarly has held that if a parent voluntarily relinquished a child to third party for a “long term,” this can be grounds to award custody to the non-parent.<sup>21</sup>

In contrast, in other states the parental presumption applies even in the face of proof of voluntary relinquishment. The Colorado Court of Appeals has stated that this result is mandated by the U.S. Supreme Court’s opinion in *Troxel v. Granville*.<sup>22</sup>

### **III. The Compromise Position - Apply the Parental Presumption Unless Compelling Circumstances Exist**

In some other states, in addition to the grounds for rebutting the parental presumption set forth above, the parental presumption can be rebutted if “compelling circumstances” justify it. To be able to rebut the parental presumption based on compelling circumstances, in some states the third-party challenger must establish that he or she is a de facto parent or a psychological parent.

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<sup>19</sup> N. Y. DOM. REL. LAW § 72 (McKinney 2021).

<sup>20</sup> *Suarez v. Williams*, 44 N.E.3d 915, 923 (N.Y. 2015).

<sup>21</sup> *Hernandez v. Hernandez*, 265 P.3d 495, 500 (Idaho 2011) (citing *Stockwell v. Stockwell*, 775 P.2d 611, 614 (Idaho 1989)).

<sup>22</sup> *In re E.S.*, 264 P.3d 623, 628 (Colo. App. 2011) (citing *Troxel v. Granville*, 530 U.S. 57 (2000)).

A Pennsylvania case involved a custody dispute between a stepfather and the father. The father and the mother had a brief marriage and divorced when the child was one year old. The mother then married another man, who lived with the child since the child was a year old. The child developed a close relationship with the stepfather, referring to him as “daddy.” Five years after the mother married the stepfather, the mother died of cancer.

A custody dispute arose between the stepfather and the father. There was expert testimony from two therapists recommending that the child live with the stepfather. The child expressed a wish to stay with the stepfather. The child (who was eight years old at the time of trial) and stepfather were living in Pittsburgh, and to live with his father he would need to move to New Jersey. The trial court concluded that, despite the parental presumption, even though it had not been established that the father was unfit, there were compelling reasons to award primary custody to the stepfather. The appellate court affirmed the award of custody to the stepfather.<sup>23</sup>

California has adopted a statute providing that, in a dispute between a parent and a non-parent, to obtain custody the non-parent must prove that placing the child with the parent would be detrimental to the child. The statute provides that this standard can be satisfied by showing that it would harm the child to remove him or her from a stable placement of the child with a person who had assumed the role of the child’s parent.<sup>24</sup>

A South Carolina case involved a situation in which an unmarried woman gave birth to a child after a brief relationship with a man. The woman lived in Florida and sometimes went to South Carolina (where the father lived) so the father could spend time with the child. The woman’s father provided financial support to both the mother and her child, as well as a place for them to live in Florida. The grandfather helped her care for the child when they were in Florida. The mother killed herself when the child was five. A custody dispute between her father and the child’s father arose.

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<sup>23</sup> Charles v. Stehlik, 744 A.2d 1255 (Pa. 2000).

<sup>24</sup> CAL. FAM. CODE § 3041 (West 2022).



The court of appeals ruled that, despite the parental presumption, the presumption was rebutted in this case. The court found that the grandfather was the “de facto custodian” of the child under South Carolina law<sup>25</sup> because the child had lived with the grandfather for over half his life, the grandfather was the psychological parent, the grandfather had provided financial support, and he was actively a part of the child’s daily care. In contrast, the father had very little contact with the child and provided limited financial support. Because the grandfather was a de facto custodian of his grandchild, he could rebut the parental presumption with proof of compelling circumstances. While the court ruled that the father was a fit parent, the court of appeals ruled that the grandfather had established such compelling circumstances, in light of the strong attachment the grandfather had with his grandchild.<sup>26</sup>

In a Nebraska case, the birth parents separated after they had lived together for seven or eight months after their child Destiny was born. After that, Destiny lived for periods with one or the other parent. In February 2014, during a period when the Destiny was living with her mother, the mother was incarcerated for drug activity. During the period of the mother’s incarceration, Destiny stayed with Jo, a longtime family friend. When the mother was released from prison in late 2014, she allowed her daughter to keep living with Jo while the mother tried to create a more stable life. By the summer of 2017, the mother contacted Jo and told her that she was now in a position to take care of her daughter. At that time, Jo and Destiny had been living together for more than three years in Gretna, Nebraska, where the girl had many friends. The mother wanted her to relocate to Lincoln, Nebraska to live with her. Jo was concerned that such a move would be detrimental to the child. Destiny’s father testified in the custody dispute that arose that Destiny wanted to stay with Jo in Gretna and graduate from the high that she had been attending. Destiny had attended a number of different schools in Lincoln when she was younger. A therapist who had counseled Destiny for a substantial period while she was living with Jo testified that Destiny’s behavior significantly improved while she was

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<sup>25</sup> S.C. CODE ANN. § 63-15-60 (2021).

<sup>26</sup> *Alukonis v. Smith*, 846 S.E.2d 600 (S.C. Ct. App. 2020).

living with Jo. The therapist also testified that, after she visited her mother during that period, she became more depressed and agitated. The therapist believed it was in Destiny's best interest to remain in Gretna with Jo. During the period Destiny lived with Jo, Destiny's grades in school also significantly improved.

The district court found that, at the time of trial, the mother was a fit parent, and that Jo stood in loco parentis to Destiny, because she had been assuming parental obligations for Destiny for a significant period. In such a situation, there was still a parental preference in favor of the mother. However, the district court concluded that, in this instance, Jo had established by clear and convincing evidence that it was in Destiny's best interest to remain with Jo, and awarded primary custody to Jo.

On appeal to the Nebraska Supreme Court, the court stated that, in a custody dispute between a fit parent and a third party, the parental preference should be rebutted only in an exceptional case. In such an exceptional case, the third party must prove that placing the child with the parent will cause serious physical or psychological harm to the child, or a substantial likelihood of such harm. Because the district court did not apply this standard, the district court's custody order was reversed, so the district court could reevaluate the case under the standard set forth by the supreme court.<sup>27</sup>

Colorado has adopted a rule that, in a custody dispute between a parent and a non-parent, the parent should prevail unless the non-parent can show that "special factors" are present that justify rebutting the parental presumption.<sup>28</sup> In Arizona, a non-parent may make a claim for custody over the objection of parent if the non-parent can show that (1) the claimant stands in loco parentis to the child, and (2) placing the child with the parent would be significantly detrimental to the child, and (3) there are other applicable circumstances (such as one parent is dead).<sup>29</sup> Even if the claimant can satisfy this standard, the parental pre-

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<sup>27</sup> *State ex rel. Tina K. v. Adam B.*, 948 N.W.2d 182 (Neb. 2020).

<sup>28</sup> *In re B. J.*, 242 P.3d 1128 (Colo. 2010); *In re E.S.*, 264 P.3d 623 (Colo. 2011).

<sup>29</sup> ARIZ. REV. STAT. ANN. § 25-409 (2013).

sumption must still be rebutted. In a few recent cases, grandparents have successfully done so.<sup>30</sup>

#### **IV. Apply No Parental Presumption in a Custody Dispute Between a Parent and a De Facto Parent or Psychological Parent**

New Jersey has announced a rule that, in a custody dispute between a parent and a non-parent, there is no parental presumption if the non-parent can show that he or she is a “psychological parent” of the child. If the non-parent can establish this, the issue becomes what custody placement would be in the child’s best interest.<sup>31</sup> To prove that the person is a psychological parent, he or she must show that (1) the parent consented to, and fostered, the parent-like relationship between the child and the claimant, (2) the claimant and the child lived together in the same household, (3) the claimant assumed the obligations of parenthood by taking significant responsibility for the child’s care, education, and development, without expecting compensation, and (4) the claimant has assumed a parental role for sufficient length of time to have established a bonded relationship with the child that is parental in nature.<sup>32</sup>

Under the New Jersey approach, the psychological parent is not considered a legal parent.<sup>33</sup> The designation as a psychological parent merely makes it easier for a court to award custody to that person. A number of other courts have granted non-parents visitation or custody when the court has found that the party was the de facto parent or a psychological parent.<sup>34</sup>

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<sup>30</sup> See *Chapman v. Hopkins*, 404 P.3d 638 (Ariz. Ct. App. 2017); *Bundy v. Alford*, No. 1 CA–CV 16–0419 FC, 2017 WL 1325217 (Ariz. Ct. App. Apr. 11, 2017).

<sup>31</sup> *V.C. v. M.J.B.*, 748 A.2d 539, 554 (N.J. 2000).

<sup>32</sup> *Id.* at 551 (citing *In re Custody of H.S.H.-K*, 553 N.W.2d 419, 421 (Wis. 1995)); See also *P.B. v. T. H.*, 851 A.2d 780, 789-790 (N.J. Super. Ct. App. Div. 2004).

<sup>33</sup> *Tortorice v. Vanartsdalen*, 27 A.3d 1247, 1251 (N.J. Super. Ct. App. Div. 2011).

<sup>34</sup> See Jeff Atkinson & Barbara Atwood, *Moving Beyond Troxel: The Uniform Nonparent Custody and Visitation Act*, 52 FAM. L.Q. 479, 488 n.59 (2018).

In Washington, to be designated a de facto parent it must be established that the person (1) resided with the child in the same household for a significant period, (2) the person engaged in consistent caretaking for the child, (3) the person undertook full and permanent responsibilities for the child without the expectation of compensation, (4) the person held out the child as the person's child, (5) the person has established a bonded relationship with the child that is parental in nature, (6) the other parent fostered or supported the bonded relationship between the person and the child, and (7) continuing the relationship between the individual and the child is in the best interest of the child.<sup>35</sup> In Washington (as well as in Delaware, Maine, and Vermont, discussed below), if a person is found to be a de facto parent, this creates a legally recognized parent-child relationship. Because of this, in any dispute between a de facto parent and another legally recognized parent, there is no parental presumption.

Delaware has created a more streamlined set of requirements to be designated a de facto parent. In Delaware, it must be established that (1) the parent supported and consented to the establishment of a parent-child relationship between the person and the child, (2) the person has exercised parental responsibility for the child, and (3) the person has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.<sup>36</sup> Maine has also adopted a similar procedure for a person to be designated a de facto parent,<sup>37</sup> as has Vermont.<sup>38</sup>

In addition to the statutory acceptance of de facto parenthood in a number of states, the Maryland Court of Appeals has judicially adopted de facto parenthood as a way to create a legal parent-child relationship in Maryland.<sup>39</sup> To be designated a de facto parent the petitioning party must show that 1) the legal parent consented to, and fostered, the petitioner's parent-like relationship with the child, 2) the petitioner and the child lived together in the same household, 3) the petitioner as-

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<sup>35</sup> WASH. REV. CODE § 26.26A.440 (2022); *See In re Parentage of L.J.M.*, 476 P.3d 636 (Wash. Ct. App. 2020).

<sup>36</sup> 13 DEL. CODE ANN. tit. 13, § 8-201 (West 2021).

<sup>37</sup> ME REV. STAT. ANN. tit. 19-A, § 1891 (2021).

<sup>38</sup> VT. STAT. ANN. tit. 15C, § 501 (West 2022).

<sup>39</sup> *Conover v. Conover*, 146 A.3d 433, 453 (Md. 2016).

sumed obligations of parenthood by taking significant responsibility for the child's care, and 4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded relationship that is parental in nature.<sup>40</sup>

The current draft of the Restatement of Children and the Law being prepared by the American Law Institute provides that, in a custody dispute between a third party and a parent, if the third party proves that he or she is a de facto parent of the child, the dispute should be resolved on a best interests basis.<sup>41</sup>

## V. Discussion

Many states usually apply a parental presumption if there is a custody dispute between a parent and a non-parent. It was mentioned above that states disagree about how long a parent needs to “voluntarily relinquish” custody of a child to a third party before there should no longer be a parental presumption in a custody dispute.<sup>42</sup> In Texas, this occurs when a parent has left their child with another for more than one year,<sup>43</sup> while the rule in New York holds that this occurs after two years.<sup>44</sup>

The custody dispute in the famous case of *Painter v. Bannister*<sup>45</sup> arose when Harold Painter's wife and his daughter were killed in a car accident. Harold was in shock, and asked his former wife's parents to care for his son while Harold grieved, which the grandparents agreed to do. After about 18 months, when Harold had remarried, he informed his former in-laws that he was ready to resume caring for his son. The grandparents, who did not want to let Harold take his son, initiated a custody action and requested that they should be named primary custodians for their grandchild. Despite the fact that the court found Harold to be a fit parent, due to expert testimony and because the court perceived that the grandparents' household would much more stable than Harold's household, the Iowa Supreme

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<sup>40</sup> Kpetigo v. Kpetigo, 192 A.3d 929, 936 (Md. Ct. Spec. App. 2018) (citing *In re Custody of H.S.H.-K*, 553 N.W.2d 419, 421 (Wis. 1995)).

<sup>41</sup> See RESTATEMENT OF CHILD. AND THE LAW §§ 1.80-1.82 (AM. L. INST., Tentative Draft No. 2, Mar. 20, 2019).

<sup>42</sup> See *supra* text accompanying notes 20-24.

<sup>43</sup> TEX. FAM. CODE ANN. § 153.373 (West 2021).

<sup>44</sup> N.Y. DOM REL. LAW § 72 (McKinney 2021).

<sup>45</sup> *Painter v. Bannister*, 140 N.W.2d 152 (Iowa 1966).

Court reversed the trial court and ruled that the grandparents should get custody of the seven-year-old boy.

A Texas court may well agree with the Iowa Supreme Court in such a situation. Because Harold had left his son with the grandparents for more than one year, the case would be decided on a best interests basis without a parental presumption. A New York court might reach the opposite conclusion, because Harold had not left his son for more than two years, so the parental presumption would still apply. For what it is worth, after four decades of teaching this case in my family law classes, most students seem to disagree with the Iowa Supreme Court and believe that the father should have received custody of the child.

It may be that students empathize with Harold Painter's situation and do not consider him in any way blameworthy. It is unclear how students would react if, instead of needing to grieve the death of his wife, he had placed the child with grandparents for 18 months so he could address some other problem, such as addiction to drugs.

The most controversial issue today regarding resolving a custody dispute between a parent and a non-parent arises when a parent has invited a new spouse or a boyfriend or girlfriend to live with the parent and his or her child, and after a significant period of living together the romantic relationship ends. What should happen if the stepparent or boyfriend or girlfriend sues for custody? As set forth above, in some states the dispute would be resolved on a best interests basis if the court finds that the person desiring custody is a psychological parent or a de facto parent.

I believe many parents likely would be shocked to learn that this rule exists in some states, and that it may well reflect the wave of the future.<sup>46</sup> When such an approach recently was suggested to a Virginia court, the court stated:

[I]t would open a Pandora's box of unintended consequences to hold that a legal parent-child relationship is created simply by virtue of such factors as the amount of time a child spends with, or the strength of an emotional bond that exists between, another living in the same household. It is not hard to imagine profound consequences for society and the courts if a parent knows that an ex-wife, ex-husband, ex-boyfriend, ex-girlfriend, former nanny, au pair or indeed virtually anyone not re-

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<sup>46</sup> See generally Atkinson & Atwood, *supra* note 34.

lated to their child through biology or legal adoption, can be placed on equal footing as a biological or adoptive parent solely through a significant emotional bond with the child.<sup>47</sup>

The Virginia court seems to be exaggerating some possible ramifications of accepting a concept such as a de facto parent. Some courts have emphasized that, because of the various requirements for becoming a de facto parent, it should not be possible for neighbors, caretakers, baby sitters, nannies, au pairs, and family friends to become de facto parents.<sup>48</sup>

The concept of de facto parenthood certainly has received a great deal of scholarly attention during the past two decades.<sup>49</sup> While many scholars support the idea that, compared to most third parties, it should be substantially easier for a de facto parent to be able to obtain custody of a child despite the objection of a parent, it is not clear to this writer that the general public shares that view.

Assume that Harold Painter, instead of leaving his son with the Bannisters while he lived elsewhere, chose to come to live with his son in the Bannisters' home. I would argue that, in such a situation, there should be a parental presumption in any custody dispute between Mr. Painter and the Bannisters, even if the Bannisters became very involved with the care of their grandson while he was living with them. In contrast, proponents of the rights of de facto parents would argue that there should be no parental presumption if the grandparents lived with the grandchild for a substantial period and played a parental role, even if Harold was also simultaneously living with his son.

In my view, there should always be a parental presumption, except when a parent has placed the child in another household for a significant period. The New York standard that the parental presumption should be lost after letting a child live elsewhere for two years seems fair for this purpose. In all other custody disputes between a parent and a non-parent, there should be a parental presumption, which could be rebutted by showing that the parent is unfit or that other "compelling circumstances" exist.

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<sup>47</sup> Hawkins v. Grese, 809 S.E.2d 441, 448. (Va. Ct. App 2018).

<sup>48</sup> Rubano v. DiCenzo, 759 A.2d 959, 976 (R.I. 2000).

<sup>49</sup> See Joslin & NeJaime, *supra* note 2, at 5, 37; see Gregg Strauss, *What Role Remains for De facto Parenthood?* 46 FLA. ST. U. L. REV. 909 (2019).

Consider a situation where a stepparent has been living with a parent and his or her child for a significant period and then the parent dies. In a custody dispute between the stepparent and the surviving parent, there would be a parental presumption. However, compelling circumstances might exist if placing the child with the parent would require the child to change schools and move to another town, away from all of his or her friends and extracurricular activities. If the child is mature, the child's wishes could also be relevant to such a determination.

I believe that the standard proposed in this article is a compromise. It generally retains the parental presumption, but lets it be rebutted by showing that compelling circumstances exist.

## **VI. The Extent To Which a Parent's Constitutional Rights Impact These Issues**

In *Troxel v. Granville*,<sup>50</sup> the court appeared to recognize a general right of parental autonomy for a fit parent to raise his or her child without intrusion by the state. To date, a number of state courts have held that this general principle of parental autonomy does not limit the ability of states to apply a principle such as de facto parenthood to make it easier for a non-parent to obtain custody over the objection of a parent. For example, while a North Carolina court recognized a general parental right of autonomy regarding his or her child, if the parent encourages a third party to establish a close parent-like relationship with the child, this reduces the parent's right to unilaterally sever the relationship between the child and the de facto parent.<sup>51</sup>

In such a situation, the New Jersey Supreme Court has stated that when a parent allows a third party to live with the parent and the child and

allow[s] that party to function as a parent in the day-to-day life of the child; and to foster the forging of a parental bond between the third party and the child. In such circumstances, the legal parent has created a family with the third party and the child, and has invited the third party into the otherwise inviolable realm of family privacy. By virtue of her own actions, the legal parent's expectation of autonomous privacy in her relationship with her child is necessarily reduced

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<sup>50</sup> *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>51</sup> *Mason v. Dwinnell*, 660 S. E.2d 58, 69 (N.C. Ct. App. 2008)(citing *Middleton v. Johnson*, 633 S.E.2d 162, 169 (S.C. Ct. App. 2006)).



from that which would have been the case had she never invited the third party into their lives.<sup>52</sup>

The Maryland Court of Appeals also has held that it is not a violation of *Troxel* to allow a de facto parent to maintain a custody action against a legal parent, and cites decisions from other states allowing third-party de facto parents or psychological parents to contest custody over the objection of a legal parent.<sup>53</sup> So, it does not appear that courts have found it a violation of a parent's constitutional autonomy rights if their state makes it easier for a de facto parent to obtain custody over the objection of a parent.

## VII. Conclusion

Custody disputes are arising with some frequency between a parent and a non-parent, particularly when the non-parent has established a strong bond with a child. Perhaps the strongest cases are those in which the parent has voluntarily relinquished the child to another's care for a substantial period. In such a case, it is quite possible that the child has a stronger bond with the non-parent than the parent. In addition, where voluntary relinquishment has occurred, one could argue that the parent has abandoned the child.

The most controversial situation arises where the non-parent has lived with the parent and the child in a romantic relationship with the parent for a significant period and then the romantic relationship ends, after the non-parent has established a bond with the child. As discussed above, states disagree regarding whether the parental presumption should apply, and if it does, what the non-parent needs to show to rebut the presumption. I argued above that, even if the non-parent is a de facto parent, there generally should be a parental presumption, which could be rebutted by showing the parent is unfit or that other compelling circumstance exist.

While almost all states recognize that the U.S. Supreme Court in *Troxel* recognized a general right of parental autonomy, most courts to date do not find it a violation of *Troxel* if a court

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<sup>52</sup> V.C. v. M.J.B., 748 A.2d 539, 554 (N.J. 2000).

<sup>53</sup> Conover v. Conover, 146 A.3d 433, 445-446 (Md. 2016).

or legislature chooses to make it easier for a de facto parent or psychological parent to contest custody with a legal parent.

## **Day of Reckoning: On Non-Custodial Parents' Rights to Teach Their Children Religion**

by  
Mark Strasser\*

### **I. Introduction**

The U.S. Supreme Court has long recognized that the Constitution protects the right of parents to impart religious values to their children. However, the Court has never addressed the Constitution's limitations on the states with respect to how those states resolve divorced parents' disputes about their children's religious training. State courts have adopted various approaches when seeking to balance the parent's respective rights and their children's interests. But many state approaches do not take adequate account of existing Religion Clause guarantees and are unlikely to pass muster under the current Court's increasingly robust view of free exercise protections. The Court's ever-evolving understanding of the depth and breadth of those guarantees is likely to play havoc in the context of court attempts to limit the rights of parents to impart their religious views to their children, and state courts would be wise to modify their approaches before they are inundated with cases.

Part II of this article discusses the constitutional protection of the right to instruct one's child in religious matters, concluding that this fundamental right is likely to be given increasingly robust protection by the Court. Part III discusses several state cases in which courts have tried to balance the constitutional interests of the parents and the welfare interests of their children, noting that some of these decisions would likely have been reversed had they come before the current Court. The article concludes that many states will likely have to modify their approaches with respect to the conditions under which noncustodial parents may be

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prohibited from instructing their children on religious matters, best interests of the children notwithstanding.

## **II. The Parent's Right to Engage in Religious Instruction**

The Court has long made clear that the Constitution protects the right of parents to educate their children in various matters including religion. That right is not unqualified and the Court has spelled out some limitations, although much remains unclear. Further, the Court has not come close to addressing the appropriate framework for addressing the respective parent's rights to instruct in religious matters when the parents' views are in conflict, although the Court has issued hints about its view. Each parent's right to educate his or her child on religious matters is likely viewed by the Court as much stronger than many seem to appreciate.

### *A. Early Cases*

About a century ago, the U.S. Supreme Court addressed the right of parents to direct the education of their children. Initially, the Court did not focus on the right to educate in religious matters, although that issue in particular was addressed soon thereafter. The Court made clear that the parent's right to educate his or her children on religious matters had constitutional protection, although the Court left many questions unanswered when addressing the contours of that right.

In *Meyer v. Nebraska*,<sup>1</sup> the Court examined the constitutionality of a Nebraska law prohibiting anyone from teaching a live language other than English to a child who had not yet passed eighth grade. Robert Meyer, who worked in a parochial school and had been teaching German through the use of Bible stories,<sup>2</sup> was convicted of teaching that language to a ten-year-old who

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<sup>1</sup> 262 U.S. 390 (1923).

<sup>2</sup> *Id.* at 397 (“[T]he offense charged and established was ‘the direct and intentional teaching of the German language as a distinct subject to a child who had not passed the eighth grade,’ in the parochial school maintained by Zion Evangelical Lutheran Congregation, a collection of Biblical stories being used therefore.”) (quoting *Meyer v. State*, 187 N.W. 100, 102 (Neb. 1922), *rev'd*, 262 U.S. 390 (1923)).

had not yet attained the requisite level of educational achievement.<sup>3</sup>

When analyzing whether the Nebraska prohibition passed constitutional muster, the *Meyer* Court suggested that “education and acquisition of knowledge . . . [are] matters of supreme importance which should be diligently promoted,”<sup>4</sup> and observed that “it is the natural duty of the parent to give his children education suitable to their station in life.”<sup>5</sup> But the question at hand was whether Nebraska had the power to preclude children from acquiring certain knowledge before they had a sufficient grounding in other matters.<sup>6</sup>

The *Meyer* Court cited to the Ordinance of 1787 for the proposition that “Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”<sup>7</sup> Regretta-

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<sup>3</sup> *Id.* at 396–97 (“[O]n May 25, 1920, while an instructor in Zion Parochial School he unlawfully taught the subject of reading in the German language to Raymond Parpart, a child of 10 years, who had not attained and successfully passed the eighth grade.”).

