
**PARENS PATRIAE RUN AMUCK: THE CHILD
WELFARE SYSTEM’S DISREGARD FOR THE
CONSTITUTIONAL RIGHTS OF NONOFFENDING
PARENTS**

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Over the past hundred years, a consensus has emerged recognizing a parent’s ability to raise his or her child as a fundamental, sacrosanct right protected by the Constitution. Federal courts have repeatedly rejected the parens patriae summary mode of decision making that predominated juvenile courts at the turn of the twentieth century and have instead held that juvenile courts must afford basic due process to parents prior to depriving them of custodial rights to their children. This recognition has led to the strengthening of procedural protections for parents accused of child abuse or neglect in civil child protection proceedings.

Yet, despite these advances, juvenile courts continue to disregard the constitutional rights of nonoffending parents, individuals against whom the state has made no allegations. Nearly every state permits juvenile courts to deprive nonoffending parents of rights to their children based solely on findings or admissions of child maltreatment by the other parent. Such actions not only raise many constitutional questions, but also jeopardize children’s safety and well-being by increasing the likelihood that they will unnecessarily enter foster care and that their parents will disengage with the process. This Article proposes a policy solution that reflects the correct balance between safeguarding the constitutional rights of the nonoffending parent and preserving the flexibility of juvenile court judges to issue orders ensuring that the child’s needs are met.

TABLE OF CONTENTS

I.	INTRODUCTION.....	56
II.	<i>PARENS PATRIAE</i> DECISION MAKING	59
III.	EMERGENCE OF CONSTITUTIONALLY PROTECTED PARENTAL RIGHTS.....	64
	A. <i>Recognition of Substantive Due Process Right to Parent</i>	65
	B. <i>Constitutional Rights of Noncustodial Parents</i>	66
	C. <i>Enhanced Procedural Protections in Child Welfare Cases</i>	68
IV.	THE TREATMENT OF NONOFFENDING PARENTS	70
	A. <i>No Parental Presumption</i>	70
	B. <i>Limited Parental Presumption</i>	73

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C. <i>No State Involvement</i>	76
V. SHORTCOMINGS OF CURRENT APPROACHES	77
VI. SOLUTION	84
VII. CONCLUSION	87

I. INTRODUCTION

Over the past forty years, significant progress has been made in affording procedural protections to parents accused of child abuse or neglect in civil child protection proceedings. Before a court can take the authority to make decisions from a parent who allegedly maltreated her child,¹ she² is entitled to a trial to adjudicate the allegations against her,³ and in most jurisdictions, is appointed an attorney to represent her if she is indigent.⁴ Her attorney is given time to prepare for the hearing and can use traditional litigation tools including discovery and subpoena power to gather relevant information. If the state is seeking to terminate a parent's legal rights to the child, it must prove its case by clear and convincing evidence.⁵ Many, if not all, of these changes were precipitated by landmark Supreme Court decisions recognizing that child protection cases impose a "unique kind of deprivation" on families that necessitate enhanced due process safeguards not typically available to litigants in civil cases.⁶ Though

1. Throughout this Article, the terms "jurisdiction" and "dependency" will be used interchangeably to describe the act of the court transferring the custodial rights to the child from the parent to the state.

2. Since the majority of child welfare cases are brought against the child's mother, the offending parent will often be referred to as "she" and the nonoffending parent as "he." This is done for stylistic purposes only and in no way is meant to indicate any general belief about the proclivity of either gender to maltreat children.

3. *Stanley v. Illinois*, 405 U.S. 645, 649 (1972) ("[A]s a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken away from him . . ."). These protections are set forth in state law. *E.g.*, D.C. CODE ANN. § 16-2316 (LexisNexis 2008); MICH. R. CT., STATE 3.972.