<sup>4</sup> *Id.* at 400.

<sup>5</sup> *Id.*

<sup>6</sup> *See id.* at 397–98. The following excerpts from the opinion sufficiently indicate the reasons advanced to support the conclusion:

The salutary purpose of the statute is clear. The Legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state.

(quoting *Meyer v. State*, 187 N.W. 100, 102 (Neb. 1922), *rev'd*, 262 U.S. 390 (1923)).

<sup>7</sup> *Meyer*, 262 U.S. at 400.

bly, the Court did not explain why that passage in particular was quoted. Nebraska was encouraging a certain kind of education—it is not as if Nebraska meant to *discourage* education. While the law privileged certain kinds of knowledge over other kinds (at least with respect to when they would be acquired), there is nothing unusual in that, and one would not expect the Court to strike down a law because the Court and the state differed about the pedagogical cost-benefit calculation regarding when foreign languages should be taught.<sup>8</sup> Further, if this were a disagreement about what should be taught at which times in order to promote secular ends,<sup>9</sup> the Court might have been expected to shorten the quotation when citing to the Northwest Ordinance language—by beginning with the word “Knowledge” and not including the words “Religion and morality” at the beginning of the quotation, so there would be less reason to fear that the Court’s meaning or focus might be misconstrued.

A closer examination of the Nebraska Supreme Court opinion that the U.S. Supreme Court was reviewing<sup>10</sup> suggests some of the issues that the Court was likely considering *sub silentio*—the Court’s including the words “Religion and morality” was likely not by mere happenstance. While the Court did not discuss religious training expressly, the Court may have been worried about the implications of the Nebraska opinion for religious education.<sup>11</sup>

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<sup>8</sup> See *id.* at 401 (“[T]he purpose of the legislation was to . . . inhibit[] training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals.”) *But see id.* at 403 (“It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child.”). *Cf.* Louise Weinberg, *The McReynolds Mystery Solved*, 89 *DENV. U. L. REV.* 133, 144 (2011) (“Like Nebraska in the *Meyer* case, many states still postpone the study of modern foreign languages until the high-school years, at least in public schools.”).

<sup>9</sup> *Meyer*, 262 U.S. at 401 (“[T]he purpose of the legislation was to promote civic development.”).

<sup>10</sup> *Meyer v. State*, 187 N.W. 100 (Neb. 1922), *rev’d*, 262 U.S. 390 (1923).

<sup>11</sup> William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 *AKRON L. REV.* 177, 196 (2000) (“Even though *Meyer* and *Pierce* did not directly address the free exercise implications of these cases, the laws that the Court nullified in those decisions interfered with the freedom of parents to provide a religious education for

When analyzing the Nebraska law's application to the facts, the state supreme court explained that the textbook used Bible stories and was written in German.<sup>12</sup> But prosecuting someone for how he teaches the Bible in a parochial school class is fraught with potential constitutional difficulties.<sup>13</sup> Indeed, the defendant had claimed that "in teaching the German language in this book he was giving religious instruction according to the faith of the Zion Evangelical Lutheran Congregation."<sup>14</sup>

The Nebraska court reasoned that two different subjects were being taught—the German language and religion<sup>15</sup> But "[i]f the law prohibited the teaching of the German language as a separate and distinct subject, then . . . the fact that such language was taught from a book containing religious matter could not act as a shield to the defendant."<sup>16</sup> Basically, the state supreme court suggested that choice of a text containing religious material would not alone immunize the instruction from further review.

It was not as if this book was picked randomly or that there was no religious benefit to learning German. "It is true that in familiarizing the children with the German language they would become better able to fully understand the services of the church

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their children."). *See also* Weinberg, *supra* note 8, at 148 (suggesting that *Meyer* was decided "partly for religious reasons").

<sup>12</sup> *Meyer*, 187 N.W. at 101.

<sup>13</sup> There is some question whether *Meyer* was teaching during a class period rather than during recess. *See* Jesse H. Choper & Stephen F. Ross, *The Political Process, Equal Protection, and Substantive Due Process*, 20 U. PA. J. CONST. L. 983, 1030 (2018) ("In *Meyer v. Nebraska*, the Court reversed the conviction of a private school teacher for teaching (during recess) reading in the German language, in violation of a state law outlawing instruction in other languages before ninth grade."); Paula Abrams, *The Little Red Schoolhouse: Pierce, State Monopoly of Education and the Politics of Intolerance*, 20 CONST. COMMENT. 61, 74 (2003) ("Robert Meyer, a private school teacher, was convicted of teaching German during recess."). *But see* David M. Smolin, *Will International Human Rights Be Used as a Tool of Cultural Genocide? The Interaction of Human Rights Norms, Religion, Culture and Gender*, 12 J.L. & RELIGION 143, 156 (1996) ("In this context, it is useful to remember why Mr. Meyer's German lesson occurred at 'recess.' When the State of Nebraska prohibited the teaching of German prior to the eighth grade, the Lutheran school, in reliance on a state supreme court holding, attempted to bypass the reach of the prohibition through rescheduling language classes to a recess period.").

<sup>14</sup> *Meyer*, 187 N.W. at 101.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

when conducted in German.”<sup>17</sup> The Nebraska court rejected that making the children more familiar with German would have special religious benefit—“so far as teaching the particular religious beliefs of the church to the children in the school was concerned, such religious teaching could, manifestly, be as fully and adequately done in the English as in the German language.”<sup>18</sup> Yet, one would not expect a court (rather than religious authorities) to decide whether there was any religious benefit to conducting services in one language rather than another, and commentators suggest that the English-only laws for those who had not yet passed the eighth grade may have been adopted to weaken certain cultural and religious connections.<sup>19</sup>

The Nebraska Supreme Court made clear that it was not addressing “the right to hold devotional exercises in the German language, regardless of what the pupils might incidentally attain in learning and familiarity with that language while in attendance upon such exercises.”<sup>20</sup> Instead, the court was addressing “the direct and intentional teaching of the German language as a distinct subject.”<sup>21</sup> Yet, one might directly and intentionally teach children German, precisely because doing so would make certain religious activities conducted in German more meaningful, especially if the children’s parents’ command of English was not very good.<sup>22</sup> When discussing “Religion, morality and knowledge”<sup>23</sup> and affirming the right to parents to direct their children’s education,<sup>24</sup> the *Meyer* Court may well have been incorporating the parents’ right to direct their children’s religious education *sub*

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<sup>17</sup> *Id.* at 101–02.

<sup>18</sup> *Id.* at 102.

<sup>19</sup> See, e.g., Paul Finkelman, *William G. Ross, Forging New Freedoms: Nativism, Education, and the Constitution, 1917-1927*. Lincoln: University of Nebraska Press, 1994. Pp.x + 277, 45 J. LEGAL EDUC. 291, 292 (1995) (“In reality, however, supporters of the laws wanted to undermine cultural ties—and in some cases religious ties—between the Old World and the United States.”).

<sup>20</sup> *Meyer*, 187 N.W. at 102.

<sup>21</sup> *Id.*

<sup>22</sup> See *id.* (“A thorough knowledge of the German language as would be gained by young children by a course of study in the schools would no doubt, as pointed out in the testimony, make more convenient the matter of religious worship with their parents, whose knowledge of English was limited.”).

<sup>23</sup> *Meyer*, 262 U.S. at 400.

<sup>24</sup> *Id.*



*silenzio*.<sup>25</sup> The Court addressed that right more explicitly in subsequent cases.<sup>26</sup>

In *Meyer*, the Court established the right of parents to direct the education of their children. But the Court also suggested that the state had broad powers with respect to its power to regulate education. For example, the state had the power “to compel attendance at some school and to make reasonable regulations for all schools,”<sup>27</sup> although the Court did not address whether the Constitution imposed any limitations on the state power to preclude attendance at certain schools. That issue was raised in a subsequent case.<sup>28</sup>

In *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, the Court examined the constitutionality of an Oregon law requiring students between the ages of 8-16 to receive their educations in public schools.<sup>29</sup> The law was challenged by a military academy<sup>30</sup> and by a parochial school.<sup>31</sup>

The *Pierce* Court denied that the state had the power to “standardize its children by forcing them to accept instruction

<sup>25</sup> Cf. *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (“The duty to prepare the child for ‘additional obligations, referred to by the Court, must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship.’”).

<sup>26</sup> See *infra* notes 29-79 and accompanying text (discussing *Pierce*, *Prince*, and *Yoder*).

<sup>27</sup> *Meyer*, 262 U.S. at 402.

<sup>28</sup> See *infra* notes 29-36 and accompanying text (discussing *Pierce*)

<sup>29</sup> *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 530 (1925) (“The challenged act . . . requires every parent, guardian, or other person having control or charge or custody of a child between 8 and 16 years to send him ‘to a public school for the period of time a public school shall be held during the current year’ in the district where the child resides.”).

<sup>30</sup> *Id.* at 532–33 (“Appellee Hill Military Academy is a private corporation organized in 1908 under the laws of Oregon, engaged in owning, operating, and conducting for profit an elementary, college preparatory, and military training school for boys between the ages of 5 and 21 years.”).

<sup>31</sup> *Id.* at 531–32.

Appellee the Society of Sisters is an Oregon corporation . . . with power to . . . educate and instruct the youth. . . . In its primary schools many children between those ages [8-16] are taught the subjects usually pursued in Oregon public schools during the first eight years. Systematic religious instruction and moral training according to the tenets of the Roman Catholic Church are also regularly provided.

*Id.* at 531.

from public teachers only.”<sup>32</sup> In a passage requiring further unpacking, the Court commented, “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.”<sup>33</sup>

The Court did not specify which additional obligations it had in mind, although the Court is presumably referring to obligations that are not state-imposed, which may be why the Court is pointing out that the child is “not the mere creature of the state.” These non-state-imposed obligations for which the parents would have both the right and duty to prepare the child would presumably include *non-secular* obligations. Here, the Court may well have been suggesting that parents have the right and duty to provide their children religious instruction.

The *Pierce* Court, like the *Meyer* Court, affirmed that the state has broad powers over education.

No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.<sup>34</sup>

Nonetheless, the Court reasoned that *Meyer* controlled the outcome of the case and required the invalidation of the law at issue. “Under the doctrine of *Meyer v. Nebraska*, . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>35</sup> *Pierce* has come to

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<sup>32</sup> *Id.* at 535. The Court made a related point in *Meyer v. Meyer*, 262 U.S. at 402 (“The desire of the Legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate.”). The *Meyer* Court suggested that the proposed method of achieving that goal exceeded permissible bounds. *Id.* at 402 (“But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error.”).

<sup>33</sup> *Pierce*, 268 U.S. at 535.

<sup>34</sup> *Id.* at 534.

<sup>35</sup> *Id.* at 534–35.

be recognized as protecting the parent's right to afford his or her child religious and secular education.<sup>36</sup>

### B. *Mixed Signals in the Developing Jurisprudence*

*Meyer* and *Pierce* established the parent's right to educate his or her child, but left open how great a burden the state would have to bear to justify overriding that right. The Court's subsequent jurisprudence is open to multiple interpretations, at least in part because the Court has sent mixed messages with respect to how important the implicated state interest must be to justify imposing limitations on religious practices.

In *Prince v. Massachusetts*<sup>37</sup> the Court made clear that the parent's right to direct the religious education of his or her child, while not without limit, must be taken quite seriously. "The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters."<sup>38</sup>

At issue in *Prince* was Sarah Prince's conviction under Massachusetts child labor laws for permitting her child<sup>39</sup> to hand out

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<sup>36</sup> See *Prince v. Massachusetts*, 321 U.S. 158, 165–66 (1944) ("[I]n *Pierce v. Society of Sisters*, 268 U.S. 510, this Court had sustained the parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the state's requirement of attendance at public schools."). See also Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 1055–56 (2013) (discussing "the Supreme Court's affirmation in *Pierce v. Society of Sisters* that families have a constitutional right to educate their children according to their own religious beliefs"); Alan M. Hurst, *The Very Old New Separationism*, 2015 B.Y.U. L. REV. 1, 29 n.131 ("[P]arents' religious education of their children . . . had already received protection in *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925)."); Norman B. Smith, *Constitutional Rights of Students, Their Families, and Teachers in the Public Schools*, 10 CAMPBELL L. REV. 353, 408 (1988) ("Religious free exercise claims of those who wish to withdraw from public education into private or parochial schools or home education are fully protected under *Pierce v. Society of Sisters*.").

<sup>37</sup> 321 U.S. 158 (1944).

<sup>38</sup> *Id.* at 165.

<sup>39</sup> Sarah "was the aunt and custodian of Betty M. Simmons, a girl nine years of age." See *id.* at 159.

religious magazines in exchange for donations.<sup>40</sup> The Supreme Judicial Court of Massachusetts had held that the Massachusetts law was applicable to the circumstances at issue<sup>41</sup> and that application of the laws to that conduct did not violate constitutional guarantees.<sup>42</sup>

The *Prince* Court recognized that important constitutional rights were implicated, including the child's right to religious exercise and the parent's right to give the child religious training<sup>43</sup> Important interests had to be balanced. "On one side is the obviously earnest claim for freedom of conscience and religious practice [which was] . . . allied [with] the parent's claim to authority in her own household and in the rearing of her children."<sup>44</sup> On the other side stood the societal interest in protecting children.<sup>45</sup> The state interest included protecting the child from abuse and giving the child the opportunity to grow into a free and independent citizen.<sup>46</sup>

When performing the requisite balancing, the Court noted, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."<sup>47</sup> But, the Court cautioned, the family may be regulated in appropriate circumstances, religious claims notwithstanding.<sup>48</sup>

When balancing religious liberties with the child's interests, the Court assessed the degree to which the child's welfare was

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<sup>40</sup> *Id.* ("Sarah Prince appeals from convictions for violating Massachusetts' child labor laws, by acts said to be a rightful exercise of her religious convictions.").

<sup>41</sup> *Com. v. Prince*, 46 N.E.2d 755, 757 (Mass. 1943), *aff'd sub nom. Prince v. Massachusetts*, 321 U.S. 158 (1944) ("And, finally, we cannot say that the evils at which the statutes were directed attendant upon the selling by children of newspapers, magazines, periodicals, and other merchandise in streets and public places do not exist where the publications are of a religious nature.").

<sup>42</sup> *Id.* at 758 ("We are of opinion that these statutes as here construed do not infringe upon the constitutional guaranties of freedom of the press and of religion.").

<sup>43</sup> *Prince*, 321 U.S. at 165.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 166 (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

<sup>48</sup> *Id.*

endangered by engaging in the prohibited activity. Prince had argued that Betty's presence on the street with Prince nearby was either not harmful or, at any rate, no more harmful than many other practices in which children are permitted to engage.<sup>49</sup> But the Court was unconvinced, because child labor was known to have many deleterious effects.<sup>50</sup> The Court concluded, "It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parents claim to control of the child or one that religious scruples dictate contrary action."<sup>51</sup>

One reason that the implications of *Prince* are open-ended is that a lot depends upon the degree of danger posed by Betty Simmons engaging in the proscribed activities.<sup>52</sup> The Court noted that "propagandizing the community . . . may and at times does create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face."<sup>53</sup> In addition, such activities might result in other physical or psychological harms.<sup>54</sup>

If indeed Betty was in great danger, then it is unsurprising that the Court upheld the constitutionality of the State preventing the conduct at issue.<sup>55</sup> But absent a showing of great danger, the Court would not be affording the implicated rights much protection,<sup>56</sup> and the State would seem permitted to override relig-

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<sup>49</sup> *Prince*, 321 U.S. at 167.

<sup>50</sup> *Id.* at 168.

<sup>51</sup> *Id.* at 168–69.

<sup>52</sup> Betsy was Prince's niece. *See supra* note 39.

<sup>53</sup> *Prince*, 321 U.S. at 169–70.

<sup>54</sup> *Id.* at 170.

<sup>55</sup> *Cf.* *Wisconsin v. Yoder*, 406 U.S. 205, 229–30 (1972) (noting "the Court's severe characterization of the evils that it thought the legislature could legitimately associate with child labor, even when performed in the company of an adult") (citing *Prince*, 321 U.S. at 169–70).

<sup>56</sup> *See Prince*, 321 U.S. at 174 (Murphy, J., dissenting) ("If the right of a child to practice its religion in that manner is to be forbidden by constitutional means, there must be convincing proof that such a practice constitutes a grave and immediate danger to the state or to the health, morals or welfare of the child.") (citing *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1843)).

ious rights by simply claiming that doing so would somehow promote the child's interest or public welfare.<sup>57</sup>

It is not as if Sarah Prince left Betty alone to fend for herself. Rather, Sarah was nearby,<sup>58</sup> which presumably mitigated some of the dangers to which Betty might be exposed. If the mere possibility of psychological injury resulting from people saying mean things to Betty justifies the state intervention, then the State would seem to have great flexibility in limiting free exercise to promote child welfare.

Yet, the opposite conclusion might be drawn from *Wisconsin v. Yoder*.<sup>59</sup> At issue in *Yoder* was a Wisconsin law requiring school attendance until children reached age 16.<sup>60</sup> Some Amish parents refused to send their children (aged 14 or 15 respectively) to school out of a fear that doing so would undermine the children's values<sup>61</sup> and jeopardize all of their lives in the hereafter.<sup>62</sup>

The *Yoder* Court explained that in order for Wisconsin to be justified in requiring school attendance past the eighth grade in contravention of sincere religious belief, the state had to have "a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."<sup>63</sup> The Court then set about assessing the importance of the state's implicated interest.

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<sup>57</sup> *Id.* at 177 (Jackson, J., concurring in the result) ("[A] foundation is laid for any state intervention in the indoctrination and participation of children in religion, provided it is done in the name of their health or welfare.").

<sup>58</sup> *Id.* at 162 ("Betty . . . and Mrs. Prince took positions about twenty feet apart near a street intersection.").

<sup>59</sup> 406 U.S. 205 (1972).

<sup>60</sup> *Id.* at 207 ("Wisconsin's compulsory school-attendance law required them to cause their children to attend public or private school until reaching age 16.").

<sup>61</sup> *Id.* at 210-11 (The Amish "object to . . . higher education generally because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a 'wordly' influence in conflict with their beliefs.").

<sup>62</sup> *Id.* at 209 ("They believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children.").

<sup>63</sup> *Id.* at 214.

The Court began its analysis by explaining that providing public education is a very important state function.<sup>64</sup> But the Court immediately put that statement in context by noting that the parent's role in directing the religious education of his or her children is also very important.<sup>65</sup> The State's interest in universal education must be balanced against the parent's right to direct his or her children's religious education where those interests come into conflict.<sup>66</sup>

When performing that balancing, the Court emphasized the damage that would allegedly be done if the children were required to attend school—"compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today."<sup>67</sup> At the same time, the Court discounted the benefits that would be accrued by enforcing the requirement.<sup>68</sup> The Court was unsympathetic to the State's claim that preventing the child from attending school past the eighth grade would promote ignorance,<sup>69</sup> explaining:

Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional 'mainstream.' Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms.<sup>70</sup>

Suppose that Amish children who had not attended school past the eighth grade were to leave the community.<sup>71</sup> The Court was confident that the children with their practical training and skills would not become burdens on society.<sup>72</sup>

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<sup>64</sup> *Id.* at 213.

<sup>65</sup> *Yoder*, 406 U.S. at 213–14.

<sup>66</sup> *Id.* at 214.

<sup>67</sup> *Id.* at 218.

<sup>68</sup> *Id.* at 222.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 224 ("The State argues that if Amish children leave their church they should not be in the position of making their way in the world without the education available in the one or two additional years the State requires.").

<sup>72</sup> *Yoder*, 406 U.S. at 224.

Had there been clear evidence of harm, the Court might have reached a different result.<sup>73</sup> But the instant case was “not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred.”<sup>74</sup> Further, the Court cautioned that if the state law were enforced, the state would greatly influence if not determine the child’s “religious future.”<sup>75</sup>

In *Prince*, the mere *possibility* of harm was enough to justify the state intervention. In *Yoder*, the harm had not been demonstrated and the Court nonetheless held that the State could not require high school attendance. The cases are reconcilable if the harm in *Prince* is characterized as significant (or, perhaps, very likely to occur) and the harm at issue in *Yoder* merely speculative.<sup>76</sup> However, *Yoder* might be read as affording strong free exercise protection,<sup>77</sup> and it along with *Sherbert v. Verner*<sup>78</sup> are read as two of the most protective of free exercise guarantees.<sup>79</sup>

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<sup>73</sup> Cf. *Parham v. J. R.*, 442 U.S. 584, 603 (1979) (“[A] state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.”).

<sup>74</sup> *Yoder*, 406 U.S. at 230.

<sup>75</sup> *Id.* at 232.

<sup>76</sup> *Id.* at 222 (“[T]he evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests.”).

<sup>77</sup> Matthew D. Krueger, *Respecting Religious Liberty: Why RLUIPA Does Not Violate the Establishment Clause*, 89 MINN. L. REV. 1179, 1183–84 (2005) (“In *Wisconsin v. Yoder*, the Court offered perhaps its most robust protection of religious liberty, exempting an Amish family from a compulsory school-attendance law.”).

<sup>78</sup> 374 U.S. 398 (1963).

<sup>79</sup> Frederick Mark Gedicks, *The Improbability of Religion Clause Theory*, 27 SETON HALL L. REV. 1233, 1249 (1997) (“[T]he *Sherbert-Yoder* test appeared highly protective of religion.”); Jonathan Kieffer, *A Line in the Sand: Difficulties in Discerning the Limits of Congressional Power as Illustrated by the Religious Freedom Restoration Act*, 44 U. KAN. L. REV. 601, 604 (1996) (“The *Sherbert* Court’s standard of strict scrutiny relative to free exercise law was reinforced in 1972 in *Wisconsin v. Yoder*.”); Johnathan A. Mondel, *Mentally Awake, Morally Straight, and Unfit to Sit?: Judicial Ethics, the First Amendment, and the Boy Scouts of America*, 68 STAN. L. REV. 865, 875 (2016) (“The *Sherbert-Yoder* test was very protective of free exercise rights.”).



At issue in *Sherbert* was a challenge to a denial of unemployment benefits.<sup>80</sup> Adell Sherbert could not work on Saturday because her faith tradition treated that day as the Sabbath.<sup>81</sup> But her employer fired her, and other employers were unwilling to hire her because she could not work on Saturday.<sup>82</sup> Her application for unemployment compensation was denied, because of her unwillingness to accept appropriate employment without good cause.<sup>83</sup> The Court struck down the state refusal to award unemployment compensation.<sup>84</sup>

In *Employment Division, Department of Human Resources of Oregon v. Smith*, the Court explained its *Sherbert* holding by noting that the “*Sherbert* test . . . . was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct,”<sup>85</sup> because in each case an assessment would be required to determine whether the good cause condition had been met. The *Smith* Court described *Yoder* as triggering a special hybrid exception involving free exercise and some other right such as the parent’s right to direct his or her child’s education.<sup>86</sup> Unless one of these two exceptions was applicable, the *Smith* Court concluded that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that

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<sup>80</sup> See *Sherbert*, 374 U.S. at 400–01.

<sup>81</sup> *Id.* at 399 (“[S]he would not work on Saturday, the Sabbath Day of her faith.”).

<sup>82</sup> *Id.* (“Appellant, a member of the Seventh-day Adventist Church was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith. . . . [S]he was unable to obtain other employment because from conscientious scruples she would not take Saturday work.”).

<sup>83</sup> *Id.* at 400–01 (“That law provides that, to be eligible for benefits, a claimant must be ‘able to work and . . . is available for work’; and, further, that a claimant is ineligible for benefits ‘(i) if . . . he has failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer . . . .’”).

<sup>84</sup> *Id.* at 402 (“We reverse the judgment of the South Carolina Supreme Court.”).

<sup>85</sup> Emp. Div., Dep’t of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 884 (1990).

<sup>86</sup> *Id.* at 881 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”<sup>87</sup>

In other cases, the Court has affirmed the right of the parent to make decisions for his or her child. In *Troxel v. Granville*, the Court noted that the parent’s right to the care, custody, and control of his or her child is fundamental,<sup>88</sup> and that “the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.”<sup>89</sup>

A number of points might be made about the Court’s jurisprudence. The Court has recognized that the parent’s right to direct the religious education of his or her child is fundamental. However, all of the cases have involved the parent’s right when weighed against the state. None of these cases involves the right of one parent pitted against the right of the other parent, so it is unclear what the Court would say when confronted with that kind of scenario. Two further points should be noted. Courts make individualized assessments when deciding who should have custody and what kinds of limitations may be imposed on a parent’s religious education of his or her child. This may well implicate the kind of close scrutiny triggered in *Sherbert*.<sup>90</sup> Further, the Court recently explained that “government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.”<sup>91</sup> Whether secular activities are comparable is to be determined in terms of the asserted state interest.<sup>92</sup> Assuming that strict scrutiny has been triggered, the state must “show that mea-

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<sup>87</sup> *Id.* at 879 (citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

<sup>88</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

<sup>89</sup> *Id.* at 72–73.

<sup>90</sup> *See supra* note 85 and accompanying text (discussing the individualized assessment at issue in *Sherbert*).

<sup>91</sup> *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67–68 (2020)).

<sup>92</sup> *Id.* (whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue.”) (citing *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 67).

tures less restrictive of the First Amendment activity could not address its interest.”<sup>93</sup> But this means that if noncustodial parents are not or cannot be precluded from engaging in certain secular activities that the State believes contrary to a child’s interests, then the State may also be precluded from prohibiting a parent from engaging in certain religious activities that the State believes contrary to the child’s interests.

The Court’s current understanding of free exercise guarantees is that they are rather robust. It may well be, for example, that the kind of restriction upheld in *Prince* would not pass muster in light of the Court’s current understanding of the strength of those guarantees. Even if the *Sherbert* balancing was not triggered by virtue of a court’s performing an individualized assessment when deciding the degree to which a parent’s inculcation of religious values could be limited, a parent’s teaching his or her child religious values would likely implicate both free exercise and the right to educate, which would mean that any state attempts to limit a parent’s teaching of religious values to her or his child would be subject to the kind of scrutiny associated with *Yoder*. When strict scrutiny is triggered, the State will face a daunting task in trying to establish that there were no less restrictive means to promote the state’s implicated interest. In short, the current jurisprudence will make it much harder for states to limit noncustodial parents in their attempts to inculcate religious values in their children than many state courts seem to appreciate.

### **III. State Cases Involving Parents in Conflict over Their Children’s Religious Training**

While the U.S. Supreme Court has not addressed the constitutional limitations on the resolution of disputes between divorced parents over their children’s education, state courts have often needed to do so, and the states have come up with varying approaches to resolve these disputes.<sup>94</sup> This is a particularly

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<sup>93</sup> *Id.* at 1296–97.

<sup>94</sup> Kevin S. Smith, *Religious Visitation Constraints on the Noncustodial Parent: The Need for National Application of a Uniform Compelling Interest Test*, 71 IND. L.J. 815, 816 (1996):

thorny area, which is likely to become even more so in light of the changing free exercise landscape.

A. *Extreme Cases No Longer Extreme?*

Courts have long sought to balance children's welfare interest with religious guarantees. That has sometimes come up in the context of trying to make decisions about who would have custody, and courts have been unwilling to treat practices motivated by religious beliefs in the same way that those practices would have been treated had they been motivated by purely secular concerns.

Consider *Quiner v. Quiner*.<sup>95</sup> Linnea and Edward Quiner had one child, and the parents each sought primary custody.<sup>96</sup> The trial court awarded custody to the father and enjoined the mother from teaching the child her religious views.<sup>97</sup> Linnea sincerely believed<sup>98</sup> that she was religiously required not to associate with those who did not share her beliefs,<sup>99</sup> because non-adherents were "spiritually unclean."<sup>100</sup> Because her ex-husband, Edward, did not share her beliefs, she could not associate with

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Currently, jurisdictions differ on what rights noncustodial parents should enjoy in the religious upbringing of their children. Some courts hold that the noncustodial parent has relatively few rights in this area. Others recognize that he does have constitutionally protected rights, but differ on the appropriate degree of protection those rights should receive.

<sup>95</sup> *Quiner v. Quiner*, 59 Cal. Rptr. 503 (Cal. Ct. App. 1967).

<sup>96</sup> *Id.* at 504 ("Edward sued for divorce on November 29, 1963, alleging extreme mental cruelty and requesting custody of John Edward. Linnea cross complained for separate maintenance and custody.").

<sup>97</sup> *Id.* ("The judgment, among other things, granted visitation rights to Linnea, but enjoined her . . . from teaching or informing said child of any matter or thing or religious belief concerning the Plymouth Brethren.").

<sup>98</sup> *Id.* at 517 ("There is no dispute that appellant is a sincere believer in a bona fide faith.").

<sup>99</sup> *See id.* at 504.

<sup>100</sup> *Id.* at 508. *Cf.* *Harrison v. Tauheed*, 235 P.3d 547, 558–59 (Kan. Ct. App. 2010), *aff'd*, 256 P.3d 851 (Kan. 2011):

Adiel next complains of the following excerpt from the trial court's memorandum decision: "The teachings of the Jehovah's Witnesses, including those that teach non-Jehovah's Witnesses will suffer annihilation, may not be considered by this Court in deciding custody issues." Based on this statement, Adiel claims the trial court ignored evidence that these religious doctrines were harming J.D.H., specifically, "the

him. Further, she would teach her child not to associate with his father.<sup>101</sup> That said, however, she would also teach their son that he should love and honor his father.<sup>102</sup>

In Linnea's faith tradition, children are discouraged or forbidden from engaging in any extracurricular activities at school.<sup>103</sup> Children are not permitted to play games, listen to music or the radio, or watch TV.<sup>104</sup> Reading literature, periodicals or newspapers is discouraged or banned, although Bible-reading is not discouraged.<sup>105</sup>

The trial court had awarded custody to the father because "the child's mental welfare, and opportunities for his intellectual, social, character and personality growth will best be served by granting custody to the plaintiff."<sup>106</sup> The intermediate appellate court reversed, because at the time California used the tender years doctrine under which the mother would be awarded custody of a young child as a general matter,<sup>107</sup> and because the

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alienating affect [*sic*] of the "teaching" that Adiel is 'God's foe' and a "non-believer" who will eventually have his head chopped off. "

<sup>101</sup> See *Quiner*, 59 Cal. Rptr. at 505.

<sup>102</sup> *Id.* ("I would teach him to love his father as a son and as his father and to respect him in every way and to obey him.")

<sup>103</sup> *Id.* at 508 ("While permitted to attend public schools as required by law, children are discouraged, if not forbidden as sinful, from participating in all forms of extracurricular activity. This includes all forms of participation in athletic, dramatic, musical, social, literary, scientific, political and other extra scholastic activities."). See also *Peterson v. Peterson*, 474 N.W.2d 862, 871 (Neb. 1991) ("There was also testimony that the father feels that certain behavior and activities apparently forbidden or discouraged by the mother's church are appropriate for his children. These include permitting the children to watch television, participate in school sports, and dress in a contemporary manner.").

<sup>104</sup> *Quiner*, 59 Cal. Rptr. at 508-09

All forms of public or private entertainment are discouraged, if not forbidden. This edict excludes all types of social games such as card playing, dominoes, checkers and chess. In the defendant's home neither radio, television nor recorded music is permitted. Children may not have toys. If anyone outside the group should give a child a toy, a radio, television set or record player it would not be permitted in the house but would be returned to the giver.

<sup>105</sup> *Id.* at 509 ("The reading of all forms of literature and periodicals is discouraged or banned, except the Bible. This includes current news media.").

<sup>106</sup> *Id.* at 508.

<sup>107</sup> See *id.* at 517 ("The law is settled, that all things being equal, the custody of a child of tender years should go to the mother."). See also *id.* at 515

court reasoned that the state could not take religious beliefs into account.<sup>108</sup> The court admitted that had the mother held these beliefs as a secular matter, the father would have been awarded custody.<sup>109</sup>

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(“We have found no case, with the exception of *Barbush*, . . . which even squints at holding that a court can take a child of tender years away from the mother because of a potential effect the religious views of the mother may have on the mental welfare of her child.”). The *Quiner* court may have been referring to *Com. ex rel. Barbush v. Barbush*, 71 Pa. D. & C. 442 (Com. Pl. 1950), where the *Barbush* court refused to grant custody of a child to the mother, where the father and grandparents seemed to be taking good care of the child. *See id.* at 451 (“The weight of the evidence indicates clearly that this child, Francis Charles Barbush, 2nd, is at the present time receiving the devotion of his father and paternal grandparents as well. The child is receiving requisite supervision and adequate care.”).

One reason the court did not grant custody to the mother was the court’s belief that the father would then not get to see the child because the mother and father had sectarian differences. *Id.* at 452 (“If this child were entrusted to the mother, any visitation with the father would almost certainly result in serious emotional disturbance because of the sectarian differences of these parents.”).

<sup>108</sup> *Quiner*, 59 Cal. Rptr. at 516 (“We cannot proscribe the doctrine of separation, as taught by the Brethren, because, although it is admittedly a spiritual doctrine, temporal effects may cause deviation from the accepted norm.”) *See also Harrison*, 235 P.3d at 549:

Of particular note, Adiel also asserts the trial court applied an incorrect legal standard, which resulted in the court’s failure to consider evidence about Monica’s religious beliefs and practices as a Jehovah’s Witness. Adiel claims these religious beliefs and practices have adversely affected or could adversely affect J.D.H. in the future. As discussed more fully below, we review Kansas law regarding the legal standard a trial court should apply to evidence of a parent’s religious beliefs and practices in a child custody case. We hold that a parent’s religious beliefs and practices may not be considered by the trial court as a basis to deprive that parent of custody unless there is a showing of actual harm to the health or welfare of the child caused by those religious beliefs and practices.

<sup>109</sup> *Quiner*, 59 Cal. Rptr. at 518:

The fact that judged by the common norm, it may be logically concluded that custody in the father is for the child’s best interests, does not warrant us in taking custody away from the mother when such an order must be bottomed on our opinion that the mother’s religious beliefs and teachings, in their effect on the child, are and will continue to be contrary to child’s best interests.

The court offered reasons to believe that the mother having custody would not have the dire effects predicted by the father, for example, that the father's relationship with the child would be greatly compromised.<sup>110</sup> Hopeful that the father would be able to promote his relationship with the child when the father had visitation,<sup>111</sup> the court noted that thus far there was no evidence that the father's relationship with the child had suffered.<sup>112</sup>

Yet, the father's relationship with the child had not suffered because the father had had custody. When the father had had custody, there was no evidence that the son had been alienated from the mother,<sup>113</sup> and it seemed at least probable that the mother having custody would result in a souring of the relationship between the father and child.<sup>114</sup>

The *Quiner* court noted that the custodial parent gets to determine the child's religion,<sup>115</sup> which would mean that "the child

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<sup>110</sup> *Id.* at 513 ("We are sensitive to the revelation . . . that custody in the mother may breed in John Edward a lack of religious and filial rapport with his father and the father's parents, and may possibly breed definite antipathy to his father and his paternal grandparents.").

<sup>111</sup> *Id.* at 514 ("[W]e have no right to assume that the father, even though custody is in the mother, will have no effect whatsoever in the upbringing of John Edward. Liberal rights of visitation plus weekends and part of summer vacations with the father would supply ample opportunity.").

<sup>112</sup> *Id.* at 517–18 ("There is no showing at bench . . . that any acts of appellant (other than her admission that the child is and will be taught the doctrine of separation), has in any way diminished his affection and devotion to his father. There is no evidence, and indeed it may have been too early to accumulate any evidence, that the doctrine of separation had in any manner affected the child's physical, emotional or mental well-being.").

<sup>113</sup> *Id.* at 514 ("[I]t may be persuasively argued that custody in the father would have little or no effect on the child's affection for his mother and may result in nothing other than a sympathetic tolerance of the mother's espousal of the principle of separation.").

<sup>114</sup> *Id.* at 513 ("[C]ustody in the mother may breed in John Edward a lack of religious and filial rapport with his father . . . , and may possibly breed definite antipathy to his father . . . . We agree that it is probable that such attitude may interfere with complete empathy between the child and the father."). See also Michael Loatman, *Protecting the Best Interests of the Child and Free Exercise Rights of the Family*, 13 VA. J. SOC. POL'Y & L. 89, 107 (2005) ("In *Quiner*, the mother's behavior was likely to lead to alienation by the child toward his father.").

<sup>115</sup> *Quiner*, 59 Cal. Rptr. at 513 ("[T]he parent having the custody of a child has the right to bring up the child in the religion of such parent.").

would be taught his father is ‘unclean,’ . . . [which] obviously is not for the best interests of the child.”<sup>116</sup> Yet, custody could not be awarded to the father on that account, given that the beliefs at issue were religious.<sup>117</sup> To justify awarding custody to the father, “[e]vidence [would have to] . . . be produced which . . . [would] sustain a finding that there . . . [was] actual impairment of physical, emotional and mental well-being contrary to the best interests of the child.”<sup>118</sup>

The court was setting a high bar.<sup>119</sup> Because the child was quite young at the time of trial, the required evidentiary showing regarding the harmful effects of separation could not be made,<sup>120</sup> which meant that the father would be unable to show that the child would be harmed if placed in the mother’s custody.

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 518:

The fact that judged by the common norm, it may be logically concluded that custody in the father is for the child’s best interests, does not warrant us in taking custody away from the mother when such an order must be bottomed on our opinion that the mother’s religious beliefs and teachings, in their effect on the child, are and will continue to be contrary to child’s best interests.

<sup>118</sup> *Id.* at 516.

<sup>119</sup> *Cf.* Kent Greenawalt, *Child Custody, Religious Practices, and Conscience*, 76 U. COLO. L. REV. 965, 975 (2005) (discussing “the nearly absolutist approach of *Quiner*”).

<sup>120</sup> *Quiner*, 59 Cal. Rptr. at 511:

At bench too, there is no evidence, nor could there have been, since John Edward was at the time of the trial two and one-half years old, that the principle of separation manifested by such requirements as eating lunch apart from his schoolmates, or remaining aloof from them and their activities, had actually taken place and had impaired the physical, emotional and mental health and well-being of the child.



Many states, including California,<sup>121</sup> require that either actual harm have occurred *or* that harm would probably occur.<sup>122</sup> One would have expected the *Quiner* court to discuss whether harm would probably occur. It was simply unclear whether the court was requiring that harm be *actually* established with the understanding that although harm could not then be established the father could later file for a modification of custody if that showing could be made<sup>123</sup> or, instead, was simply unconvinced that harm was likely to occur.<sup>124</sup> It may be that the court was suggesting that as a general matter courts consider actual or probable harm but where religion is concerned the court is not

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<sup>121</sup> See *In re Marriage of Weiss*, 49 Cal. Rptr. 2d 339, 345–46 (Cal. Ct. App. 1996):

Given the constitutional dimensions of the matter, it appears to this court *Zummo* wisely declines to speculate that such exposure is harmful, and instead, requires the party seeking the restriction to demonstrate by competent evidence the belief or practice of the party to be restricted actually presents a substantial threat of harm to the child.

(citing *Zummo v. Zummo*, 574 A.2d 1130, 1154–55, 1157 (Pa. Super. Ct. 1990)).

<sup>122</sup> See *Wilson v. Davis*, 181 So. 3d 991, 995 (Miss. 2016). Cf. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006) (state laws “are designed to prevent probable harm to the child and the State is not required to wait until actual harm has occurred”); *Kirchner v. Caughey*, 606 A.2d 257, 262 (Md. 1992) (“A factual finding of a causal relationship between the religious practices and the actual or probable harm to a child is required.”); *Blixt v. Blixt*, 774 N.E.2d 1052, 1059 (Mass. 2002) (“[T]he State has a compelling interest to protect children from actual or potential harm.”).

<sup>123</sup> *Quiner*, 59 Cal. Rptr. at 518 (“[I]f, as a consequence of the teaching of the principle of separation to the child, it be shown that John Edward’s physical, emotional and mental well-being has been affected and jeopardized . . . the courts of our state are open forums to which father has ready access for relief.”).

<sup>124</sup> *Quiner*, 59 Cal. Rptr. at 514:

[W]e have no right to assume that the father, even though custody is in the mother, will have no effect whatsoever in the upbringing of John Edward. Liberal rights of visitation plus weekends and part of summer vacations with the father would supply ample opportunity. The evidence shows the father to be a worker and a Godfearing man, devoted to the child.

See also *Loatman*, *supra* note 114, at 108 (“Nonetheless, the *Quiner* Court thought it very possible there would be no alienation.”).

permitted to make a judgment about whether harm would likely occur.<sup>125</sup>

*Quiner* has been criticized for having been too deferential to religion, especially to minority religions that govern all aspects of life.<sup>126</sup> Yet, at least one difficulty with that criticism is that the *Quiner* court sent mixed messages, so it is not quite clear what the court was saying. For example, the court explained that “[i]f it be shown at any time in the future that appellant, contrary to established legal principles and proper injunctive order is teaching John Edward not to love and respect his father, such direct indoctrination would undoubtedly require the application of sanctions.”<sup>127</sup>

Here, the court seemed to be suggesting that if the religious teaching resulted in the child not loving and respecting his father, then the court could take action, notwithstanding that the teaching merely involved inculcation of the sincerely held religious beliefs. According to this interpretation of the opinion, once harm has been established (or, perhaps, once the likelihood of harm is sufficiently high), the court can act, even if the actual or probable harm results from religious teaching. Yet, if this interpretation is correct, then the court may not be according religious teaching

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<sup>125</sup> *Quiner*, 59 Cal. Rptr. at 516:

Precisely because a court cannot *know* one way or another, with any degree of certainty, the proper or sure road to personal security and happiness or to religious salvation, which latter to untold millions is their primary and ultimate best interest, evaluation of religious teaching and training and its projected as distinguished from immediate effect (psychologists and psychiatrists to the contrary notwithstanding) upon the physical, mental and emotional well-being of a child, must be forcibly kept from judicial determinations.

<sup>126</sup> Carl E. Schneider, *Religion and Child Custody*, 25 U. MICH. J.L. REFORM 879, 888 (1992):

Far from being “neutral,” the *Quiner* test disadvantages parents who are not members of what we may call other-worldly sects. Members of such separatist sects tend to be governed in all aspects of their lives by their religion. Excluding religiously based behavior from consideration in custody disputes involving a member of an other-worldly sect excludes almost everything from consideration.

Loatman, *supra* note 114, at 101 (“[T]he *Quiner* rule is poor policy in that it favors the parent with an uncommon religion over a more mainstream parent.”).

<sup>127</sup> *Quiner*, 59 Cal. Rptr. at 518.

*sufficient* protection, at least in light of the Court's current jurisprudence. Presumably, a parent could not be precluded from mentioning *anything* negative about the other parent for fear that doing so might undermine the relationship between the other parent and the child.<sup>128</sup> If that is so, then the question will be whether the (prohibited) religious expression is being treated less favorably than some (permissible) nonreligious expression.

A different way of reading *Quiner* protects religious expression much more robustly. If legal principles preclude the state from prescribing religious beliefs because of the "complete integrity of freedom of conscience guaranteed by the Constitution,"<sup>129</sup> then no *established* legal principle or *proper* injunctive order could require the mother to say something contrary to faith or not say something required by faith, which might mean (depending upon the content of her religious belief) that she could not be precluded from directing her son to refrain from loving and respecting her father. But according to this reading, the courts would be quite constrained in the kinds of limitations that they may impose on religious teaching, even if it might result in foreseeable harm.

Yet another way to read the *Quiner* opinion is that notwithstanding sincere religious belief the court could preclude the mother from telling the son to disrespect his father, but the court could not preclude the mother from saying that he should respect but remain separate from his father.<sup>130</sup> This interpretation emphasizes that the "direct indoctrination"<sup>131</sup> must not involve teaching him to disrespect his father, although more indirect indoctrination (the father is worthy of respect but associating with

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<sup>128</sup> See *In re Marriage of McSoud*, 131 P.3d 1208, 1216 (Colo. App. 2006) ("[A] parental responsibilities order[ ] that infringes on [the] . . . constitutional right [of a fit legal parent] is permissible only if it is necessary to promote a compelling state interest and does so in the least restrictive manner possible.").

<sup>129</sup> *Quiner*, 59 Cal. Rptr. at 512 (citing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639-42 (1943)).

<sup>130</sup> *Id.* at 514:

The principle of separation, assuming it 'takes,' although causing a spiritual cleavage and possibly one in habits of life between father and son, does not necessarily detract from the love, respect and devotion which can be engendered and impelled in a son by a God-fearing, loving and devoted father.

<sup>131</sup> *Id.* at 518.

him might result in the son's losing his way) might be permissible. This approach would not solely be concerned with the goal (promoting respect for the noncustodial parent) but, in addition, would also be concerned with the means (no direct undermining of respect). The emphasis on the means is appropriate, given the Court's emphasis on narrow tailoring.<sup>132</sup> But the direct/indirect approach might not be sufficiently closely tailored to the goal, because indirect methods might be quite efficacious in bringing about undesirable results, which might mean that a prohibition of direct undermining would be struck down because not sufficiently closely tailored to the state's interest. Thus, because the indirect method was permissible even though undermining the state interest, the state would not be allowed to prohibit the direct method (which was no more efficacious in undermining the state interest).

Suppose that a particular faith tradition rejects divorce and holds that adultery is sinful. A couple receives a civil divorce and the custodial parent begins a new relationship. The noncustodial parent whose faith tradition both rejects divorce and holds that a relationship with someone other than the (religiously recognized) marital partner constitutes adultery might teach that the ex-spouse is an adulterer.<sup>133</sup> Or, the non-custodial parent might instead discuss the religion's tenets about marriage and relationships outside of marriage, but let the child connect the dots with respect to whether the custodial parent was committing adultery. The direct versus indirect distinction would seem to permit the latter but not the former, and the two approaches might well be equally effective in undermining the custodial parent.

*Quiner* makes clear that matters that normally could be taken into account in determining best interests may be consid-

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<sup>132</sup> See *supra* note 93 and accompanying text.

<sup>133</sup> See *Willis v. Willis*, 775 N.E.2d 878, 881 (Ohio Ct. App. 2002). See also *Becnel v. Becnel*, 732 So. 2d 589, 591 (La. Ct. App. 1999) ("Kathleen contended that Robert's marriage to Diane is 'nothing less than adultery in religious terms, because his marriage vows have not been declared invalid by any ecclesiastic authority. His violation of those vows, according to Catholic teaching, is a mortal sin.'"). By the same token, the custodial parent might object to the child visiting with the non-custodial parent who is allegedly an adulterer. See *In re Marriage of Roberts*, 503 N.E.2d 363, 364 (Ill. App. Ct. 1986).

ered off the table because they are religiously inspired.<sup>134</sup> Where there is another way to determine custody, e.g., some kind of tender years presumption,<sup>135</sup> the court will be able to decide who gets custody, even if that decision would be unlikely to promote the child's best interests. But if the tender years presumption is not used because of equal protection concerns,<sup>136</sup> then the court may have some trouble deciding who should get custody,<sup>137</sup> because matters that would otherwise be appropriate to consider must now be ignored. For example, a parent might believe as a religious matter that parents should be distant and authoritarian. A parent being authoritarian might be disfavored as a secular matter,<sup>138</sup> but *Quiner* suggests that the factor should not be considered if based on religious principles.

Various state courts have offered a fairly narrow interpretations of *Quiner*. For example, citing *Quiner* in support, the Colorado Supreme Court suggested that "Courts are precluded by the free exercise of religion clause from weighing the comparative merits of the religious tenets of the various faiths or basing its

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<sup>134</sup> *But see* Schneider, *supra* note 128, at 889 ("How, then, should a court treat a case like *Quiner*? I do not see any wholly satisfactory principle. However, I would propose that a court treat such cases no differently from the other custody cases it considers.").

<sup>135</sup> *See supra* note 107.

<sup>136</sup> *Ex parte* Devine, 398 So. 2d 686, 695 (Ala. 1981) ("[T]he tender years presumption represents an unconstitutional gender-based classification which discriminates between fathers and mothers in child custody proceedings solely on the basis of sex.").