4. *See* Astra Outley, Representation for Children and Parents in Dependency Proceedings 7 (The Pew Commission on Children in Foster Care, Background Paper 2003), available at <http://pewfostercare.org/research/docs/Representation.pdf> (finding that thirty-nine states have statutes that provide for appointment of counsel for indigent parents in dependency cases). For examples of state statutes providing the right to counsel, see ALA. CODE § 12-15-63 (LexisNexis 2005 & Supp. 2008); COLO. REV. STAT. § 19-3-202 (2008); GA. CODE ANN. § 15-11-6 (2008).

5. *See Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982) (holding that "clear and convincing" standard satisfies due process requirements in parental rights termination cases, though states can impose higher evidentiary burden).

6. *M.L.B. v. S.L.J.*, 519 U.S. 102, 127-28 (1996) (quoting *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981)). In *Santosky*, the Supreme Court observed that

[e]ven when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

far from perfect, much progress has been made during this time to protect the civil liberties of the alleged offending parent.⁷

Yet, despite these advances, child welfare systems continue to disregard the constitutional rights of nonoffending parents, individuals against whom the state has made no allegations and who thus have done nothing wrong other than to have a child in common with a parent who allegedly abused or neglected the child. These parents are presumed to be unfit based simply on their association with the other parent. Nearly every state permits juvenile courts to deprive nonoffending parents of custodial rights to their children based solely on findings or admissions of child maltreatment by the other parent.⁸ Courts are empowered to do this even if the nonoffending parent is ready and willing to assume full responsibility for the child immediately. In a number of these states, courts even have the power to place the child in foster care, without any evidence indicating that the nonoffending parent is unfit, based solely on their subjective determination that such a placement would further the child's best interests.⁹ In others, although the nonoffending parent is allowed to assume physical custody of the child, the legal authority to make decisions concerning the child rests in the hands of the juvenile court judge, who also has the power to compel the nonoffending parent to comply with services, such as attending a parenting class.¹⁰ Only in a few states do nonoffending parents retain their full custodial rights until evidence of unfitness is introduced.¹¹ The justification for this near-universal approach is clear: "[D]ependency law is based on the protection of the children rather than the punishment of the parent. It follows that a finding

455 U.S. at 753–54.

7. Though much progress had been made in the past hundred years, procedural protections for offending parents still remain inadequate. Far too many children are removed from their homes each year, attorneys appointed to represent parents in child protective cases are often overworked and poorly compensated, and judges frequently fail to act as neutral decision makers there to safeguard the constitutional rights of families. See, e.g., Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM. CT. REV. 457, 457–59 (2003) (discussing statistics regarding high number of emergency child removal proceedings resulting in unnecessary removals, and difficulties faced by parents in trying to get their child back); Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 147–52 (1995) (addressing sources of bias in child custody proceedings); Kathleen A. Bailie, Note, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285, 2310–13 (1998) (describing lack of adequate counsel for parents and resulting effects on indigent parents); Editorial, *Giving Overmatched Parents a Chance*, N.Y. TIMES, June 17, 1996, at A14 (identifying difficulties facing counsel appointed to parents in neglect hearings).

8. See Angela Greene, *The Crab Fisherman and His Children: A Constitutional Compass for the Non-Offending Parent in Child Protection Cases*, 24 ALASKA L. REV. 173, 189 (2007) (noting that only three states—New York, Maryland, and Pennsylvania—have “found that a child cannot be deemed dependent or neglected if a fit parent is available to care for that child”).

9. See *infra* Part II for a description of various state approaches to adjudicating the rights of nonoffending parents. For an outline of various approaches, see Greene, *supra* note 8, at 181–99.

10. See, e.g., Greene, *supra* note 8, at 184–86 (describing Michigan's approach to custody proceedings).

11. *Id.* at 189–90.

against one parent is a finding against both in terms of the child being adjudged a dependent.”¹²

Yet this reasoning, which consistently appears in cases across the country in which the rights of nonoffending parents have been raised, contravenes Supreme Court case law holding that parents with established relationships with their children have a right to direct the upbringing of their child protected by the Fourteenth Amendment,¹³ a right which cannot be interfered with absent proof of parental unfitness.¹⁴ This precedent, however, has not influenced the jurisprudence surrounding nonoffending parents. Juvenile courts throughout the country continue to disregard the rights of nonoffending parents and maintain systems in which judges routinely substitute their judgment of what a child needs for what the child’s presumptively fit parent believes is best for the child.