<sup>137</sup> *See* Schneider, *supra* note 126, at 888 ("Excluding religiously based behavior from consideration in custody disputes involving a member of an other-worldly sect excludes almost everything from consideration."); *Hoedebeck v. Hoedebeck*, 948 P.2d 1240, 1242 (Okla. Civ. App. 1997):

While Lisa characterizes the placement of the children with Raymond as religiously motivated, the evidence showed the children were being emotionally harmed by the actions of Lisa in ways which did not include the religion matter. Again, the court may not decide that one religion is better or worse than another, but it does have the duty to determine the best interests of the children. To fail to consider the impact of certain actions the parents take, simply because the actions are labeled religious would be to exempt such acts from consideration, no matter the impact on the children.

<sup>138</sup> *See, e.g., Com. ex rel. Husack v. Husack*, 417 A.2d 233, 236 (Pa. Super. Ct. 1979) (custody not awarded to father, at least in part, because of his "overly-authoritarian nature").

custody decisions solely on religious considerations.”<sup>139</sup> While these narrow interpretations are correct in that the *Quiner* court held that custody decisions could not be based solely on religious considerations, *Quiner* was much more deferential to religion than these interpretations imply, for example, because *Quiner* suggests that would what normally be included in a best interests analysis would not permissibly be included if religiously inspired.<sup>140</sup>

The *Quiner* trial court had precluded the mother from teaching her child about a tenet of their faith—separation from non-adherents.<sup>141</sup> Suppose that the appellate court had permitted the father to retain custody. Under what conditions, if any, could the court have precluded the mother from teaching her child about her religious views? The appellate court had noted that the child’s relationship with his parents had not suffered while his father had had custody,<sup>142</sup> although the mother had presumably refrained from discussing the doctrine of separation while she was visiting with the child.<sup>143</sup>

#### B. *Limiting Noncustodial Parent Religious Instruction*

As a general matter, states agree that noncustodial parents can be precluded from giving religious instruction to their children where doing so would be harmful.<sup>144</sup> However, states are

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<sup>139</sup> *In re Marriage of Short*, 698 P.2d 1310, 1313 (Colo. 1985) (citing *Quiner*). See also *Clift v. Clift*, 346 So. 2d 429, 434 (Ala. Civ. App. 1977) (“[C]ourts have repeatedly declared that religious beliefs alone shall not constitute the sole determinant in child custody awards.”); *Pater v. Pater*, 588 N.E.2d 794, 798 (Ohio 1992) (“[C]ustody cannot be awarded solely on the basis of the parents’ religious affiliations and that to do so violates the First Amendment to the United States Constitution.”).

<sup>140</sup> See *supra* note 134 and accompanying text.

<sup>141</sup> *Quiner*, 59 Cal. Rptr. at 504 (“The judgment, among other things, granted visitation rights to Linnea, but enjoined her ‘. . . from teaching or informing said child of any matter or thing or religious belief concerning the Plymouth Brethren, or the ‘Exclusive Brethren’, or the concept of ‘separation’ as believed or practiced by the ‘Exclusive Brethren.’”).

<sup>142</sup> See *supra* notes 112-13.

<sup>143</sup> The appellate court implied that she had abided by the trial court’s restriction. See *Quiner*, 59 Cal. Rptr. at 513 (“The mother, as custodian, *would thus have* the opportunity to inculcate the principle of separation in the mind of the child.”) (italics added).

<sup>144</sup> *McSoud*, 131 P.3d at 1215:

often insufficiently clear about how much or what kind of harm must be actual or probable in order to justify a restriction.<sup>145</sup> Nor are they clear about how closely tailored the restriction must be to pass constitutional muster.

Some kinds of harm are grave and imminent and so justify extreme measures. For example, courts use the refusal to author-

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Although this issue has not yet been addressed in Colorado, courts in most other states have also recognized that, absent a clear showing of substantial harm to the child, a parent who does not have decision-making authority with respect to religion nevertheless retains a constitutional right to educate the child in that parent's religion.

*In re Marriage of Jensen-Branch*, 899 P.2d 803, 808 (Wash. Ct. App. 1995):

[I]n order to protect the parents' respective constitutional rights to the free exercise of religion, Washington courts have created a separate standard where a trial court's order regarding decision-making authority restricts those rights: there must be a substantial showing of actual or potential harm to the children from exposure to the parents' conflicting religious beliefs.

*Zummo v. Zummo*, 574 A.2d 1130, 1154–55 (Pa. Super. Ct. 1990):

The vast majority of courts addressing this issue, . . . have concluded that each parent must be free to provide religious exposure and instruction, as that parent sees fit, during any and all period of legal custody or visitation without restriction, unless the challenged beliefs or conduct of the parent are demonstrated to present a substantial threat of present or future, physical or emotional harm to the child in absence of the proposed restriction.

*But see Lange v. Lange*, 502 N.W.2d 143, 146 (Wis. Ct. App. 1993), *on reconsideration* (May 18, 1983):

Because sec. 767.001(2m), Stats., confers on Elizabeth as the custodial parent the sole right to choose the religion of the children, the trial court possesses discretion to fashion reasonable restrictions to protect her choice. First, sec. 767.24(1), Stats., empowers the court to make just and reasonable provisions regarding custody and placement. The court may therefore place reasonable restrictions on visitation. Second, the custodial parent's exclusive right to choose the religion is meaningless without protection from subversion. Since Robert, as the non-custodial parent, has no right to participate in the choice, he cannot complain if his visits with the children are reasonably restricted to protect Elizabeth's choice.

<sup>145</sup> Cf. Nelson A. Mendez, *Child Custody Entangled with Religion: Osteraas v. Osteraas*, 31 IDAHO L. REV. 339, 346 (1994) ("If the Idaho Supreme Court wishes to adopt a strict standard of noninterference with religious matters in custody disputes, it needs to give directions as to when and in what manner intervention is appropriate.").

ize blood transfusions or the administration of needed medicine in emergency circumstances as a clear example of harm justifying state intervention.<sup>146</sup> Yet, the fact that some faith traditions preclude certain kinds of medical treatment does not mean that a parent in that tradition should be denied custody where there is only a slight risk that such emergency conditions will present themselves.<sup>147</sup> Indeed, even were the risk to present itself while such a parent had custody, a court might appoint a temporary guardian to authorize the needed procedure or medication.<sup>148</sup>

Suppose that a child is harmed not by the religious teaching per se, but because the teachings of the custodial and noncustodial parent conflict, and the existence of the conflict is causing

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<sup>146</sup> See *Int. of Ivey*, 319 So. 2d 53, 58 (Fla. Dist. Ct. App. 1975) (“[T]he overwhelming weight of authority throughout the country supports the view that the state, as *parens patriae*, may step in and protect the rights of a child threatened with death because its natural parents will not consent to medical treatment because of religious beliefs or otherwise.”).

<sup>147</sup> See *Garrett v. Garrett*, 527 N.W.2d 213, 221 (Neb. App. 1995)

Likewise, regarding Jeanne’s refusal to consent to a blood transfusion for her children even in the event of an emergency, no evidence was presented showing that any of the minor children were prone to accidents or were plagued with any sort of affliction that might necessitate a blood transfusion in the near future. We cannot decide this case based on some hypothetical future accident or illness which might necessitate such treatment.

*In re Stevens*, 851 N.Y.S.2d 66, \*3 (Sur. 2007)

While neither side submitted evidence on the frequency with which the necessity for blood transfusions arises, the possibility that Natalie’s life could be threatened by refusal of a transfusion is surely remote. There is no controlling case law that would prevent granting –A guardianship—or custody of a minor child—to a parent solely because of her unwillingness to consent to a blood transfusion on some hypothetical future occasion. .

See also *Harrison*, 235 P.3d at 557:

Kansas law provides that a parent’s religious beliefs and practices may not be considered by the trial court as a basis to deprive that parent of custody unless there is a showing of actual harm to the health or welfare of the child caused by those religious beliefs and practices.

<sup>148</sup> *In re Guardianship of L.S. & H.S.*, 87 P.3d 521, 522 (Nev. 2004) (“[W]hen the parents refused to consent to medically necessary care for H.S. based on their religious convictions, the district court did not abuse its discretion in appointing Valley Hospital as a temporary guardian to make decisions to provide medically necessary, life-saving treatment for H.S.”).



the child stress.<sup>149</sup> A court might well be asked to prevent the noncustodial parent from increasing the child's stress by instructing the child in ways that contradict the custodial parent's teachings.

Several issues might have to be addressed. One would be whether the court prohibited all nonreligious content that might cause the child stress. Parents might disagree about many issues including the relative importance of appearance, athletics, academics, and social life. These differences might also cause the child to feel stress, because the child might want to please both parents but would be unable to do so because the parents had incompatible views.<sup>150</sup> But a failure to impose restrictions in

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<sup>149</sup> See, e.g., *Funk v. Ossman*, 724 P.2d 1247, 1251 (Ariz. Ct. App. 1986) (“As a result of being put in the middle of the relationship between his parents, his anxiety is manifested by the encopresis [soiling his pants]. He feels that he is a mediator and must please both parents, including pleasing them over the religious issue.”); *LeDoux v. LeDoux*, 452 N.W.2d 1, 3 (Neb. 1990) (“[C]onflicts in the Catholic and Jehovah’s Witnesses religions were an obvious contributing factor to the stress felt and manifested by Andrew.”); *Bentley v. Bentley*, 448 N.Y.S.2d 559, 559 (N.Y. App. Div. 1982) (“The Family Court found that the children were ‘emotionally strained and torn’ as a result of the parties’ conflicting religious beliefs.”); *Meyer v. Meyer*, 789 A.2d 921, 924 (Vt. 2001) (“Mother presented extensive evidence that the conflicting practices and rules in each household that stemmed from her and father’s disparate religious beliefs were causing Hannah and Hillary to experience extreme confusion and anxiety.”).

*But see* *Pierson v. Pierson*, 143 So. 3d 1201, 1203 (Fla. Dist. Ct. App. 2014):

While the mother’s concern that exposure to two different religions could confuse the children may be reasonable, neither that concern nor the evidence presented below established the requisite showing of harm to grant the mother ultimate religious decision-making authority for the children and to restrict the father from “doing anything in front of the children or around the children that . . . conflicts with the Catholic religion.”;

*McSoud*, 131 P.3d at 1217 (“We also agree with those courts that have found merely exposing a child to a second religion need not be harmful, and indeed may be healthy for the child.”).

<sup>150</sup> See, e.g., *Andros v. Andros*, 396 N.W.2d 917, 920 (Minn. Ct. App. 1986) (“Dr. Scurry offered his opinion that . . . because the children are so closely bonded with both parents, they feel a need to try to please both. However, the children know that to please one parent necessarily involves displeasing the other.”).

these areas might mean that a restriction on religious instruction would not pass muster.<sup>151</sup>

In addition, courts would have to examine whether the adopted means was the least restrictive.<sup>152</sup> For example, suppose that the parents disagreed about how modestly a child should dress. One possibility would be to have the child abide by each parent's rules when with that parent.<sup>153</sup> But that might mean that barring a parent from expressing views about modesty might be struck down because a less restrictive means could be adopted to reduce the child's stress level.<sup>154</sup>

In *In re Marriage of McSoud*,<sup>155</sup> a Colorado appellate court explained that "[g]overnmental interference with the constitutional rights of a fit, legal parent is subject to strict scrutiny."<sup>156</sup> At issue (among other matters) was a restriction of the "mother's right to take the child to her church unless she support[ed] the religion chosen by father for the child."<sup>157</sup> The intermediate appellate court suggested that such a restriction was unconstitutional,<sup>158</sup> explaining that the "right of all citizens freely to pursue their religious beliefs is guaranteed by the Free Exercise Clause of the First Amendment of the United States Constitution."<sup>159</sup>

<sup>151</sup> See *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021); ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.") (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. at 67-68).

<sup>152</sup> See *supra* note 93 and accompanying text.

<sup>153</sup> See *Hobby v. Walker*, 385 S.W.3d 331, 333 (Ark. Ct. App. 2011) ("[A]t her father's home, G.W. is not allowed to listen to music unless it is Christian music that their church listens to, and she cannot wear jeans, skirts, or shorts. Brooke would allow G.W. to wear shorts and jeans."); *id.* at 334 ("Regarding G.W.'s dress, Tommy denied that he had a dress code and said that G.W. had a choice as to what she could wear at home, although he said that there were 'certain limits' in that her clothing had to be 'modest.'").

<sup>154</sup> *Cf. Kirchner v. Caughey*, 606 A.2d 257, 264 (Md. 1992) ("The record would also support findings that the father has created conflict within the child's mind and caused anxiety by imparting his views on modesty to the child through the criticism of a bathing suit furnished by the mother.").

<sup>155</sup> 131 P.3d 1208.

<sup>156</sup> *Id.* at 1216.

<sup>157</sup> *Id.* at 1214.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1215.

That constitutional right is not contingent on a state court's having awarded custody to that parent. Rather, "absent a clear showing of substantial harm to the child, a parent who does not have decision-making authority with respect to religion nevertheless retains a constitutional right to educate the child in that parent's religion."<sup>160</sup> Further, it should not be thought that establishing harm will be relatively easy. There must be "a clear and affirmative showing of harm to the children."<sup>161</sup> The showing that is required in this context will likely exceed the showing that would be required in a secular context.

Several courts have discussed what does not suffice to establish sufficient harm. *Hanson v. Hanson*<sup>162</sup> involved a divorced couple, one of whom was Catholic and the other a member of the Pentecostal Apostolic Church.<sup>163</sup> The court noted that "the physical or emotional harm to the child resulting from the conflicting religious instructions or practices cannot be simply assumed or surmised, but must be demonstrated in detail."<sup>164</sup>

The mother, the custodial parent, had testified that "the boys do not like to visit with James because 'he has been telling them they are not religious,' that 'the Catholic church believes in cannibalism,' and that 'the Catholic church and Lutheran church taught false doctrine.'"<sup>165</sup> She also testified that "the boys are being 'pulled back and forth' because of the conflict in their parents' religious beliefs and that this 'upsets' them."<sup>166</sup> However, the appellate court found that "the evidence in this case falls short of the clear and affirmative showing of physical or emo-

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<sup>160</sup> *McSoud*, 131 P.3d at 1215. Not all state courts seem to understand this. See *Andros*, 396 N.W.2d at 924:

We hold that the court's decision does not affect appellant's constitutional right to freedom of religion. Although appellant's wish to involve the children in his religious activities is now subject to respondent's consent while they are minors, appellant is, and always has been, free to practice his religious beliefs as he sees fit.

<sup>161</sup> *Khalsa v. Khalsa*, 751 P.2d 715, 721 (N.M. Ct. App. 1988).

<sup>162</sup> 404 N.W.2d 460 (N.D. 1987).

<sup>163</sup> *Id.* at 462.

<sup>164</sup> *Id.* at 464.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 464-65.

tional harm to the children required to justify the religious restrictions placed upon James' visitation rights."<sup>167</sup>

In *Munoz v. Munoz*, the children were raised in both the Catholic and Church of the Latter Day Saints traditions.<sup>168</sup> The Washington Supreme Court suggested that the welfare of the child is paramount when the parents disagree about religious training.<sup>169</sup> However, if the child's welfare is not at issue, courts are reluctant to interfere in disputes between the parents about religious matters.<sup>170</sup> Here, the trial court had found that it would be detrimental to the children to be exposed to conflicting traditions so it would be in the children's best interests to be raised in the tradition of the custodial parent.<sup>171</sup> Because there was "no affirmative showing in the record that it would be detrimental to the well-being of the children to allow the defendant to take them to the Catholic Church or to religious instruction in that faith during the periods of his rights of visitation,"<sup>172</sup> the court struck that part of the order as a "a manifest abuse of discretion."<sup>173</sup> But this implies that when religious practices are at issue the question is not merely whether exposing the children to multiple practices would be detrimental, but whether the alleged detriment can be attributed to a particular practice.

In *Morris v. Morris*, the divorced parents were of different religions—the mother, who had custody, was Roman Catholic, while the father was a Jehovah's Witness.<sup>174</sup> The mother sought to prevent the father from bringing the child with him when he went door-to-door doing religious solicitation. At trial, a clinical psychologist testified that the child at that age "would tend to

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<sup>167</sup> *Id.* at 465.

<sup>168</sup> *Munoz v. Munoz*, 489 P.2d 1133, 1134 (Wash. 1971)

<sup>169</sup> *Id.* at 1134.

<sup>170</sup> *Id.* at 1135.

<sup>171</sup> *Id.* at 1134.

<sup>172</sup> *Id.* at 1135. *See also In re Marriage of Murga*, 163 Cal. Rptr. 79, 82 (Cal. Ct. App. 1980):

[W]hile the custodial parent undoubtedly has the right to make ultimate decisions concerning the child's religious upbringing, a court will not enjoin the noncustodial parent from discussing religion with the child or involving the child in his or her religious activities in the absence of a showing that the child will be thereby harmed.

<sup>173</sup> *Munoz*, 489 P.2d at 1136.

<sup>174</sup> *Morris v. Morris*, 412 A.2d 139, 141 (Pa. Super. Ct. 1979).

adopt her parents' beliefs rather than form her own judgments, and that considerable inconsistency in the former would cause the child to disregard the teaching of either parent."<sup>175</sup> That witness also testified that "door-to-door solicitations would probably. . . result in some psychological impairment."<sup>176</sup>

The court noted that "the state of the art in psychiatry is such that absolute certainty is not possible,"<sup>177</sup> and that "the psychiatrist treads in a cryptic area replete with uncertainty."<sup>178</sup> But that very uncertainty was what justified accepting that "the inconsistent teachings would probably result in some mental disorientation,"<sup>179</sup> which allegedly justified the limitations on the father with respect to bringing his child door-to-door.

When upholding the limitation on door-to-door proselytizing, the court explained that the father was "not prohibited from seeing Lisa, nor from discussing his beliefs with her, but only from forcing her to accompany him on his door-to-door visits,"<sup>180</sup> implying that the limitation was rather limited and thus justifiable.<sup>181</sup> Further, the court might have cited *Prince* for the proposition that parents can be prohibited from bringing their children along to proselytize.<sup>182</sup> Regrettably, the court failed to appreciate that even limited restrictions must be closely tailored to promoting the state's asserted interest. Permitting the father to discuss his beliefs would allegedly lead to the harm to be averted—the daughter's disregarding the teaching of either parent. But if that is so, then the imposed limitation (prohibiting the door-to-door proselytizing) was not closely tailored to promote the state interest (because the state interest would allegedly be undermined anyway), which would mean that the limitation would likely not pass constitutional muster.

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<sup>175</sup> *Id.* at 146.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 147.

<sup>179</sup> *Id.*

<sup>180</sup> *Morris*, 412 A.2d at 147.

<sup>181</sup> *See id.* ("The order is, at any rate, quite liberal . . . [and] temporary in nature,") (citing *Friedman v. Friedman*, 307 A.2d 292 (Pa. 1973); *Commonwealth ex rel. Hickey v. Hickey*, 264 A.2d 420 (Pa. 1970)).

<sup>182</sup> *See supra* notes 37-58 and accompanying text (discussing *Prince*).

Proselytizing was at the center of the dispute in *Kirchner v. Caughey*.<sup>183</sup> At issue was a challenge to an order prohibiting the father from having “the minor child of the parties participate in any church or church-related activity while said minor child is in his care and custody during his visitation periods.”<sup>184</sup>

The mother, who had testified that “the child suffered anxiety attacks and had trouble sleeping just prior to scheduled visitations and would come home from visitations crying,”<sup>185</sup> attributed this anxiety to “the child’s participation in certain activities of the father’s church, and to conflicts arising from the ardor with which the father pursued newly-found fundamentalist beliefs in his conversations and dealings with the child.”<sup>186</sup> But a separate question was whether the mother had accurately identified the cause of the anxiety and, if so, what steps might be taken to alleviate that anxiety.

The *Kirchner* court explained that a “factual finding of a causal relationship between the religious practices and the actual or probable harm to a child is required—mere conclusions and speculations will not suffice.”<sup>187</sup> After announcing this demanding standard, the court seemed to undermine the very standard that it had announced.

A psychiatrist had testified that “the proselytizing by the father and the direct involvement by the child in his efforts to convert others [was] . . . particularly harmful to the child,”<sup>188</sup> although that harm had to be put in context. The expert had testified that religion was not the primary issue; instead, the parents had different views of what was “right” and what was “wrong.”<sup>189</sup> For example, the father had criticized the daughter’s bathing suit as immodest and had objected to her listening to rock and roll.<sup>190</sup> Yet, it was not clear that prohibiting the father from including the child in religious activities would resolve the conflict felt by the child in light of the parents’ differing world views—even if the

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<sup>183</sup> 606 A.2d 257 (Md. 1992).

<sup>184</sup> *Id.* at 259.

<sup>185</sup> *Id.* at 260.

<sup>186</sup> *Id.* at 260–61.

<sup>187</sup> *Id.* at 262 (citing *Khalsa*, 751 P.2d at 720).

<sup>188</sup> *Id.* at 263.

<sup>189</sup> *Kirchner*, 606 A.2d at 264.

<sup>190</sup> *Id.*

child was precluded from attending the “non-denominational”<sup>191</sup> Sunday school classes at the father’s church, the child would likely still feel torn. But this might well mean that the focus on limiting religious activities would not pass muster, because other practices were being permitted, notwithstanding their promoting what the State wished to prevent.

#### IV. Conclusion

Children who are placed in the middle of their divorced parent’s conflicts may suffer ill effects.<sup>192</sup> Understandably, state courts wish to minimize the ill effects that children experience when their parents strongly disagree about certain matters including religious ones. Yet, the noncustodial parent’s right to instruct his or her child on religious matters is protected as a constitutional matter and recent decisions suggest that this protection is quite robust.

Courts that impose limitations on religious instruction must establish that these limitations are the least restrictive means to promoting a compelling state interest,<sup>193</sup> and courts often fail to establish that the chosen means is sufficiently closely tailored.<sup>194</sup> The U.S. Supreme Court is likely to view limitations on religious instruction with a jaundiced eye if secular expression is not similarly limited.<sup>195</sup> Further, the Court is unlikely to uphold limita-

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<sup>191</sup> *Id.* at 263.

<sup>192</sup> Robert E. Emery, *Foreword*, 10 VA. J. SOC. POL’Y & L. 1, 3 (2002) (“For children, . . . one of the worst things about divorce [is] getting caught in the middle between your warring parents.”); Gregory Firestone & Janet Weinstein, *In the Best Interests of Children A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203, 204 (2004) (“[O]ne of the most consistently reported findings of divorce research involves the toxic effect on children caught in the middle of ongoing conflict of their parents.”); Sol R. Rappaport, *Deconstructing the Impact of Divorce on Children*, 47 FAM. L.Q. 353, 364 (2013) (“[P]arental conflict pre-and post-divorce that puts the children in the middle increases the likelihood that a child will have post-divorce adjustment difficulties.”).

<sup>193</sup> *See Tandon*, 141 S. Ct. at 1296.

<sup>194</sup> *Id.*, at 1296-97 (“narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest”).

<sup>195</sup> *Id.* at 1296 (“[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause,

tions on religious instruction if those limitations are unlikely to achieve the state goal, e.g., if the child is still going to undergo stress and anxiety because the child still feels forced to choose sides.

When striking down the restrictions on religious instruction, the Court will likely accept that the State has a compelling interest in preventing harm to children. However, the Court's free exercise jurisprudence has focused increasingly closely on the means adopted, and has made clear that secular activity can never be favored over religious activity.

Religious activity cannot be prohibited where *comparable* secular activity is permitted,<sup>196</sup> so an important issue will involve which secular activities are comparable. The Court has been relatively deferential with respect to which secular activities are comparable to religious activities for these purposes,<sup>197</sup> which means that states will have great difficulty in making sure both that their restrictions are not overbroad and that comparable secular teaching is not permitted while religious teaching is prohibited. While the determination of which limitations are permissible will have to be worked out in the courts, the Court has set up a very daunting standard. Many of the current state approaches will likely have to be revised, even if that results in children's welfare being diminished.

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whenever they treat *any* comparable secular activity more favorably than religious exercise.”).

<sup>196</sup> *Cf. Tandon*, 141 S. Ct. at 1298 (Kagan, J., dissenting) (“California need not, as the *per curiam* insists, treat at-home religious gatherings the same as hardware stores and hair salons . . . the law does not require that the State equally treat apples and watermelons.”).

<sup>197</sup> *See supra* note 192 and accompanying text.



## Fifth Amendment Privilege in Family Law Litigation

by  
Brett R. Turner\*

### Introduction

Family law lawyers are used to practicing in a world where broad financial discovery is mandatory. Courts have a genuine need for a wide variety of evidence in order to divide marital property, award spousal and child support, and determine custody of children.<sup>1</sup> Not uncommonly, parties are required to comply with even the most intrusive requests for information. Objections result only in the entry of a protective order barring disclosure of the produced material to persons other than the parties, their counsel, and the court.<sup>2</sup>

Even in family law cases, however, there are *some* limits on what must be produced in discovery or allowed into evidence at trial. One of the stronger limits is the privilege against self-incrimination. The privilege is recognized by the Fifth Amendment to the U.S. Constitution,<sup>3</sup> and by a similar provision in most state constitutions.<sup>4</sup> Because the privilege is an important consti-

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<sup>1</sup> BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* § 4:3 (4th ed. 2021).

<sup>2</sup> *Id.* §§ 4:3, 4:6, 4:11.

<sup>3</sup> U.S. CONST. amend. V.

<sup>4</sup> *See, e.g.*, CAL. CONST. art. I, § 15; MASS. CONST. pt. I, art. XII; N.C. CONST. art I, § 23.

tutional right, it is of the few devices that can defeat the public policy of broad financial disclosure in family law cases.

Still, the privilege is not always easy to invoke, and the court's power to draw an adverse inference against the party who invokes the privilege, or to even deny that party all affirmative relief, can be a powerful countervailing force.<sup>5</sup> The clear trend in the cases is to recognize the privilege when it applies; but whether invoking the privilege will actually help the witness over the long run can be a close and debatable question.

Part I of this article will examine the basic parameters of the privilege. Part II will discuss when and how the privilege can be waived, a subject which is essential to determining the practical scope of the privilege. Part III will discuss case law applying the privilege to documents and other forms of nontestimonial evidence. Finally, Part IV will discuss the adverse consequences of asserting the privilege.

This article covers only the Fifth Amendment privilege. Privileges under similar state provisions generally track the protection given by the federal provision,<sup>6</sup> but it is prudent to double-check this point in specific cases, since there is no requirement that the federal and state privileges exactly mirror one another.

## **I. Parameters of the Privilege**

The Fifth Amendment to the U.S. Constitution provides simply that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”<sup>7</sup> While the text of the amendment speaks only of criminal cases, it is settled that a person also may not be compelled to be a witness against himself in a civil case.

The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official ques-

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<sup>5</sup> See Part IV *infra*.

<sup>6</sup> See, e.g., *State v. Kramer*, 2006 WI App 133, ¶8 n.3, 294 Wis. 2d 780, 786, 720 N.W.2d 459, 462 (Wis. Ct. App. 2006) (“Historically, we have interpreted [Wisconsin’s state privilege against self-incrimination] to provide the same scope of protections as the FIFTH AMENDMENT to the United States Constitution.”)

<sup>7</sup> U.S. CONST., amend. V.

tions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.<sup>8</sup>

Thus, the privilege applies in family law litigation.

The most common fact pattern involving invocation of the Fifth Amendment in family law litigation has traditionally been when a party in a divorce case refuses to answer questions on extramarital relationships, on grounds that the answer might lead to a conviction for criminal adultery.<sup>9</sup> As criminal adultery statutes drop in number,<sup>10</sup> and as divorce cases generally attach less weight to fault,<sup>11</sup> this fact pattern has become less common. Modern cases are increasingly seeing the privilege invoked in response to questions about tax returns and other prior statements involving the witness's finances,<sup>12</sup> or in custody or dependency litigation, by a spouse accused of misconduct involving a child.<sup>13</sup>

What does it mean for a person to be a witness against himself? At a minimum, a person is a witness against himself when the answer to a question can be used against him in a criminal

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<sup>8</sup> Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

The privilege applies specifically to juvenile proceedings. “Although the court in this case initially appeared to base its ruling that Abigail could not refuse to testify on an erroneous understanding that she could not invoke her Fifth Amendment privilege in this juvenile adjudication, the court ultimately appeared to recognize that she could invoke the privilege.” *In re Vladimir G.*, 944 N.W.2d 309, 317 (Neb. 2020); *see also* New Jersey Div. of Child Prot. & Permanency v. S.K., 193 A.3d 309 (N.J. Super. Ct. App. Div. 2018).

*Vladimir G.* held, however, that if self-incriminating evidence had improperly been introduced, the remedy was to exclude that evidence in a future criminal prosecution, and not to reverse the trial court for admitting that evidence, especially where the claim that the evidence was incriminating was weak.

<sup>9</sup> *See infra* note 29.

<sup>10</sup> Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions After Lawrence v. Texas*, 39 SUFFOLK L. REV. 837 (2006) (“[m]any states . . . repeal[ed] their own criminal adultery statutes”).

<sup>11</sup> *See generally* Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773 (1996); Peter Nash Swisher, *Marriage and Some Troubling Issues with No-Fault Divorce*, 17 REGENT U. L. REV. 243 (2004).

<sup>12</sup> *See, e.g.*, Slater v. Slater, 78 Misc. 2d 13, 14, 355 N.Y.S.2d 943, 944 (N.Y. Sup. Ct. 1974).

<sup>13</sup> *See, e.g.*, *In re Billman*, 634 N.E.2d 1050, 1051 (Ohio Ct. App. 1993) (“the right to refrain from testifying against oneself attaches to a dependency action in juvenile court”).

prosecution.<sup>14</sup> In addition, a person is also a witness against himself if his answer, while not itself admissible in a criminal prosecution, “could lead to other evidence that might be so used.”<sup>15</sup>

Who determines whether the answer to a question might be used against the witness in a criminal production? “The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified.”<sup>16</sup>

When the court reviews an attempt to assert the Fifth Amendment privilege, it need not find that an answer to the question certainly would result in a criminal conviction. “To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered *might* be dangerous because injurious disclosure *could* result.”<sup>17</sup> But again, the test is whether answering the question objectively could result in a criminal prosecution, and not whether the witness subjectively believes that a criminal prosecution is likely. “[T]he guiding principle in a self-incrimination inquiry is the objective reasonableness of a witness’s claimed fear of future prosecution.”<sup>18</sup> The Fifth Amendment “protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution.”<sup>19</sup>

<sup>14</sup> *E.g.*, *Kastigar v. United States*, 406 U.S. 441, 445 (1972).

<sup>15</sup> *Id.* “The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.” *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *see also Vladimir G.*, 944 N.W.2d at 317–18.

<sup>16</sup> *Hoffman*, 341 U.S. at 486. “A party is not entitled to decide for himself whether he is protected by the fifth amendment privilege. Rather, this question is for the court to decide.” *SEC v. First Fin. Grp., Inc.*, 659 F.2d 660, 668 (5th Cir. 1981).

<sup>17</sup> *Hoffman*, 341 U.S. at 486–87 (emphasis added).

<sup>18</sup> *Grosshuesch v. Cramer*, 659 S.E.2d 112, 119 (S.C. 2008).

<sup>19</sup> *Kastigar*, 406 U.S. at 445. “[T]he proper test simply assesses the objective reasonableness of the target’s claimed apprehension of prosecution.” *United States v. Sharp*, 920 F.2d 1167, 1171 (4th Cir. 1990). “A valid assertion of the fifth amendment privilege exists where a witness has reasonable cause to apprehend a real danger of incrimination. A witness must, however, show a “real danger,” and not a mere imaginary, remote or speculative possibility of

A good example of how these concerns are balanced is *Slater v. Slater*.<sup>20</sup> There, the husband asserted the privilege when questioned about his tax returns. The basis for the husband's claim was quite specific: "the defendant might be subject to the penalties of perjury under section 6065 of title 26 of the United States Code, were he compelled to answer despite his assertion of the constitutional privilege."<sup>21</sup>

The trial court wrote a curious opinion which acknowledged the importance of the privilege, acknowledged the policies it protected, and then refused to sustain the husband's invocation of the privilege across the board. The stated reasoning was the well-accepted policy that "[i]n this, as in all difficult matrimonial disputes, the wife has a right to inquire into the financial status of her husband," and the comment that "if the bald assertion of the privilege were accepted at face value, the substantive rights of the wife in this instance could be severely prejudiced."<sup>22</sup> This author completely agrees that full disclosure of finances is a critically important policy,<sup>23</sup> but it is questionable whether that policy is of the same magnitude as a constitutional right.<sup>24</sup>

Nevertheless, a somewhat different line of reasoning supports the result reached. It was clearly the husband's burden to prove that answering the question would actually tend to convict him of a specific crime. The crime at issue was a violation of 26 U.S.C. § 6065, which essentially provides that tax returns are filed under penalty of perjury. It is certainly likely that some answers to some questions would tend to convict the husband of perjury. For example, if the question were "why did you not list your gambling winnings as income on your tax return," and a true answer would be "because I did not want to pay income taxes on them and I was trying to cheat the I.R.S.," the privilege would obviously apply. A truthful answer would be a damaging direct admission of perjury. The privilege could be invoked de-

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prosecution." *In re Morganroth*, 718 F.2d 161, 167 (6th Cir. 1983) (citation omitted).

<sup>20</sup> 355 N.Y.S.2d at 944.

<sup>21</sup> *Id.* at 944.

<sup>22</sup> *Id.* at 946.

<sup>23</sup> See TURNER, *supra* note 1, § 4:3.

<sup>24</sup> *Cf.* *Coronado v. State*, 351 S.W.3d 315, 329 (Tex. Crim. App. 2011) ("There is no 'balancing' the defendant's constitutional right of confrontation and cross-examination against other social policies, even compelling ones").

spite the public policy in favor of full disclosure in divorce cases; the policy is trumped by a constitutional right.

But it is not certain that a truthful answer to *every* conceivable question would tend to convict the defendant of perjury. The court quoted only two specific questions asked of the husband, both of which asked him to state how he arrived at the statement on the return that his gross income was \$21,631. It is quite possible that a truthful answer to the question might not have been incriminating at all. For example, if the true answer were, "I took that amount off the taxable salary line on my W-2 form," there would be no risk of incrimination. Even if the husband lied on the return by understating his income, a truthful answer to the question, how did you compute the amount of income which you *did* report, would not be incriminating. Taxpayers do not generally overstate the amount of their income; there is no financial benefit (and in fact a financial detriment) for doing so.

The husband's claim that he could not answer *any* questions about his tax return was therefore overbroad. In many ways, it was inconsistent with the requirement in civil litigation that the privilege must be invoked on a question-by-question basis.<sup>25</sup> The court's decision that questioning should proceed, subject to specific objections to specific questions, makes considerable sense. But the court should have based its reasoning more on a finding that a truthful answer to at least some questions would not have posed an objectively reasonable risk of self-incrimination, and less upon a questionable suggestion that a public policy could overcome a constitutional right.<sup>26</sup>

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<sup>25</sup> See *infra* note 44.

<sup>26</sup> It might also be noted that to the extent that the privilege was properly invoked by the husband, the wife was permitted to ask the court to draw an adverse inference. See *infra* note 72. In most cases, the adverse inference provides full protection to the public policy in favor of full disclosure. For example, if the husband is asked why he did not report a stated amount of gambling winnings as income, and he properly invokes the privilege, the court may draw an adverse inference that the husband actually earned the stated amount of gambling winnings. Even if there are no records of the husband's gambling winnings, forensic analysis may still permit court to infer the amount of funds unaccounted from paychecks or a bank account. There are ways to accommodate the public policy in favor of full financial disclosure without trampling over the privilege against self-incrimination.

In assessing the objective reasonableness of the witness's fear of future prosecution, the focus is on whether testimony would assist a prosecutor in proving the witness guilty of a criminal offense.<sup>27</sup> Whether a prosecutor would actually be likely to prosecute the offense is not a relevant issue.<sup>28</sup> This point arises often in the family law context with regard to evidence of adultery. Adultery remains a crime in many states, but it is very rarely prosecuted.<sup>29</sup> Nevertheless, if an answer would be admissible evidence against the witness in a prosecution for criminal adultery or a similar sex-related criminal offense, the witness may assert the privilege.<sup>30</sup>

Likewise, a party who seeks to obtain an answer regarding adultery in civil litigation cannot defeat the privilege by arguing

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<sup>27</sup> *Pulawski v. Pulawski*, 463 A.2d 151, 158 n.1 (R.I. 1983) (reversing the trial judge who “uncritically accepted the assertion of the privilege against self-incrimination in many instances when it was perfectly clear that the answers could not ‘furnish a link in a chain of evidence’ that might be utilized in order to prosecute the witness for criminal conduct”).

<sup>28</sup> “[O]nce incriminating potential is found to exist, courts should not engage in raw speculation as to whether the government will actually prosecute.” *Sharp*, 920 F.2d at 1171. “[T]he privilege against self-incrimination does not require, or even permit, the court to assess the likelihood of an actual prosecution in deciding whether to permit the privilege. . . . Forcing a witness to make incriminating statements whenever the court feels that actual prosecution is unlikely would impermissibly weaken the privilege against self-incrimination.” *People v. Seijas*, 114 P.3d 742, 751 (Cal. 2005).

<sup>29</sup> *Thomas v. Marion Cnty.*, 652 N.W.2d 183, 186 (Iowa 2002) (referring to “rare prosecutions for adultery”); *Choi v. State*, 560 A.2d 1108, 1113 (Md. 1989) (“prosecutions under [criminal adultery] statutes may be rare”); *In re Knapp*, 536 So. 2d 1330, 1335 (Miss. 1988) (“[a]dultery is a criminal offense in this state, notwithstanding the Circuit Court’s exclamation that it had heard of no prosecutions therefor in the past twenty years”).

<sup>30</sup> For sample cases in which a spouse successfully asserted the Fifth Amendment privilege on grounds that answering might help establish criminal liability for adultery, see, e.g., *Webb v. Webb*, 950 So. 2d 322, 325 (Ala. Civ. App. 2006); *Hathcock v. Hathcock*, 287 S.E.2d 19 (Ga. 1982); *Choi*, 560 A.2d 1108; *Payne v. Payne*, 366 A.2d 405 (Md. Ct. App. 1976); *S.K.*, 193 A.3d 309, 324 (N.J. Super. Ct. App. Div. 2018); *S.K. v. I.K.*, 27 Misc. 3d 1205(A), 910 N.Y.S.2d 408 (N.Y. Sup. Ct. 2010); *Cantwell v. Cantwell*, 427 S.E.2d 130 (N.C. Ct. 1993); *Griffith v. Griffith*, 506 S.E.2d 526, 529 (S.C. Ct. App. 1998) (“it is legally proper for persons facing criminal prosecution for adultery to invoke their Fifth Amendment privilege against self-incrimination”); see generally James H. Feldman & Carolyn Sievers Reed, *Silences in the Storm: Testimonial Privileges in Matrimonial Disputes*, 21 FAM. L.Q. 189, 224-25 (1987).

that criminal adultery statutes are unconstitutional.<sup>31</sup> The key point is whether answering the question creates a reasonable risk of self-incrimination. There exists at least a reasonable chance that criminal adultery statutes are constitutional.<sup>32</sup> The court that is asked to compel the witness to answer cannot reduce that risk to zero, because the question of constitutionality will be decided in future criminal litigation between the witness and the state. That litigation will be heard by a different judge, and the party arguing for constitutionality will be the state, which is not a party to the civil action. So long as there exists any reasonable risk that criminal adultery statutes will be upheld, the witness can assert the Fifth Amendment privilege when asked to testify about adultery in civil cases.

For similar reasons, legal disputes over the definition of adultery do not prevent a witness from asserting the privilege, if there is a reasonable risk that adultery might be defined in a manner that includes the conduct about which the witness is asked.<sup>33</sup>

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<sup>31</sup> See generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that Texas' sodomy statute was unconstitutional, because unmarried persons have a right of privacy in their intimate personal relationships).

<sup>32</sup> See *Ingleson v. Burlington Med. Supplies, Inc.*, 141 F. Supp. 3d 579, 588 n.4 (E.D. Va. 2015) (recognizing "a clear distinction between the private, consensual sexual activity at issue in *Lawrence* and the Commonwealth's other statutes criminalizing certain sexual conduct, including the prohibition against adultery"); *Commw. v. Stowell*, 449 N.E.2d 357 (Mass. 1983) (upholding an adultery statute against constitutional attack); *United States v. Orellana*, 62 M.J. 595, 596 (N.M. Ct. Crim. App. 2005) ("We specifically hold that *Lawrence v. Texas* does not bar the prosecution of adultery under the [Uniform Code of Military Justice]"); *City of Sherman v. Henry*, 928 S.W.2d 464 (Tex. 1996) (same); see also *Malecek v. Williams*, 804 S.E.2d 592, 594 (N.C. Ct. 2017) (upholding torts of alienation of affections and criminal conversation against a constitutional attack based upon *Lawrence*); see generally Brett R. Turner, *Justice Scalia's "Wild Ride": Lawrence v. Texas and the Constitutionality of Penalizing Adultery*, 17 DIVORCE LITIG. 109 (July 2005) (arguing at length that *Lawrence* does not apply to adultery statutes, because unlike the sodomy at issue in *Lawrence*, adultery is misconduct with a victim: the innocent spouse).

<sup>33</sup> See *Payne*, 366 A.2d at 410 (where legal uncertainty existed as to whether sexual relations with an unmarried woman constituted adultery, the husband was permitted to invoke the Fifth Amendment privilege when asked about such relations; a reasonable risk existed that sexual relations with an unmarried woman could constitute adultery).



While rarity of prosecution does not alone prevent a party from asserting the Fifth Amendment privilege, there are more substantial obstacles to prosecution that will bar assertion of the privilege. “The privilege cannot be asserted” when there are real questions concerning the government’s *ability* to [prosecute the witness] because of legal constraints such as statutes of limitation, double jeopardy, or immunity.<sup>34</sup>

The most common of these obstacles is the statute of limitations. Many criminal adultery statutes have a limitations period.<sup>35</sup> If the witness is asked about commission of adultery, and the question applies only to conduct older than the statute of limitations, some authority holds that the privilege cannot be asserted.<sup>36</sup> For example, if the statute of limitations for criminal adultery is one year, then there is no risk of prosecution for adultery that occurred more than a year ago, as the statute of limitations would be an absolute bar to prosecution.

But there are certain countervailing arguments. A prosecutor could use adultery occurring before the statute of limitations ran as a tool to obtain evidence of more recent adultery—for example, to identify a long-term paramour or to locate a place in which adultery was often committed. There is substantial authority from criminal adultery cases that misconduct occurring outside the limitations period is admissible evidence of more recent adultery.<sup>37</sup> Some courts, relying on this point, have held

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<sup>34</sup> *Sharp*, 920 F.2d at 1171 (emphasis added).

<sup>35</sup> See, e.g., VA. CODE ANN. § 18.2-365 (adultery is a misdemeanor); *id.* § 19.2-8 (providing a one year statute of limitations for misdemeanors).

<sup>36</sup> See, e.g., *Ex parte Edmondson*, 238 So. 3d 85 (Ala. Civ. App. 2017) (rejecting an argument that adultery is a continuing offense, so that the statute does not start to run until the last act of adultery between a spouse and a paramour); *Howard v. Howard*, 422 So. 2d 296 (Ala. Civ. App. 1982); *Messiah v. Messiah*, Ch. No. 110950, 17 Va. Cir. 365, 1989 WL 646415 (Fairfax Cnty. Oct. 25, 1989) (holding that a witness cannot invoke the Fifth Amendment privilege when asked about adultery occurring outside of the limitations period).

<sup>37</sup> See, e.g., *State v. Dukes*, 25 S.E. 786 (N.C. 1896) (adultery occurring before the limitations period can be introduced as corroborative evidence of adultery committed during the limitations period); *State v. Potter*, 52 Vt. 33, 40-41 (1879) (“The evidence as to acts and instances of intercourse prior to the time limited by the statute, was admissible in connection with the other evidence that was not objected to, as tending to show that he was the guilty party to the acts of intercourse which were admitted to have occurred with the girl within the time covered by the indictment”).

that the privilege can be asserted even as to acts occurring outside of the limitations period.<sup>38</sup>

In addition, some adultery is criminal under the federal Mann Act,<sup>39</sup> which bars transportation of persons across state lines for purposes of sexual activity. The statute of limitations under the Mann Act is five years<sup>40</sup>—longer than many limitations periods under state adultery statutes.<sup>41</sup>

Likewise, a grant of immunity by a prosecutor is an absolute bar to criminal prosecution. Such waivers have been rare in the reported domestic relations case law, but where they exist, they are a bar to asserting the privilege.<sup>42</sup>

It is worth noting that only a formal grant of immunity bars assertion of the privilege. A mere informal promise by a prosecutor is not sufficient, because the promise would not be legally binding upon the prosecutor's successor, or upon a prosecutor in a different jurisdiction.<sup>43</sup> To bar assertion of the privilege, a grant of immunity must be legally binding on all future prosecutors.

In a criminal case, the defendant can generally exercise the privilege on a broad basis and refuse to testify at all. In a civil case, the procedure is somewhat different. The privilege cannot

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<sup>38</sup> See *Zohn v. Zohn*, No. 11415., 1989 WL 646156 at \*2 (Va. Cir. Ct. Loudoun Cnty. Jan. 12, 1989) (sustaining the invocation of privilege; "I can easily see how a prosecutor could take the witness' answer concerning a time barred misdemeanor sexual offense and use it as a starting place for further inquiry and investigation that could link the witness to a non-time barred sexual offense").

<sup>39</sup> 18 U.S.C. § 2421 (2021).

<sup>40</sup> 18 U.S.C. § 3282. The limitations period is even longer if the victim is a minor. *Id.* § 3283.

<sup>41</sup> See *Fisher v. Fisher*, No. 90-113, 1992 WL 884615, at \*1 (Va. Cir. Ct. Warren Cnty. Apr. 1, 1992) (upholding the assertion of the Fifth Amendment privilege, based upon the risk of prosecution under the Mann Act).

<sup>42</sup> "The parties stipulated that they had been granted immunity from prosecution for adultery. Thus, there was no legal justification for the wife's refusal to answer the questions." *Griffith*, 506 S.E.2d at 531; see, e.g., *United States v. Wilson*, 421 U.S. 309, 311 (1975).

<sup>43</sup> See *Temple v. Commonwealth*, 75 Va. 892, 1881 WL 6314 at \*4 (Mar. 1881) (holding that an informal promise by the Commonwealth's Attorney not to prosecute a witness did not prevent invocation of privilege; the promise did not grant immunity, because the Commonwealth's Attorney "might die, or be removed, or resign, and his successor might see fit to institute a prosecution").

be asserted to prevent testimony entirely, and instead must be asserted during testimony on a question-by-question basis.<sup>44</sup>

## II. Waiver of the Privilege

The Fifth Amendment privilege, like constitutional rights generally, is subject to waiver. An express waiver of the privilege must be made “voluntarily, knowingly and intelligently,” which is a high standard to meet.<sup>45</sup>

But there are cases where the high bar of an express waiver was cleared. In *Feig v. Feig*,<sup>46</sup> a property settlement agreement required the husband to provide the wife with a financial statement and a copy of his tax return upon her written request. The wife issued such a request, and the husband refused to comply, asserting his Fifth Amendment privilege. The trial court held the husband in contempt. The Georgia Supreme Court affirmed, finding that the privilege had been waived:

It is patent that Mr. Feig, who was represented by counsel, voluntarily and intelligently waived his constitutional and statutory safeguards as part of the quid pro quo of the property settlement agreement. The privilege against self incrimination can be waived in praesenti. We hold that it can be voluntarily waived by property settlement agreement as to future income tax returns and financial information covering future financial events unknown at the time of entering into the contract. We further hold that where a person represented by counsel enters into a property settlement agreement which has the necessary effect of waiving a constitutional right, express notice of or reference to such waiver is not required. . . . We find that in light of his voluntary contractual waiver of a known constitutional right, Mr. Feig must produce the agreed and requested financial information.<sup>47</sup>

Note that the agreement in *Feig* required only that the returns and the statement be produced. There was no express reference to the privilege against self-incrimination. The court nevertheless held that the privilege had been waived. The clear lesson is that a voluntary agreement to produce documents upon request, or at a stated time, may well waive any Fifth Amendment objection to production.