Despite the importance of this issue, it has only received minimal attention from academics and policymakers. No one has proposed a comprehensive law and policy solution which balances the rights of the nonoffending parent, the child, and the parent found to be abusive or neglectful.¹⁵ This Article describes

12. *In re Ryan W.*, No. A115424, 2007 WL 2588808, at *5 (Cal. Ct. App. Sept. 10, 2007); *see also* L.A. County Dep’t of Children & Family Servs. v. John D. (*In re James C.*), 128 Cal. Rptr. 2d 270, 278–79 (Ct. App. 2002) (noting jurisdiction over child may be granted based on actions of one parent alone); *In re Alysha S.*, 58 Cal. Rptr. 2d 393, 396–97 (Ct. App. 1996) (rejecting father’s claim that jurisdictional finding against one parent was not valid against the other).

13. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing, for first time, an individual constitutional right to “establish a home and bring up children”); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (describing right as “perhaps the oldest of the fundamental liberty interests”); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (“Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course.”); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.”); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”); *May v. Anderson*, 345 U.S. 528, 534 (1953) (“[A] mother’s right to custody of her children is a personal right entitled to at least as much protection as her right to alimony.”).

14. *Stanley v. Illinois*, 405 U.S. 645, 649 (1972).

15. For example, in a recent article addressing this practice in Alaska, one author concluded that juvenile courts should have no authority to issue any orders regarding the child if a nonoffending parent seeks to care for his or her child, except to grant that parent long-term custody of the child immediately. Greene, *supra* note 8, at 199–201. But, as will be discussed more fully below, this solution would pose safety risks for the child, would deny the child the ability to receive much-needed services, and would deprive the offending parent of the opportunity to receive services to rectify the conditions that led to the maltreatment and perhaps regain custody of her child. Another scholar takes the opposite approach and proposes that the correct solution is to afford juvenile court judges vast discretion in determining the child’s custody, even if a nonoffending parent is present and has not been judged to be unfit. Leslie Joan Harris, *Involving Nonresident Fathers in Dependency Cases: New Efforts, New Problems, New Solutions*, 9 J.L. & FAM. STUD. 281, 307 (2007). Professor Harris would permit the court to infringe upon the nonoffending parent’s right to legal and physical custody if the judge feels that such action is in the “best interests of the child.” *Id.* She writes, “A critical part of the solution to these problems is well-drafted statutes and rules that require judges to ensure children’s safety and give them discretion to make dispositional orders that will serve the child’s best interests.” *Id.* This result, however, yields too much power to the court, which should not have the authority to

the historical origins of this practice and its conflict with current constitutional doctrine, and suggests a balanced policy response.

This Article will argue that the child welfare system's disregard for the rights of nonoffending parents, a vestige of antiquated procedures previously prevalent in child protective cases, violates the constitutional guarantees in the Fourteenth Amendment. The practice also affirmatively harms children by encouraging courts to make decisions based on unreliable information, by holding children in foster care unnecessarily, and by disempowering fit parents. Part II will briefly discuss the *parens patriae* mindset, prevalent during the time that specialized juvenile courts emerged, that laid the foundation for the current practice of disregarding the nonoffending parent's rights. This mindset, which transformed the state into the guardian of all children, permitted the summary transfer of custodial rights from parents to the state based on general assertions regarding the child's condition, as opposed to specific findings of each parent's unfitness. Part III will detail the Supreme Court's rejection of this approach and the Court's recognition of constitutionally protected parental rights. It will be argued that these rights extend to nonoffending parents and preclude states from restricting that parent's legal and physical custodial rights absent evidence of parental unfitness. Part IV will assert that, in contravention of these holdings, states have continued to deprive nonoffending parents of custodial rights to their children without any evidence of parental unfitness. Finally, Part V will argue that a system that preserves all custodial rights with the fit, nonoffending parent, while giving courts the flexibility to address the needs of the offending parent and the child, best serves the interests of children.