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<sup>44</sup> *Knapp*, 536 So. 2d at 1334.

<sup>45</sup> *Colorado v. Spring*, 479 U.S. 564, 572-73 (1987).

<sup>46</sup> 272 S.E.2d 723, 724 (Ga. 1980).

<sup>47</sup> *Id.* at 724.

The standard for an implied waiver is lower than the standard for an express waiver. Implied waivers are common because the Fifth Amendment privilege is a yes-or-no matter. The witness can invoke the privilege and refuse to testify on incriminating matters at all, or waive the privilege and testify freely. But the witness cannot invoke the privilege selectively, waiving it for favorable testimony and asserting it for unfavorable testimony. Such selective assertion would convert the Fifth Amendment, in the language of countless cases, from a defensive shield into a powerful sword.<sup>48</sup>

The most common application of implied waiver involves the testimony of the defendant in a criminal case. The defendant can assert the privilege and remain silent, or waive the privilege and testify. But if the defendant elects to waive the privilege upon direct examination, he cannot assert the privilege to bar cross-examination.<sup>49</sup>

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<sup>48</sup> See, e.g., *United States v. Rylander*, 460 U.S. 752, 758 (1983) (refusing to “convert the privilege from the shield against compulsory self-incrimination which it was intended to be into a sword whereby a claimant asserting the privilege would be freed from adducing proof in support of a burden which would otherwise have been his”); *Steinbrecher v. Wapnick*, 300 N.Y.S.2d 555, 563, 248 N.E.2d 419, 425 (1969) (“[s]ince the sole purpose of the privilege is to shield a witness against the incriminating effects of his testimony, the courts will not permit its use as a weapon to unfairly prejudice an adversary”); *Cantwell v. Cantwell* 427 S.E.2d 129, 130 (N.C. Ct. App. 1993) (“The privilege against self-incrimination is intended to be a shield and not a sword”); *Pulawski*, 463 A.2d at 157 (“[w]hen the court deals with private litigants, the privilege against self-incrimination must be weighed against the right of the other party to due process and a fair trial. The shield of the privilege must not be converted into a sword”).

<sup>49</sup> “[A witness] cannot reasonably claim that the Fifth Amendment gives him . . . an immunity from cross-examination on the matters he has himself put in dispute.” *Brown v. United States*, 356 U.S. 148, 155-56 (1958). “When a defendant voluntarily testifies, he waives his fifth amendment right and places himself in the same position as any other witness, subject to cross examination as to matters revealed in his direct testimony.” *McGahee v. Massey*, 667 F.2d 1357, 1362 (11th Cir. 1982).

In a civil case, a witness cannot invoke the privilege and refuse to testify at all.<sup>50</sup> The witness must take the stand and invoke the privilege on a question-by-question basis.<sup>51</sup>

The rule against selective assertion applies regardless of the depth and detail of the question. A simple admission of misconduct in direct testimony allows considerable exploration of the details of misconduct upon cross-examination. “It is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details.”<sup>52</sup>

Applying these points in the domestic relations context, a witness who wishes to assert the privilege must assert the privilege consistently. For example, if witness is accused of adultery, the witness must remain completely silent on the question of adultery. If the witness gives testimony denying adultery, the privilege is waived, and the witness can then be cross-examined

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<sup>50</sup> See *Warford v. Medeiros*, 160 Cal. App. 3d 1035, 1045, 207 Cal. Rptr. 94, 102 (1984) (“a blanket refusal to testify is unacceptable; a person claiming the Fifth Amendment privilege must do so with specific reference to particular questions asked”); *In re M.J.*, No. 2011-A-0014, 2011 WL 2183787 (Ohio Ct. App. June 3, 2011) (“the Fifth Amendment protection against self-incrimination did not permit Ms. Schreiber to completely refuse to testify”); *In re Myers*, No. 13-06-48, 2007 WL 1039260 (Ohio Ct. App. Apr. 9, 2007) (where witness “did not answer a single question or make a statement that would incriminate him in a subsequent criminal proceeding,” the trial court did not err by allowing him to testify and by relying upon the answers he gave).

<sup>51</sup> *Kaye v. Newhall*, 249 N.E.2d 583, 586 (Mass. 1969) (“[t]he plaintiff had the right to call the defendant as a witness and to cross-examine him . . . even though the plaintiff knew that the defendant would claim his privilege”).

<sup>52</sup> *Mitchell v. United States*, 526 U.S. 314, 321 (1999); see also *Rogers v. United States*, 340 U.S. 367, 373 (1951) (holding that “[d]isclosure of a fact waives the privilege as to details”); *Bonham v. Bonham*, 489 So. 2d 578, 581 (Ala. Civ. App. 1985) (“[t]he contention by husband in brief, that by making the admission it was not intended that all the ugly details would be disclosed, is of no avail”), *overruled on other grounds, Ex parte Bayliss*, 550 So. 2d 986 (Ala. 1989).

Note that the privilege is waived as to details only where the details are no more incriminating than the original admission. “Although a witness who testifies to incriminating facts waives the privilege as to the details of the events he relates, . . . , he does not waive the privilege as to collateral criminal activity.” *Woody v. Commonwealth*, 199 S.E.2d 529, 531 (Va. 1973).

on the subject.<sup>53</sup> The cross-examination can be quite detailed; for instance, following a simple summary denial, the witness can be asked questions about adultery at specific times with specific persons.

The rule against selective assertion applies not only to testimony in court, but also to admissions in other contexts. For example, a witness who waives the privilege and testifies voluntarily in discovery cannot assert the privilege when asked to testify on the same subject at trial.<sup>54</sup> Likewise, a witness who asserts the privilege to bar discovery cannot then waive the privilege at trial.<sup>55</sup>

A closer question is whether admission of conduct in a pleading constitutes waiver of the privilege. If a party admits to incriminating conduct in a complaint or counterclaim, there is a good argument that the privilege was waived.<sup>56</sup> But the cases hold that a denial of incriminating conduct in an answer is not a waiver, as an answer is compelled and not voluntary.<sup>57</sup> This is

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<sup>53</sup> “[A] witness who voluntarily takes the stand in a civil case has been held to waive the privilege against self-incrimination in respect to cross-examination that is relevant to the issues raised by such testimony.” *Pulawski*, 463 A.2d at 155.

The waiver is even more clear if the witness admits adultery. *See Bonham*, 489 So. 2d at 581 (the husband waived his Fifth Amendment privilege “by admitting in open court the act of adultery charged in the complaint”).

<sup>54</sup> *See Bonham*, 489 So. 2d 578 (finding that the husband who testified on adultery at his deposition waived the right to invoke the Fifth Amendment privilege at trial).

<sup>55</sup> *See S.E.C. v. Zimmerman*, 854 F. Supp. 896, 899 (N.D. Ga. 1993) (“The Fifth Amendment privilege cannot be invoked to oppose discovery and then tossed aside to support a party’s assertions”); *Knapp*, 536 So. 2d at 1336 n.12 (“[i]f he intends to waive his privilege, he must do so reasonably in advance of trial and afford Hutchins reasonable opportunity for discovery”).

<sup>56</sup> *See Minnesota State Bar Ass’n v. Divorce Assistance Ass’n, Inc.*, 248 N.W.2d 733, 740 (Minn. 1976) (“the fact that Doyle had already admitted in the pleadings that he was not so licensed [to practice law] obviously constituted a waiver of his right to refuse to testify on this matter at the deposition”).

<sup>57</sup> *See Mahne v. Mahne*, 328 A.2d 225, 226 (N.J. 1974) (“the mere filing of their pleadings by the defendants is not fairly to be viewed as having effectuated a waiver”); *Knapp*, 536 So. 2d at 1336 (“Knapp certainly has not waived his privilege against self-incrimination by filing an answer in the civil action commenced by Hutchins. Knapp did not bring this lawsuit. He was sued”).

especially true where the answer is a blanket general denial of the allegations of the complaint, even if the answer is verified.<sup>58</sup>

### **III. Documents and Other Written Material: Testimonial Versus Nontestimonial Evidence**

When the Fifth Amendment privilege is properly invoked, a witness is not required to answer questions or give testimony. The question of whether the privilege applies to documents poses a much harder issue.

To begin with, the Fifth Amendment privilege applies only to *self*-incriminating material. The privilege therefore does not apply to documents obtained through persons other than the witness. Stated differently, the mere fact that a document *could* have been obtained from the witness does not make the document subject to the privilege, if the document was in fact obtained from other sources. Under the Fifth Amendment, “[a] party is privileged from producing the evidence, but not from its production.”<sup>59</sup>

For example, if a taxpayer creates financial records, and then gives those records to the taxpayer’s attorney or accountant, the taxpayer cannot assert the Fifth Amendment privilege to prevent the IRS from obtaining the records from the attorney or accountant.<sup>60</sup> The compelled production of business records, from someone other than the witness, does not violate the privilege.<sup>61</sup>

In the family law context, tax returns obtained from someone other than the person invoking the privilege are not inadmissible on Fifth Amendment grounds.<sup>62</sup> Case law is divided on

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<sup>58</sup> See *Crittenden v. Superior Ct.*, 225 Cal. App. 2d 101, 105, 36 Cal. Rptr. 903, 906 (1964) (“merely because petitioner filed a verified answer to the affidavit for the order to show cause, denying its allegations, he did not waive his right to refuse to testify”); *Gunn v. Hess*, 367 S.E.2d 399, 401 (N.C. Ct. App. 1988) (“the mere filing of a verified answer does not operate to effectuate a waiver of the right to assert the privilege against self-incrimination”).

<sup>59</sup> *Johnson v. United States*, 228 U.S. 457, 458 (1913).

<sup>60</sup> *Fisher v. United States*, 425 U.S. 391 (1976); *Couch v. United States*, 409 U.S. 322 (1973); *Johnson*, 228 U.S. 457.

<sup>61</sup> *Andresen v. Maryland*, 427 U.S. 463 (1976).

<sup>62</sup> *Lanier v. Lanier*, 608 S.E.2d 213, 216 (Ga. 2005); *Harrison v. Harrison*, 285 So. 2d 752, 755 (Miss. 1973).

whether the party who filed the return must answer questions about it.<sup>63</sup>

Likewise, if evidence of adultery or financial misconduct is in the hands of persons other than a party to a divorce case, that party probably cannot use the Fifth Amendment to bar production of the documents.<sup>64</sup>

When production of documents or other material is sought directly from the witness, the privilege applies. But even then, the privilege does not apply to everything. “[T]he protection of the privilege reaches an accused’s *communications*, whatever form they might take.”<sup>65</sup> Thus, the privilege prevents a party from subpoenaing the witness’ own papers directly from the witness.<sup>66</sup> Documents or other communications protected by the privilege are said to be *testimonial*.

Conversely, the privilege “offers no protection against compulsion to submit to fingerprinting, photographing, or measure-

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<sup>63</sup> Contrast Lanier, 608 S.E.2d 216 (questions not permitted), with *In re Marriage of Sachs*, 95 Cal. App. 4th 1144, 1161, 116 Cal. Rptr. 2d 273, 287 (2002) (“where husband was in arrears in support, wife could obtain a copy of Jeffrey’s income tax returns and examine him about their contents, subject to the statutory requirement of confidentiality”) (emphasis added); *Slater*, 355 N.Y.S.2d at 944 (allowing questioning, subject to careful control of the court).

<sup>64</sup> See, e.g., *Fisher v. United States*, 425 U.S. 391 (1976).

<sup>65</sup> *Schmerber v. California*, 384 U.S. 757, 763–64 (1966) (emphasis added).

<sup>66</sup> *Boyd v. United States*, 116 U.S. 616, 633 (1886) (“we have been unable to perceive that the seizure of a man’s private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself”).

The holding in *Boyd* has been considerably weakened by later cases. For a good discussion, see *Moyer v. Commonwealth*, 531 S.E.2d 580 (Va. Ct. App. 2000). It is now clear that the Fifth Amendment does not prevent the introduction of a witness’s private papers into evidence through third persons. *United States v. Doe*, 465 U.S. 605, 613 (1984). But it does still prevent the use of court processes to obtain private documents *from the witness himself or herself*. *Id.*; *Fisher*, 425 U.S. at 398 (“the taxpayers retained any privilege they ever had not to be compelled to testify against themselves and not to be compelled themselves to produce private papers in their possession”). This exception can be narrow in the criminal context, since the government can obtain private documents through a search warrant and then admit them into evidence directly. *Moyer*, 531 S.E.2d 580 (holding that the defendant’s personal diaries were admissible on this basis). In civil litigation, however, it remains difficult to obtain introduce testimonial documents directly from the witness.



ments, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.<sup>67</sup> This point also applies to blood tests.<sup>68</sup> The defendant in a paternity case therefore cannot assert the Fifth Amendment privilege to prevent the plaintiff from collecting a blood or DNA sample.<sup>69</sup> Material that is not a communication, and therefore not subject to the privilege, is said to be *nontestimonial*.

#### **IV. Consequences of Exercising the Privilege: Denial of Affirmative Relief and Adverse Inferences**

The Fifth Amendment states that no person shall be compelled to give evidence against himself. But it does not say that no penalty shall ever attach when a person refuses to give evidence against himself. If a penalty is so severe that production is essentially compelled, the privilege protects against the penalty.<sup>70</sup> A number of lesser penalties, however, are not so severe. "[T]he fact that there may be adverse consequences when a defendant invokes the fifth amendment in a civil proceeding does not necessarily mean that the defendant is subject to unlawful compulsion for fifth amendment purposes."<sup>71</sup> In practice, therefore, in a civil case, invocation of the privilege can have significant adverse consequences.

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<sup>67</sup> *Schmerber*, 384 U.S. at 64.

<sup>68</sup> *Id.*

<sup>69</sup> See *Salicco v. Salicco*, 125 Misc. 2d 137, 146, 479 N.Y.S.2d 313, 318 (1984) ("the privilege against self incrimination of the Fifth and Fourteenth Amendments is not triggered when a person is subjected to a blood test"); *State v. Kuehlewind*, 570 So. 2d 179, 181 (La. Ct. App. 1990) (blood test for purposes of determining paternity is not testimonial); *Lawrence v. Bluford-Brown*, 336 S.E.2d 899, 901 (Va. Ct. App. 1985) ("the genetic blood grouping test required in this case did not violate the appellant's privilege against self-incrimination").

<sup>70</sup> "[C]ertain penalties, even those outside the criminal context, are severe enough to constitute compulsion to speak." *In re Ivory W.*, 271 A.3d 633, 646 (Conn. 2022). "Testimony is deemed compelled in violation of the Fifth Amendment when the state threatens to impose severe sanctions on a witness unless the constitutional privilege is waived or imposes 'substantial penalties' on a witness who invokes his right not to testify. *People v. O'Day*, No. 19CA2314, 2022 WL 552927 (Colo. App. Feb. 24, 2022).

<sup>71</sup> *Ivory W.*, 271 A.3d at 645.

The most basic penalty that can attach to invocation of the Fifth Amendment privilege in a civil case is an adverse inference. “[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.”<sup>72</sup> Thus, if a witness is asked about adultery, and asserts the privilege, the court is permitted to draw an adverse inference that the witness actually committed adultery.<sup>73</sup> Likewise, if a spouse asserts the Fifth Amendment when asked about financial misconduct<sup>74</sup> or misconduct involving children,<sup>75</sup> the court may draw an inference that the spouse is guilty of the misconduct he or she was asked about. It may not be possible, however, to draw an adverse inference from *another* witness’s invocation of the Fifth Amendment.<sup>76</sup>

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<sup>72</sup> *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

“In a civil suit involving only private parties, no party brings to the battle the awesome powers of the government, and therefore to permit an adverse inference to be drawn from exercise of the [Fifth Amendment] privilege does not implicate the policy considerations underlying the privilege.” Robert Heidt, *The Conjurer’s Circle - The Fifth Amendment Privilege in Civil Cases*, 91 *YALE L.J.* 1062, 1111 (1982).

<sup>73</sup> “There being no good faith reason for the refusal to testify, we can think of but one logical explanation for her reticence; that is, the answers would have tended to establish the adulterous conduct which the husband sought to prove.” *Griffith*, 506 S.E.2d at 532; *see also Kaye*, 249 N.E.2d at 586 (holding that the trial court did not err by allowing the husband’s attorney to comment upon the wife’s invocation of the Fifth Amendment in his closing).

<sup>74</sup> *Long v. Long*, 785 A.2d 818, 823 (Md. Ct. Spec. App. 2001) (“the trial court was entitled to draw an adverse inference against appellant when appellant invoked the Fifth Amendment in response to questions about the status of his 1998 and 1999 tax returns”).

<sup>75</sup> [W]here the parent or guardian fails to respond to probative evidence offered against him/her during the course of an abuse and neglect proceeding, a lower court may properly consider that individual’s silence as affirmative evidence of that individual’s culpability.“ *W. Va. Dep’t of Health & Human Res. ex rel. Wright v. Doris S.*, 475 S.E.2d 865, 874 (W. Va. 1996).

<sup>76</sup> *See Levy v. Levy*, 53 A.D.2d 833, 833, 385 N.Y.S.2d 314, 315 (N.Y. App. Div. 1976) (“the Trial Justice was in error in drawing an unfavorable inference against plaintiff from the [wife’s alleged paramour’s] invocation of the privilege against self incrimination“; although error harmless on the facts).

“[W]e have concerns over the appropriateness of drawing an inference adverse to a party based on another witness’s invocation of the privilege against self-incrimination in a civil case.” *Griffith*, 506 S.E.2d at 532. The husband in *Griffith* argued that the court could draw an adverse inference of adultery

The scope of the adverse inference must match the scope of the question not answered. For example, in *Long v. Long*,<sup>77</sup> a husband failed to answer a question as to whether he had filed tax returns. The court permitted an adverse inference, but limited the scope. “[A] court, based on such an inference, may not find a specific amount of imputed or undisclosed actual income without supporting evidence.”<sup>78</sup> Thus, an adverse inference based on failure to answer questions about tax returns cannot be the only evidence to support a finding as to income.

The mere fact that the Fifth Amendment privilege was claimed does not require an adverse inference; the inference is discretionary with the court. In *Commonwealth ex rel. McGovern v. McGovern*,<sup>79</sup> the husband invoked the Fifth Amendment privilege, but he also “did testify and both [parties] presented contradictory testimony as to the financial status of the husband.” A trial court decision refusing to draw an adverse inference was affirmed.<sup>80</sup>

Logically, whether an adverse inference is drawn in any specific case should depend upon the degree of harm resulting from invocation of the privilege. For example, if the husband asserts the privilege when faced with a question involving drug use, but the issues in the case are entirely financial, it is doubtful whether the invocation of the privilege imposed any real prejudice upon the opposing party. A truthful answer might well have been entirely irrelevant. In that sort of situation, the argument against drawing an inference seems strong. Even if the questions at issue involved financial matters, the invocation of the privilege would still seem to be without prejudice if there was ample other evidence introduced, allowing the court to confidently determine the invoking party’s income and assets. Conversely, if the ques-

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against the wife on grounds that her alleged paramour pled the Fifth Amendment privilege. While the court had doubts whether this was proper, it avoided the issue by finding that the wife’s own invocation of the privilege was alone sufficient to prove adultery.

<sup>77</sup> 785 A.2d 818.

<sup>78</sup> *Id.* at 823.

<sup>79</sup> 301 A.2d 905, 907 (Pa. Super. Ct. 1973).

<sup>80</sup> *See also* *Tarro v. Tarro*, 485 A.2d 558, 563 (R.I. 1984) (“nowhere in [prior case law] do we state that negative inferences, or action, *must* be drawn, or taken, against the party asserting the privilege by the trial justice in these situations” (emphasis in original)).

tion was highly relevant and no evidence existed, the argument for drawing an adverse inference would seem to be much stronger.

A stricter remedy is to hold that the spouse asserting the privilege cannot testify at trial. In *Meyer v. Second Judicial District Court*,<sup>81</sup> the mother refused to answer any questions about the purchase or use of drugs, asserting her Fifth Amendment privilege. The trial court held that the mother would not be permitted to testify at trial at all unless she waived her privilege and answered the questions. If the wife elected to answer the questions, the deposition would be sealed. The Nevada Supreme Court upheld the order:

In the case at hand, the questions which petitioner has refused to answer go to the heart of the major issues before the court; her fitness, and the fitness of the children's father and his present wife, to serve as custodial parents of the couple's three minor children. As the Supreme Court of Minnesota observed when faced with a similar refusal by a mother to answer questions, on Fifth Amendment grounds, which related directly to her alleged misconduct as a wife and mother; "a person ought not to be permitted to divulge only that part of the story favorable to his or her position and thus present a distorted and misleading picture of what has really happened."<sup>82</sup>

The law generally does not permit the court to sanction a party who invokes the Fifth Amendment privilege by a direct decrease in that spouse's property or support award, or by a direct increase in the property or support awarded to the other party:

[In a prior case,] we held that the trial justice's neglect to draw even the slightest inference against [the party who invoked the privilege] was prejudicial error. . . . Thus, we implied that *negative* action by the court (e.g., summary denial) may be warranted against a party seeking affirmative relief (e.g., a cross-petition for divorce, alimony, and division of marital property) who refuses to testify on self-incrimination grounds. Nowhere in that decision did we state or otherwise intend to suggest that the other spouse, who is trying to cross examine the party remaining silent, is automatically entitled to such *positive* court action as a larger alimony award or a larger share of the marital assets simply

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<sup>81</sup> 591 P.2d 259, 260-61 (Nev. 1979).

<sup>82</sup> *Id.* at 262-63, quoting *Christenson v. Christenson*, 162 N.W.2d 194, 202 (Minn. 1968); see also *Ivory W.*, 271 A.3d at 658 (finding that the trial court did not err in holding that the mother who invoked the privilege could not testify at the hearing on termination of parental rights).

as a result of the other spouse's refusal to answer; we merely stated that negative action may be merited against the silent party.<sup>83</sup>

It may be possible to reach a similar result, however, by drawing an adverse inference sufficient to justify a different property or support award, such as an inference that a spouse has committed marital or financial misconduct.

The stiffest penalty is the denial of all affirmative relief. The general rule in many states is that a witness who fails to answer questions when asked, either in discovery or at trial, is in no position to seek affirmative relief from the court.<sup>84</sup> The rule is a remedy of last resort, and it should not be used where lesser measures, such as an adverse inference, will provide complete relief.<sup>85</sup> But the Fifth Amendment gives the spouse a right to completely refuse to answer questions. If that right is invoked, the court may deny the invoking spouse the right to seek affirmative relief.

For example, in *Christenson v. Christenson*,<sup>86</sup> the plaintiff wife refused to answer discovery questions regarding adultery, asserting her Fifth Amendment privilege. The court held that the wife's failure to answer created a serious risk that she might prevail in the action even though the true facts were against her. "The risk that plaintiff might thereby succeed in an unmeritorious claim would seem to be so substantial that she must either divulge the information or abandon her claim."<sup>87</sup> The wife could not be forced to waive the privilege, but "in this divorce action, as in any other civil action, she must either waive it or have her action dismissed."<sup>88</sup>

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<sup>83</sup> *Tarro*, 485 A.2d at 563 (emphasis in original).

<sup>84</sup> "[U]pon oral or written interrogatories being properly propounded to discover relevant and material facts peculiarly and exclusively within the knowledge of the party, his refusal to answer justifies striking his pleadings." *Franklin v. Franklin*, 283 S.W.2d 483, 486 (Mo. 1955).

<sup>85</sup> "The adverse inference drawn from the invocation of the Fifth Amendment privilege should not be followed with the draconian result of denial of affirmative relief." *Griffith*, 506 S.E.2d at 536.

<sup>86</sup> 162 N.W.2d at 202.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 204; see also *Stockham v. Stockham*, 168 So. 2d 320, 322 (Fla. 1964) ("in civil litigation where it is manifest the exercise of the privilege would operate to further the action or claim of the party resorting to the privilege against his adversary contrary to equity and good conscience, the party assert-

The same principle applies where the privilege is invoked by a defendant. For example, in *Cantwell v. Cantwell*,<sup>89</sup> the plaintiff husband asked the defendant wife discovery questions about adultery, and the defendant pled the Fifth Amendment privilege. The trial court held she thereby waived her claim for alimony, and the appellate court affirmed. “[T]he defendant in the present case was properly given the choice to either shield herself from criminal charges by refusing to answer questions regarding her alleged adultery, and in so doing abandon her alimony claim, or waive her privilege and pursue her claim.”<sup>90</sup>

While it is proper to strike the affirmative claims of a party who invokes the Fifth Amendment privilege, it is not proper to strike all of that party’s pleadings, resulting in a default judgment.<sup>91</sup>

It may be error to dismiss a claim for affirmative relief which is unrelated to the questions not answered. For example, in *Mahne v. Mahne*,<sup>92</sup> where the wife invoked the privilege when asked about adultery, the court held that it was error to dismiss a counterclaim for divorce based upon extreme cruelty. “The counterclaim was based on extreme cruelty and did not relate to the alleged adultery on which the complaint was grounded.”<sup>93</sup>

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ing privilege will not be permitted to proceed with his claim or action”); *Minor v. Minor*, 240 So. 2d 301, 302 (Fla. 1970) (“affirming a trial court order that compels the plaintiff wife in a divorce action to answer over objections invoking the Fifth Amendment protection against self-incrimination certain pretrial deposition questions relating to the husband’s counterclaim of adultery, or suffer dismissal of her complaint”; reaffirming *Stockham*); *Franklin*, 283 S.W.2d 483; *Pulawski*, 463 A.2d at 157 (“one who seeks affirmative relief by way of counterclaim, cross-petition, or otherwise, may appropriately be subjected to the sanction of dismissal of such claim for affirmative relief when he or she refuses to answer questions in discovery or at trial which are relevant and material to the issues presented”); *Griffith*, 506 S.E.2d at 529-30 (“those states confronted by this issue have almost uniformly concluded that one who seeks this affirmative relief in a civil case may not invoke the Fifth Amendment privilege against self-incrimination in response to proper questions relating to the subject matter in issue”).

<sup>89</sup> 427 S.E.2d 129, 130 (N.C. Ct. App. 1993).

<sup>90</sup> *Id.* at 131.

<sup>91</sup> *Mahne v. Mahne*, 328 A.2d 225, 229 (N.J. 1974).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

A court also cannot require a party to positively admit wrongdoing as a condition upon receiving affirmative relief. This issue looms large in abuse and neglect cases, because experts may deem admission of wrongdoing to be an essential first step for treatment necessary for a defendant parent to recover custody of children.<sup>94</sup> The Fifth Amendment generally requires that any admissions of abuse made in treatment be inadmissible as evidence against the parent in future criminal prosecutions.<sup>95</sup>

As between an adverse inference and dismissal of claims for affirmative relief, the choice of remedy is within the trial court's discretion. There is a general reluctance to strike claims for relief in fact situations where an adverse inference provides sufficient relief. For example, in *Mahne*, the court held that an adverse inference was sufficient:

[T]here is no suggestion by [the husband] that he will be unable to proceed expeditiously with his case without the aid of the pretrial testimony from the [wife and her alleged paramour.] At the trial the plaintiff will have the benefit not only of his own showing but also of any inferences to be drawn from the defendants' pretrial testimonial refusals.<sup>96</sup>

The choice of remedy is less critical when a spouse who committed adultery cannot be awarded any alimony, so that an adverse inference of adultery and denial of affirmative relief reach the same practical result. That rule was more common in the

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<sup>94</sup> “[T]he lower court took evidence from a psychologist to the effect that there was no hope of correcting the conditions of abuse because the Appellant, in the exercise of his privilege against self-incrimination, failed to admit the abuse during a psychological examination.” *In re Daniel D.*, 562 S.E.2d 147, 158 (W. Va. 2002).

<sup>95</sup> See *E.S. v. H.A.*, 167 A.3d 685, 694-95 (N.J. Super. Ct. App. Div. 2017) (holding that a requirement that abuse be admitted “compels defendant to waive his privilege against self-incrimination and violates his rights under the Fifth Amendment and our State Constitution”); *In re Amanda W.*, 124 Ohio App. 3d 136, 141, 705 N.E.2d 724, 727 (Ohio Ct. App. 1997) (where the father’s “failure to admit meant he would not be likely to regain custody,” his Fifth Amendment privilege was violated; “in order to avoid a Fifth Amendment infringement, the state was required to offer Alan and Sandra protection from the use of any compelled statements and any evidence derived from those answers in a subsequent criminal case against either one or both of them”); cf. *Daniel D.*, 562 S.E.2d 147 (construing the West Virginia immunity statutes broadly to avoid this sort of violation).

<sup>96</sup> *Mahne*, 328 A.2d at 229.

past, and much less common now.<sup>97</sup> In jurisdictions where fault is not relevant at all, a question regarding adultery can probably be avoided as irrelevant before the privilege is asserted.

In the majority of states which treat adultery as one relevant factor in determining property division and/or alimony,<sup>98</sup> the modern trend is toward drawing an adverse inference, since a finding of adultery would be only a negative factor and would not result in complete denial of relief. This trend makes considerable sense. It is logical to treat invocation of the Fifth Amendment privilege, in a civil case, as a permissible basis for assuming that the witness committed the misconduct charged. It is much less logical to impose upon the invoking spouse a penalty larger than what the penalty would be if the accusation of misconduct is deemed to be well-founded.

## V. Conclusion

The Fifth Amendment privilege remains alive and well in family law litigation. The setting in which it is most commonly invoked is slowly changing; it is used less often in response to questions about sexual misconduct, and more often in response to questions about financial matters or matters involving children. In all settings, the privilege is regularly claimed by litigants and regularly sustained by the courts.

The difficult question is the consequences that ensue when the privilege is invoked. Essentially all states permit the court to draw an adverse inference against a party who invokes the privilege in a civil case, and such inferences have often been drawn in the reported cases. Where necessary, the courts have also refused to allow parties invoking the privilege to testify, and even refused to grant those parties affirmative relief. The U.S. Supreme Court has allowed imposition of these penalties in civil litigation generally,<sup>99</sup> and there is no reason why it would not likewise allow them to be imposed in family law litigation. Thus,

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<sup>97</sup> See generally Kirsten Gallagher, *Fault-Based Alimony in No-Fault Divorce*, 22 J. CONTEMP. LEGAL ISSUES 79 (2014/2015); Brett R. Turner, *Spousal Support in Chaos*, 25 FAM. ADVOC. 14 (Spring 2003).

<sup>98</sup> “[A] majority of states — approximately twenty-eight — still consider marital fault factors in determining spousal support and the distribution of marital property.” Swisher, *supra* note 11, at 248 (emphasis in original).

<sup>99</sup> E.g., *Baxter*, 425 U.S. at 318 (1976).



while the privilege can permissibly be asserted, its assertion comes with a price. Whether the benefit of invoking the privilege justifies that price is a question which must be answered on a case-by-case basis.



## Constitutional Issues in Family Law: An Annotated Bibliography (Part 1 of 2)

by  
Allen Rostron\*

Family law has long been a source for interesting and important constitutional issues. The Constitution is of course the foundational document of American law, spelling out vital principles about government and the rights of people. Few things are as fundamentally important to most Americans as their families and the relationships and interests connected to them. As a result, all of the major topics in family law, such as marriage, divorce, and parenting, inevitably raise a steady stream of new and challenging constitutional questions.

This bibliography covers some of the significant constitutional issues arising in the realm of family law today, as well as other legal and policy issues spinning off of the constitutional controversies. It focuses on issues discussed in the articles in this issue of the *Journal of the American Academy of Matrimonial Lawyers*.

This bibliography begins with the issue of abortion, which is obviously a topic receiving an immense amount of attention recently because of the Supreme Court's decision to overrule *Roe v. Wade* and eliminate the federal constitutional right to choose to have an abortion.<sup>1</sup> The bibliography focuses on issues that are especially important in the wake of that decision, such as whether Congress can enact national legislation about abortion, whether states that prohibit abortion can prohibit their citizens from traveling to other states where abortion is still legal, and whether the availability of medication abortions will undercut abortion bans. The bibliography also covers a few other issues of

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<sup>1</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

particular relevance to family law, such as abortion laws affecting those who become pregnant while in foster care.

The Indian Child Welfare Act is also receiving significant attention right now, because the Supreme Court will soon be hearing and deciding a case about whether the Act exceeds Congress's authority or involves racial distinctions that violate Equal Protection rights.<sup>2</sup> This bibliography covers the literature on several key aspects of the Act, its history, and its effects, including arguments in favor of and against its constitutionality.

Other topics in this bibliography include the constitutional dimensions of fatherhood, the Second Amendment's impact on family law, the right to make medical decisions, the rights of parents versus non-parents, the privilege against self-incrimination, and the profound issues at the intersection of religious beliefs and family law.

The next issue of the *Journal* will also have a bibliography on constitutional issues.

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<sup>2</sup> *Haaland v. Brackeen*, 142 S. Ct. 1205 (2022) (granting certiorari in four consolidated cases).

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## **Abortion**

### **– Effects of Allowing or Limiting Access to Abortion**

Helen M. Alvaré, *Nearly 50 Years Post-Roe v. Wade and Nearing Its End: What Is the Evidence that Abortion Advances Women's Health and Equality?*, 34 REGENT U. L. REV. 165 (2021-2022) (asserting that pro-choice advocates have failed to produce persuasive evidence that abortion rights improve women's health, quality of life, or equality).

Ederlina Co, *Abortion Privilege*, 74 RUTGERS U. L. REV. 1 (2021) (discussing the implications of inequality in access to abortion and the disparities that arise along racial, economic, and geographic lines).

Emma Knight, *Statistically Speaking: Quality of Life Improves with Access to Choose: Easing Abortion Restrictions Benefits Both Mother and Child, Especially for Families of Color*, 41 CHILD. LEGAL RTS. J. 188 (2021) (arguing that courts should protect abortion rights because research has demonstrated that abortion access produces better economic and educational outcomes for women and their children, particularly for people of color and people living in poverty).

Lynne Marie Kohm, *Roe's Effects on Family Law*, 71 WASH. & LEE L. REV. 1339 (2014) (assessing the extent to which significant changes in parent-child relationships, marriages, sexuality, and family life are attributable to the Supreme Court's decision in *Roe v. Wade*, and concluding that the decision has had a profound effect on family law and produced harmful changes for men, women, and relationships between men and women).

Michelle Oberman, *What Will and Won't Happen When Abortion Is Banned*, 9 J.L. & BIOSCIENCES 1 (2022) (using empirical data and international comparisons to assess the extent to which abortion bans will deter people from having abortions, change cultural attitudes on abortion by sending a message that abortion is wrong, and be competently implemented and enforced).

Rachel Rebouché, *The Public Health Turn in Reproductive Rights*, 78 WASH. & LEE L. REV. 1355 (2021) (recommending that the debate over reproductive rights should shift away from constitutional doctrine and toward generating and evaluating

credible empirical information about the effects of abortion access and abortion restrictions).

– **Extraterritorial Restrictions on Abortion**

Susan Frelich Appleton, *Gender, Abortion, and Travel After Roe's End*, 51 ST. LOUIS U. L.J. 655 (2007) (analyzing the choice-of-law and constitutional questions presented by state laws that prohibit state residents from having abortions in other states, and arguing that such extraterritorial abortion bans improperly seek to subordinate and police women's behavior).

Anthony J. Bellia Jr., *Federalism Doctrines and Abortion Cases: A Response to Professor Fallon*, 51 ST. LOUIS U. L.J. 767 (2007) (discussing the types of standards that the Supreme Court would use to analyze difficult federalism issues arising from *Roe v. Wade* being overruled, including whether states can prohibit their citizens from going to other states to obtain abortions).

C. Steven Bradford, *What Happens if Roe Is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87 (1993) (discussing constitutional provisions and principles that might be violated by extraterritorial regulation of abortion, including the Full Faith & Credit Clause, due process, the right to a jury trial, the dormant Commerce Clause, and the right to interstate travel).

I. Glenn Cohen, *Circumvention Tourism*, 97 CORNELL L. REV. 1309 (2012) (considering whether a country that prohibits a medical procedure, such as abortion, can or should extend its prohibition to bar residents from leaving the country to circumvent the restriction).

Joseph W. Dellapenna, *Abortion Across State Lines*, 2008 B.Y.U. L. REV. 1651 (arguing that a state probably can prohibit a person who is a resident of the state from having an abortion outside the state, but not if the person establishes a legitimate place of residence in the other state before the abortion occurs).

Richard Fallon, *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611 (2007) (discussing issues that would arise from *Roe v. Wade* being overruled, particularly whether it would be constitutional for

right-to-life states to prohibit their residents from traveling outside their borders to have abortions).

Alan Howard, *Fundamental Rights Versus Fundamental Wrongs: What Does the U.S. Constitution Say About State Regulation of Out-of-State Abortions?*, 51 ST. LOUIS U. L.J. 797 (2007) (predicting that it is unlikely any state would attempt to forbid its citizens from traveling to have an abortion in another state, and that an attempt to do so would violate the doctrine of federal citizenship rights under the Citizenship Clause of the Fourteenth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment).

Seth F. Kreimer, “*But Whoever Treasures Freedom. . .*”: *The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907 (1993) (arguing that constitutional structure, history, and traditions support the view that states should not be able to regulate their citizens’ activities while present in other states).

Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992) (arguing that extraterritorial abortion restrictions would run counter to strong constitutional principles limiting the extent to which states can project their moral views into other states).

Andrew J. Ries, Note, *Extraterritoriality of Restrictive State Abortion Laws: States Can Abort Plans to Abort at Home but Not Abroad*, 70 WASH. U. L.Q. 1205 (1992) (arguing that although extraterritorial application of a state’s law may be constitutional in some circumstances, a state would exceed the limits of its sovereignty if it tried to punish its citizens for having abortions outside the state).

– **Federal Authority to Enact Abortion Legislation**

Douglas A. Axel, Note, *The Constitutionality of the Freedom of Choice Act of 1993*, 45 HASTINGS L.J. 641 (1994) (predicting that a federal law protecting abortion rights would not be a valid exercise of Congress’s power to regulate interstate commerce and would be struck down as an infringement of authority reserved to the states by the Tenth Amendment).



Brannon Denning, *Gonzales v. Carhart: An Alternate Opinion*, 2007 CATO S. CT. REV. 167 (2007) (offering a hypothetical Supreme Court opinion striking down federal anti-abortion legislation on the ground that it exceeds Congress's power under the Commerce Clause).

Jordan Goldberg, Note, *The Commerce Clause and Federal Abortion Law: Why Progressives Might Be Tempted to Embrace Federalism*, 75 FORDHAM L. REV. 301 (2006) (arguing that the Commerce Clause empowers Congress to enact legislation prohibiting abortions or protecting abortion rights).

Allan Ides, *The Partial-Birth Abortion Ban Act of 2003 and the Commerce Clause*, 20 CONST. COMMENT. 441 (2003-2004) (describing serious doubts about whether Congress's power to regulate interstate commerce can support a federal law prohibiting abortions).

David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously: Lopez and the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59 (1997) (calling for those who generally favor a narrow interpretation of federal authority to be consistent and recognize that a federal law prohibiting an abortion procedure exceeds Congress's power under the Commerce Clause).

Peggy S. McClard, Comment, *The Freedom of Choice Act: Will the Constitution Allow It?*, 30 HOUS. L. REV. 2041 (1994) (contending that Congress has constitutional authority to enact a federal statute protecting abortion rights because abortion restrictions will affect interstate commerce).

Thomas J. Molony, *A Costly Victory: June Medical, Federal Abortion Legislation, and Section 5 of the Fourteenth Amendment*, 74 ARK. L. REV. 33 (2021) (observing that if the Supreme Court overrules *Roe v. Wade*, Congress would have no power under Section 5 of the Fourteenth Amendment to enact abortion rights legislation).

Michael J. O'Connor, *Legitimate Defense of Civil Rights or Raw Congressional Power Grab? The Constitutionality of the Freedom of Choice Act*, 32 WHITTIER L. REV. 1 (2010) (asserting that the enactment of a federal law providing a nationwide right to abor-

tion would exceed Congress's property authority and violate the sovereignty of the states).

Robert J. Pushaw, Jr., *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?*, 42 HARV. J. ON LEGIS. 319 (2005) (recommending a politically neutral approach that would uphold Congress's power to enact legislation that would expand abortion rights or restrict them).

Alissa Schechter, Note, *Choosing Balance: Congressional Powers and the Partial-Birth Abortion Ban Act of 2003*, 73 FORDHAM L. REV. 1987 (2005) (arguing that abortion is primarily a state issue rather than a federal issue and Congress's power to regulate interstate commerce does not give it the power to pass national legislation about abortion).

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Amy T. Pedagno, Note, *Who Are the Parents? In Loco Parentis, Parens Patriae, and Abortion Decision-Making for Pregnant Girls in Foster Care*, 10 AVE MARIA L. REV. 171 (2011) (criticizing the lack of consistency and clear policies concerning decisions about pregnancy and abortion for minor girls in foster care, and suggesting reforms that would provide strong maternal examples for girls in foster care).

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youth and parenting youth in foster care, including lack of resources and access to reproductive health services, and recommending ways to improve how the foster system approaches child welfare, teen sexuality, and reproductive health).

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Tanya Amber Gee, Comment, *South Carolina's Safe Haven for Abandoned Infants Act: A "Band-Aid" Remedy for the Baby-Dumping "Epidemic,"* 53 S.C. L. REV. 151 (2001) (discussing state laws that give confidentiality and immunity to parents who leave infants at designated safe haven locations, questioning the effectiveness of these laws, and suggesting alternative approaches that would be more effective).

Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753 (2006) (analyzing the impact of infant safe haven laws and arguing that these laws subtly promote the political goal of eliminating abortion rights).

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Greer Donley, *Medication Abortion Exceptionalism*, 107 CORNELL L. REV. 627 (2022) (examining federal regulations that limit distribution of drugs used to terminate pregnancies, and suggesting ways in which the Food & Drug Administration can remove unnecessary barriers to medication abortion).

Katherine Fang & Rachel Perler, Comment, *Abortion in the Time of COVID-19: Telemedicine Restrictions and the Undue Burden Test*, 32 YALE J.L. & FEMINISM 134 (2021) (arguing that state law restrictions on the provision of medication abortions via telemedicine are an undue burden on a practice that can decrease costs and improve reproductive health care, especially during the COVID-19 pandemic).

Yvonne Lindgren, *The Doctor Requirement: Griswold, Privacy, and At-Home Reproductive Care*, 32 CONST. COMMENT. 341 (2017) (contending that state laws restricting at-home use of medication abortion violate privacy rights).

Yvonne Lindgren, *When Patients Are Their Own Doctors: Roe v. Wade in an Era of Self-Managed Care*, 107 CORNELL L. REV. 151 (2021) (describing how reproductive freedom has been treated in

the past as a right to make an abortion decision in consultation with a doctor, but should be re-framed as a right that includes direct consumer access to abortion care including self-managed medication abortion).

Hina Mohiuddin, Note, *The Use of Telemedicine During a Pandemic to Provide Access to Medication Abortion*, 21 HOUS. J. HEALTH L. & POL'Y 483 (2022) (arguing that laws requiring an in-person visit with a doctor for medication abortion impose undue burdens on women seeking abortions).

Moriah Murray, *Proposal to Expand the Accessibility and Effectiveness of Medical Abortions in the United States*, 40 J. LEGAL MED. 27 (2020) (asserting that safety concerns do not justify the federal policy preventing at-home medication abortions and that policy should be changed).

Kerri Pinchuk, *California Policy Recommendations for Realizing the Promise of Medication Abortion: How the COVID-19 Public Health Emergency Offers a Unique Lens for Catalyzing Change*, 18 HASTINGS RACE & POVERTY L.J. 265 (2021) (discussing legislative steps that California can take to expand access to abortion care, including access to medication abortion via telehealth).

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*Reproductive Rights—Medication Abortion—FDA Lifts In-Person Dispensing Requirement for Mifepristone Abortion Pill—Update to FDA Risk Evaluation and Mitigation Strategy for Mifepristone on Dec. 16, 2021, Eliminating In-Person Dispensing Requirement*, 135 HARV. L. REV. 2235 (2022) (discussing the Food & Drug Administration's elimination of in-person dispensing requirements for medication abortion).

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many countries create obstacles to medication abortion by requiring doctors to perform, supervise, or authorize abortions).

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Maya Manian, *Minors, Parents, and Minor Parents*, 81 MO. L. REV. 127 (2016) (contending that state laws generally limit adolescents' access to abortion and rights and resources as parents, and thereby enforce the traditional notion that giving birth and giving up the child for adoption is the best outcome).

Alexandra Rex, Note, *Protecting the One Percent: Relevant Women, Undue Burdens, and Unworkable Judicial Bypasses*, 114 COLUM. L. REV. 85 (2014) (reviewing empirical evidence on the detrimental impact of laws requiring pregnant minors to obtain parental or judicial approval for abortions).

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**Fatherhood**

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Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809 (2006) (arguing that constitutional law and family law have taken an improperly rigid approach to the definition of fatherhood and proposing that a more flexible approach would permit the recognition of social paternity as well as biological paternity).

Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292 (2016) (discussing why unwed fathers never achieved constitutional parity with mothers or with married and divorced fathers).

Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645 (2014) (arguing that the current constitutional understanding of fatherhood, which mirrors theories of acquiring property, is inconsistent and gendered, and proposing that it be replaced with a theory of fatherhood created through labor performed in caring for the child).

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tional vehicle for gender bias but that it persists in legal areas such as immigration and custody).

Heather Kolinsky, *The Ties That Bind: Reevaluating the Role of Legal Presumptions of Paternity*, 48 LOY. L.A. L. REV. 223 (2014) (arguing that the constitutional right to parent has been improperly conferred on marriages, rather than individuals, particularly with respect to unwed biological fathers).

Yvonne Lindgren, *Antiabortion Civil Remedies and Unwed Fatherhood as Genetic Entitlement*, 99 WASH. U. L. REV. 2015 (2022) (arguing that constitutional “biology plus” norms about fatherhood, which require unwed fathers to establish a relationship with their child or the gestating parent, are violated by the recent enactment of laws allowing putative fathers to sue abortion providers for wrongful death regardless of their relationship to the gestating parent).

Jeffrey A. Parness, *Systematically Screwing Dads: Out of Control Paternity Schemes*, 54 WAYNE L. REV. 641 (2008) (criticizing how laws systematically deny genetic fathers’ paternity opportunity interests and proposing reforms that would respect fathers’ rights without unduly burdening maternal interests).

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Dara E. Purvis, *The Constitutionalization of Fatherhood*, 69 CASE W. RES. L. REV. 541 (2019) (describing the treatment of unwed biological fathers in constitutional law and arguing that the differential treatment of fathers and mothers violates Equal Protection rights).

Malinda L. Seymore, *Grasping Fatherhood in Abortion and Adoption*, 68 HASTINGS L.J. 817 (2017) (examining the distinctions drawn between biological mothers and biological fathers in decisions about abortion and adoption placement, and arguing that while the exclusion of fathers from abortion decisionmaking

is inevitable, fathers should be afforded greater rights with respect to adoption).

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Natalie Hoch, Note, *The Real American Horror Story: Overcoming the Hurdles to Terminate a Rapist's Parental Rights*, 51 VAL. U. L. REV. 783 (2017) (proposing legislation to protect victims from rapists asserting parental rights).

Margo E.H. Stevens, Note, *Rape-Related Pregnancies: The Need to Create Stronger Protections for the Victim-Mother and Child*, 65 HASTINGS L.J. 865 (2014) (arguing that states do not violate constitutional rights by allowing termination of parental rights for rape-related pregnancies, without requiring a criminal conviction and leaving the option for child-support obligations to be imposed).

Katherine E. Wendt, Comment, *How States Reward Rape: An Agenda to Protect the Rape-Conceived Child Through the Termination of Parental Rights*, 2013 MICH. ST. L. REV. 1763 (recommending the enactment of legislation providing for termination of rapists' parental rights and discussing how such statutes can satisfy constitutional requirements about fair procedures for termination of parental rights).

**Guns**

– **Domestic Violence**

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Sayoko Blodgett-Ford, Note, *Do Battered Women Have a Right to Bear Arms?*, 11 YALE L. & POL'Y REV. 509 (1993) (arguing that battered women have a constitutional right to bear arms for protection and that gun laws that may generally be valid, such as lengthy waiting periods or permit requirements, may be unconstitutional as applied to battered women).

Aaron Edward Brown, *This Time I'll Be Bulletproof: Using Ex Parte Firearm Prohibitions to Combat Intimate-Partner Violence*, 50 COLUM. HUM. RTS. L. REV. 159 (2019) (supporting the constitutionality and effectiveness of laws enabling victims of intimate-partner violence to obtain an ex parte order for protection that prohibits possession of firearms by the subject of the order).

Elizabeth Coppolecchia et al., Note, *United States v. White: Disarming Domestic Violence Misdemeanants Post-Heller*, 64 U. MIAMI L. REV. 1505 (2010) (suggesting that the federal laws banning possession of guns by those convicted for domestic violence misdemeanors may violate the right to keep and bear arms).

Monette M. Davis, *The Repugnant Effect of Reckless Conduct and Domestic Violence: Voisine v. United States and the Restriction of Firearms*, 45 S.U. L. REV. 331 (2018) (arguing that Second Amendment rights are not violated by prohibiting possession of guns by those convicted for domestic violence misdemeanors based on reckless conduct).

Kellie Desrochers, Note, *Municipalities Are Not Kingdoms: Regulating Gun Ownership in Cases Involving Domestic Violence in Light of the Pauley Decision*, 29 B.U. PUB. INT. L.J. 277 (2020) (arguing that courts should uphold the constitutionality of laws that prohibit possession of guns by those convicted of domestic violence misdemeanors, including those convicted under municipal ordinances).

Julia Hatheway, Note, *Disarming Abusers and Triggering the Sixth Amendment: Are Domestic Violence Misdemeanants Guaranteed the Right to a Jury Trial?*, 90 FORDHAM L. REV. 179 (2021) (examining whether defendants charged with domestic violence misdemeanors have a Sixth Amendment right to a jury trial because conviction would result in being prohibited from possessing a firearm).

Monica Maio, Note, *Stalkers and Firearms: A Dangerous Mix, Utah's Civil Stalking Injunction Statute*, 7 J.L. & FAM. STUD. 263 (2005) (pointing out a loophole in Utah's statutes that allows some dangerous stalkers to lawfully possess firearms even while subject to anti-stalking protective orders).

Cassie Maneen, Note, *No Right to Bear Arms and Blows: Disarming Domestic Violence Misdemeanants and the Durability of Voisine v. United States*, 57 HOUS. L. REV. 1199 (2020) (considering whether the Supreme Court's shift toward stronger protection of gun rights will result in overturning precedent allowing domestic violence misdemeanants to be prohibited from having guns).

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Claire McNamara, *Finally, Actually Saying "No": A Call for Reform of Gun Rights Legislation and Policies to Protect Domestic Violence Survivors*, 13 SEATTLE J. FOR SOC. JUST. 649 (2014) (proposing that Washington should enhance its enforcement of laws prohibiting possession of guns by domestic violence offenders, and assessing the constitutionality of measures requiring surrender of firearms by such offenders).

Cynthia M. Menta, Comment, *The Misapplication of the Lautenberg Amendment in Voisine v. United States and the Resulting Loss of Second Amendment Protection*, 51 AKRON L. REV. 189 (2017) (arguing that it would violate the right to keep and bear arms to impose a lifetime ban on possession of firearms

for those convicted of domestic violence misdemeanors where the crime was committed recklessly rather than knowingly or intentionally).

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Natalie Nanasi, *Disarming Domestic Abusers*, 14 HARV. L. & POL’Y REV. 559 (2020) (proposing strategies for meaningful enforcement of laws prohibiting perpetrators of intimate partner violence from possessing firearms).

Stacie J. Osborn, Comment, *Preventing Intimate Partner Homicide: A Call for Cooperative Federalism for Common Sense Gun Safety Policies*, 66 LOY. L. REV. 235 (2020) (proposing that Congress and states can cooperate to pass legislation that would close loopholes and improve enforcement of laws prohibiting domestic violence offenders from having firearms).

Carolyn B. Ramsey, *Firearms in the Family*, 78 OHIO ST. L.J. 1257 (2017) (arguing that current laws prohibiting domestic violence misdemeanants from possessing firearms are both under-broad and over-broad and that legislatures should revise such laws in order to give greater protection to victims who resist their batterers, provide exceptions for convicted offenders with jobs that require carrying firearms on-duty, and provide means for restoring gun rights to those who show the capacity to avoid reoffending).

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Emily J. Sack, *Confronting the Issue of Gun Seizures in Domestic Violence Cases*, 6 J. CTR. FOR FAMILIES, CHILD. & CTS. 3 (2005)

(discussing constitutional challenges and other issues raised by laws that prohibit possession of guns by domestic violence offenders).

Tracy Sauro, Note, *Don't Leave Me Now!—A Domestic Violence Victim's Right to Be Armed Because Their Abusers Are Dangerous*, 40 *WOMEN'S RTS. L. REP.* 171 (2019) (contending that legislatures should ensure that the gun rights of domestic violence victims are adequately protected, including the right to carry a concealed handgun in public).

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– **Foster Homes**

Joseph G. DuChane, *In Defense of Hearth and [Foster] Home: Determining the Constitutionality of State Regulation of Firearm Storage in Foster Homes*, 75 *WASH. & LEE L. REV.* 1639 (2018) (arguing that the Second Amendment rights of foster parents are violated by regulations requiring them to store firearms in their homes in locked safes or cabinets).

Sean Murphy, Note, *Fostering Second Amendment Rights: An Evaluation of Foster Parents' Right to Bear Arms*, 96 U. DET. MERCY L. REV. 397 (2019) (contending that foster care safe-storage laws burden foster parents' right to possess firearms in their homes for self-defense and may ultimately harm the well-being of foster children).

– **Heightened Risks for the Elderly and People with Dementia or Other Mental Problems**

Michael Bell, Comment, *Bridging the Gap Between Mental Illness and Firearms in Probate Courts*, 10 EST. PLAN. & COMMUNITY PROP. L.J. 125 (2017) (examining whether Second Amendment rights would be violated if Texas adopted a statute prohibiting a mentally ill person from inheriting a firearm).

Sarah Lynn Blodgett, *Dementia, Guns, and Red Flag Laws: Can Indiana's Statute Balance Elders' Constitutional Rights and Public Safety*, 16 NAELA J. 103 (2020) (discussing how Indiana's "red flag" law, which provides for guns to be taken from people who pose a danger to themselves or others because of mental problems, applies to elders with dementia-related illnesses and how the law can be implemented in a way that balances safety interests with elders' personal autonomy and constitutional right to own firearms).

Abigail Forrester Jorandby, *Armed and Dangerous at 80: The Second Amendment, the Elderly, and a Nation of Aging Firearm Owners*, 29 J. AM. ACAD. MATRIM. LAW. 85 (2016) (evaluating the effectiveness and constitutionality of potential laws regulating firearm ownership by elderly people diagnosed with dementia or cognitive disorders).

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Angela Selvaggio & Fredrick E. Vars, “*Bind Me More Tightly Still*”: *Voluntary Restraint Against Gun Suicide*, 53 HARV. J. ON LEGIS. 671 (2016) (proposing systems that would enable those with elevated risks for suicide to voluntarily choose to legally disqualify themselves from purchasing firearms).

Caroline Shen, Note, *A Triggered Nation: An Argument for Extreme Risk Protection Orders*, 46 HASTINGS CONST. L.Q. 683 (2019) (arguing that laws allowing courts to issue protective orders prohibiting dangerous individuals from having guns are constitutional and beneficial).

Tara Sklar, *Elderly Gun Ownership and the Wave of State Red Flag Laws: An Unintended Consequence That Could Help Many*, 27 ELDER L.J. 35 (2019) (analyzing the key provisions of “red flag” laws that some states have recently enacted, the ways in which the requirements and procedures created by these laws vary, and the implications that these laws have for elderly gun owners and their families).

Fredrick E. Vars, *Not Young Guns Anymore: Dementia and the Second Amendment*, 25 ELDER L.J. 51 (2017) (evaluating the constitutionality of laws prohibiting possession of guns after a dementia diagnosis and proposing the adoption of measures that would enable people with dementia to voluntarily relinquish their firearms and disqualify themselves from being able to purchase firearms).

#### – **International Comparisons**

Daniel Burley, Note, *The Ban Down Under: United States Should Adopt Australian-Style Gun Regulations to Curb Rising Rate of Elderly Suicides*, 26 ELDER L.J. 149 (2018) (assessing Australia’s policies designed to reduce the number of suicides committed by elderly people and whether they would be struck down as violating Second Amendment rights in the United States).

Shay Raoofi, *Around the World: A Comparison of Approaches to Gun Homicides in the United States and Japan*, 34 CHILD. LEGAL RTS. J. 344 (2014) (comparing the American and Japanese experiences with youth gun violence, and exploring how the Second Amendment and other aspects of law, policy, and culture affect the problem).

## Indian Child Welfare Act

### – Constitutional Challenges

Katie L. Bojevic, Note, *Benefit or Burden?: Brackeen v. Zinke and the Constitutionality of the Indian Child Welfare Act*, 68 BUFF. L. REV. 247 (2020) (describing the consequences that will occur if the Indian Child Welfare Act is struck down as unconstitutional, and explaining how the effects of such a decision would extend beyond adoption cases by paving the way for the invalidation of other laws that involve classifications based on Native American descent).

Christina Cook, *In the Courts: Interpreting the ICWA in Light of Adoptive Couple*, 35 CHILD. LEGAL RTS. J. 87 (2015) (discussing California court decisions rejecting constitutional challenges to the Indian Child Welfare Act).

Cassandra Crandall, Note & Comment, *Moving Forward from the Scoop Era: Providing Active Efforts Under the Indian Child Welfare Act in Illinois*, 40 N. ILL. U. L. REV. 100 (2019) (discussing the Indian Child Welfare Act's requirement that active efforts must be made to prevent the breakup of Indian families, and how the Act has been criticized and challenged on constitutional grounds).

Allison E. Davis, Note, *Roadway to Reform: Assessing the 2015 Guidelines and New Federal Rule to the Indian Child Welfare Act's Application to State Courts*, 22 SUFFOLK J. TRIAL & APP. ADVOC. 91 (2016-2017) (assessing the impact of constitutional challenges to the Indian Child Welfare Act and regulatory guidance from the Bureau of Indian Affairs).

Mariam Hashmi, Note, *Recent Challenges to the Indian Child Welfare Act Suggest It Is Time for the United States to Act: Indian Survival Depends on It*, 21 RUTGERS RACE & L. REV. 149 (2020) (examining the reasons why the Supreme Court needs to address the constitutional uncertainties surrounding the Indian Child Welfare Act and forecasting how conservative members of the Court such as Brett Kavanaugh and Clarence Thomas are likely to approach the issues).

Emily Hudson, Student Comment, *The Constitutionality of the Indian Child Welfare Act*, 47 OHIO N.U. L. REV. 359 (2021) (re-

viewing the constitutional challenges to the Indian Child Welfare Act, including the Equal Protection, Commerce Clause, anti-commandeering, and non-delegation doctrine arguments, and describing the potential consequences of the statute being struck down).

Christine Metteer, *The Existing Indian Family Exception: An Impediment to the Trust Responsibility to Preserve Tribal Existence and Culture as Manifested in the Indian Child Welfare Act*, 30 *LOY. L.A. L. REV.* 647 (1997) (criticizing courts for applying the Indian Child Welfare Act only in situations where a child would be taken away from an existing Indian family, and analyzing the constitutional issues that arise if the Act applies regardless of a whether an Indian child or the child's parents have social, cultural, or political ties to a tribe).

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Alexander Tallchief Skibine, *The Supreme Court's Last 30 Years of Federal Indian Law: Looking for Equilibrium or Supremacy?*, 8 *COLUM. J. RACE & L.* 277 (2018) (analyzing Supreme Court decisions on Indian law issues, including the Indian Child Welfare Act, and arguing that the Court seeks to maintain a proper equilibrium between tribal interests and other interests at stake in these cases).

Kelsey Vujnich, Comment, *A Brief Overview of the Indian Child Welfare Act, State Court Responses, and Actions Taken in the Past Decade to Improve Implementation Outcomes*, 26 *J. AM. ACAD. MATRIM. LAW.* 183 (2013) (reviewing legal developments surrounding the Indian Child Welfare Act and how Supreme Court decisions clarified some aspects of the statute but left significant questions unresolved).

– **Criticisms of the Act**

Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 *EMORY L.J.* 587 (2002) (exploring why state courts became



hostile to the Indian Child Welfare Act and suggesting that two key aspects of the resistance to the statute are judges' frustration with the statute's approach to defining Indian identity and judges' assumptions about how disruption of custodial arrangements will be harmful to the child).

Christine D. Bakeis, *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 543 (1996) (arguing that the Indian Child Welfare Act violates the constitutional rights of abused and neglected Indian children, as well as the rights of parents of Indian children, and proposing that the Act be amended so that it applies only to children who are part of an existing Indian family).

Teri Dobbins Baxter, *Respecting Parents' Fundamental Rights in the Adoption Process: Parents Choosing Parents for Their Children*, 67 RUTGERS L. REV. 905 (2015) (discussing how some state adoption laws and federal laws, such as the Indian Child Welfare Act, fail to give appropriate deference to parents' choices about who adopts their child).

Jennifer Nutt Carleton, *The Indian Child Welfare Act: A Study in the Codification of the Ethnic Best Interests of the Child*, 81 MARQ. L. REV. 21 (1997) (describing how the Indian Child Welfare Act represents an attempt to make a child's ethnic heritage a factor in analysis of the child's best interests, observing how the Act has often failed to preserve Indian families, and suggesting that the Act may inform discussions about the broader issue of ethnicity preferencing and transracial adoptions).

Christopher Deluzio, *Tribes and Race: The Court's Missed Opportunity in Adoptive Couple v. Baby Girl*, 34 PACE L. REV. 509 (2014) (characterizing the Indian Child Welfare Act as a radical departure from the colorblind approach to custody and adoption placement issues and discussing the constitutional issues created by the Act's racial preferences).

Philip (Jay) McCarthy, Jr., *The Oncoming Storm: State Indian Child Welfare Act Laws and the Clash of Tribal, Parental, and Child Rights*, 2013 UTAH L. REV. 1027 (suggesting that Indian gaming revenues have funded increases in lobbying efforts for passage of state laws supplementing the Indian Child Welfare

Act, asserting that tribal rights should not override parental rights, and arguing that the state laws infringe on constitutional rights because the laws mandate that notice be provided to Indian tribes in voluntary adoptions that do not involve state agencies and the laws take away discretion that judges would have under the federal Act).

Shawn L. Murphy, Comment, *The Supreme Court's Revitalization of the Dying "Existing Indian Family" Exception*, 46 MCGEORGE L. REV. 629 (2014) (contending that the Indian Child Welfare Act is unconstitutional but that the constitutional problems can be reduced by application of the "existing Indian family" doctrine, which prevents the Act from applying where the Indian child's family has not maintained significant social, cultural, or political relationships with a tribe).

Timothy Sandefur, *Recent Developments in Indian Child Welfare Act Litigation: Moving Toward Equal Protection?*, 23 TEX. REV. L. & POL. 425 (2019) (criticizing the existing literature on the Indian Child Welfare Act, claiming that defenders of the Act approach the issue in abstract terms rather than examining actual cases, and observing that the Supreme Court may be headed toward striking down the Act on Equal Protection grounds).

Amanda Tucker, *The Indian Child Welfare Act's Unconstitutional Impact on the Welfare of the Indian Child*, 9 WHITTIER J. CHILD. & FAM. ADVOC. 87 (2009) (arguing that the Indian Child Welfare Act adversely affects Native American children eligible for adoption and unconstitutionally denies them the same opportunities for placement as children of other races and ethnicities).

– **Defense of the Act**

Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. 295 (2015) (exploring how the Supreme Court's distortion of facts and law in an Indian Child Welfare Act case reflects biases and assumptions about race, gender, and class).

Bethany R. Berger, *Savage Equalities*, 94 WASH. L. REV. 583 (2019) (arguing that when laws like the Indian Child Welfare Act are attacked as infringements of individual equality, they should

be defended as measures that protect the equality of Indian tribes as governments).

Lucy Dempsey, Note, *Equity over Equality: Equal Protection and the Indian Child Welfare Act*, 77 WASH. & LEE L. REV. ONLINE 411 (2021) (arguing that the Indian Child Welfare Act does not violate equal protection rights because being Indian should be regarded as a political classification rather than a suspect racial distinction, and because the Act is narrowly tailored to serve compelling purposes so it is valid even if strict scrutiny applies).

Michael Doran, *The Equal-Protection Challenge to Federal Indian Law*, 6 U. PA. J.L. & PUB. AFF. 1 (2020) (arguing that Congress's plenary power over Indians and their tribes provides a basis for Congress to make classifications under laws affecting Indians, such as the Indian Child Welfare Act, that are subject only to rational basis review).

John Hayden Dossett, *Tribal Nations and Congress's Power to Define Offences Against the Law of Nations*, 80 MONT. L. REV. 41 (2019) (arguing that the constitutional provision empowering Congress to define offenses against the law of nations is a valid source of authority for federal laws, such as the Indian Child Welfare Act, that address child custody in the context of foreign affairs or tribal citizenship).

Allison Elder, Note & Comment, "*Indian*" as a Political Classification: Reading the Tribe Back into the Indian Child Welfare Act, 13 NW. J.L. & SOC. POL'Y 410 (2018) (arguing that strict constitutional scrutiny should not apply to the Indian Child Welfare Act because "Indian" should be treated as a political classification rather than a racial one).

Carol Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373 (2002) (discussing how courts evaluating the constitutionality of laws like the Indian Child Welfare Act treat Indian identity as a racial characteristic, but the Constitution and political theory justify treating Indian classifications as being based on special trust obligations that the federal government owes to tribes and therefore being outside the conventional framework of analysis for racial classifications).

Cheyaña L. Jaffke, *The “Existing Indian Family” Exception to the Indian Child Welfare Act: The States’ Attempt to Slaughter Tribal Interests in Indian Children*, 66 *LA. L. REV.* 733 (2006) (criticizing the judicial development of the “existing Indian family” exception to the Indian Child Welfare Act, which gives judges the discretion to decide that a child or the child’s parents have not maintained a significant relationship to a tribe, and arguing that this exception is not supported by the Act’s language, it does not serve the Act’s purposes, and it is not a necessary means of strengthening the Act’s constitutionality).

B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 *N.D. L. REV.* 395 (1997) (arguing that the objectives of the Indian Child Welfare Act have been undercut by state court decisions that disregard the Act’s terms and render its provisions ineffective, and that federal courts need to step in and be more aggressive about correcting erroneous state court decisions).

Elizabeth MacLachlan, Comment, *Tensions Underlying the Indian Child Welfare Act: Tribal Jurisdiction over Traditional State Court Family Law Matters*, 2018 *B.Y.U. L. REV.* 455 (contending that state courts have improperly resisted the Indian Child Welfare Act because the Act runs counter to the general historical tradition of state courts having nearly total jurisdiction over family law disputes, and suggesting that updated guidelines from the Bureau of Indian Affairs may help overcome state court resistance to the Act).

Jose Monsivais, *A Glimmer of Hope: A Proposal to Keep the Indian Child Welfare Act of 1978 Intact*, 22 *AM. INDIAN L. REV.* 1 (1997) (describing how the Indian Child Welfare Act was undermined by constitutional challenges and judicially-created exceptions, but it could be reinvigorated and strengthened if more state court judges understood how the Act protects Native American culture and heritage).

Addie C. Rolnick, *Indigenous Subjects*, 131 *YALE L.J.* 2652 (2022) (considering how constitutional law concerning racial classifications, particularly the claim that ancestry is equivalent to

race, has become a significant threat to the rights of indigenous people).

Addie Rolnick & Kim Pearson, *Racial Anxieties in Adoption: Reflections on Adoptive Couple, White Parenthood, and Constitutional Challenges to the ICWA*, 2017 MICH. ST. L. REV. 727 (arguing that although the Indian Child Welfare Act is not a race-based statute, the Supreme Court's skepticism of the statute reflects race-based anxieties about a law that strongly protects minority families' communities).

Nicole Russo, Note, *Back to Basics: The Supreme Court's Return to Fundamental Principles of Federal Indian Law in McGirt v. Oklahoma Ahead of Equal Protection Challenge to the Indian Child Welfare Act of 1978*, 55 SUFFOLK U. L. REV. 123 (2022) (arguing that the Supreme Court can return to fundamental principles of federal Indian law, which recognize the special trust relationship between the federal government and Indian tribes, by rejecting the equal protection challenges being brought against the Indian Child Welfare Act).

Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1 (2017) (arguing that the Indian Child Welfare Act unconstitutionally discriminates on the basis of race by reducing legal protections for Indian children, excluding them from the reach of state protective services, and subordinating their interests to those of tribal governments).

Timothy Sandefur, *The Unconstitutionality of the Indian Child Welfare Act*, 26 TEX. REV. L. & POLITICS 55 (2021) (asserting that although Congress had good intentions in enacting the Indian Child Welfare Act, the statute unconstitutionally imposes special rules on American citizens of Native ancestry and winds up hurting the children it was supposed to help).

Marcia Zug, *ICWA's Irony*, 45 AM. INDIAN L. REV. 1 (2021) (arguing that although the Indian Child Welfare Act is relentlessly criticized for providing special treatment for Native American children, the statute actually ensures that Indian families receive the same protections as other families, and the invalidation of the Act will prevent that equalization and bring about harmful differential treatment of Indian children).

– **Establishing Paternity**

Taylor Dow, Comment, *ICWA and the Unwed Father: A Constitutional Corrective*, 167 U. PA. L. REV. 1513 (2019) (describing the various approaches that state courts have taken on how an unwed father can acknowledge or establish paternity for purposes of the Indian Child Welfare Act, and proposing that courts can follow the Court’s “biology plus” jurisprudence when considering whether a putative father has developed a constitutionally protectable relationship with the child).

Shreya A. Fadia, Note, *Adopting “Biology Plus” in Federal Indian Law: Adoptive Couple v. Baby Girl’s Refashioning of ICWA’s Framework*, 114 COLUM. L. REV. 2007 (2014) (comparing the Supreme Court’s approach in Indian Child Welfare Act cases to the “biology plus” approach used to establish the existence of a father-child relationship for unwed fathers in the context of immigration law).

– **Extension Beyond American Indians**

Vinita Andrapalliyal, *The CPS Took My Baby Away: Threats to Immigrant Parental Rights and a Proposed Federal Solution*, 7 HARV. L. & POL’Y REV. 173 (2013) (proposing that the Indian Child Welfare Act should serve as a model for enactment of legislation protecting immigrant families and their children and that such legislation would be a valid exercise of Congress’s authority over immigration).

J. Bohl, “*Those Privileges Long Recognized*”—*Termination of Parental Rights Law, the Family Right to Integrity and the Private Culture of the Family*, 1 CARDOZO WOMEN’S L.J. 323 (1994) (arguing that parental unfitness, rather than best interests of the child, is the only constitutionally acceptable criterion for removing children from their families, and proposing a more constitutionally sound approach to child welfare legislation based on the general principles embodied in the Indian Child Welfare Act).

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Abi Fain & Mary Kathryn Nagle, *Close to Zero: The Reliance on Minimum Blood Quantum Requirements to Eliminate Tribal Citizenship in the Allotment Acts and the Post-Adoptive Couple Challenges to the Constitutionality of ICWA*, 43 *MITCHELL HAMLINE L. REV.* 801 (2017) (exploring the historical origins of the idea that a minimum amount of blood quantum should be required to qualify as "Indian" under federal laws such as the Indian Child Welfare Act).

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Sarah M. Gentry, Comment, *The Right to Die with Dignity: Death, Your Body, and Privacy*, 28 GEO. MASON U. CIV. RTS. L.J. 203 (2018) (arguing that physician-assisted suicide and euthanasia should be analyzed under a framework similar to that used for abortion rights under *Roe v. Wade*).

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that gives adolescents both medical decisionmaking rights and protections consistent with their evolving capacities).

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## **Religion**

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#### – Religious Exemptions

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