II. PARENS PATRIAE DECISION MAKING

The foundation for the current practice of depriving nonoffending parents of legal and physical custodial rights to their children was established at the turn of the twentieth century, when the *parens patriae* mindset emerged as the dominant rationale behind state intervention to protect children.¹⁶ Prior to this time period, parental rights were afforded much deference, frequently to the detriment of children, and the legal authority for state intervention was extremely limited. Parents had near-absolute power over their children, and, often, child abuse and neglect were ignored by the state. As described by one scholar, “[t]he family's autonomy to do essentially as it saw fit with its children was untouched.”¹⁷

issue any orders that infringe upon the nonoffending parent's custodial rights. A more nuanced approach is needed to guide policymakers confronting this complex issue.

16. *Parens patriae*, Latin for “ultimate parent or parent of the country,” refers to the power of the state to usurp the legal rights of the natural parent, and to serve as the parent of any child who is in need of protection. Marvin Ventrell, *The History of Child Welfare Law*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 113, 126–27 (Marvin Ventrell & Donald N. Duquette eds., 2005).

17. *Id.* at 117.

That view, shielding families from government scrutiny, quickly changed as reformers embraced a more intrusive attitude towards protecting children from the corrupting influences of their parents and society. Driven by the doctrine of preventive penology, child advocates—primarily middle and upper class white women—believed that “society should identify the conditions of childhood which lead to crime,” such as poverty and child abuse and neglect, and should enact legislation to commit children found in these conditions for their protection.¹⁸ This goal necessitated a significant broadening of the state’s authority to intervene in what were previously regarded as private family matters.

The enhanced scope of state authority was justified by a theory that the state was acting pursuant to its *parens patriae* powers, literally translated as “ultimate parent or parent of the country.”¹⁹ In this role, the state recast itself as the ultimate guardian of all children with the mandate to determine which children needed to be protected and how best to accomplish that goal.²⁰ The state’s authority superseded the rights of any individual to the child, including his or her parents,²¹ and all state intervention was characterized as taken to protect

18. Mason P. Thomas, Jr., *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix and Social Perspectives*, 50 N.C. L. REV. 293, 324, 326 (1972). Thomas writes that the new juvenile court movement did “little more than confirm and extend the nineteenth-century philosophy of preventive penology” that justified state intervention in the family using informal procedures. *Id.* at 323. States gave themselves “broadly defined jurisdiction over neglected children, with little thought . . . given to the rights of parents and children.” *Id.*

19. Ventrell, *supra* note 16, at 126. The doctrine was based on English law that provided the crown with “supreme guardianship” over all children. HERBERT H. LOU, *JUVENILE COURTS IN THE UNITED STATES 3* (Arno Press 1972) (1927). Lord Jekyll explained the doctrine in *Eyre v. Shaftsbury*, the leading English case decided in 1772:

The care of all infants is lodged in the king as *parens patriae*, and by the king this care is delegated to his Court of Chancery. . . . Idiots and lunatics, who are incapable to take care of themselves, are provided for by the king as *parens patriae*; and there is some reason to extend this care to infants.

Id. (alteration in original) (quoting *Eyre v. Shaftsbury*, (1722) 24 Eng. Rep. 659, 664 (Ch.)). This reasoning appears in early appellate decisions involving juvenile court decisions. *See, e.g.*, *Commonwealth v. Fisher*, 62 A. 198, 200 (Pa. 1905) (describing Juvenile Court Act as “an exercise by the state of its supreme power over the welfare of its children . . . under which it can take a child from its father and let it go where it will . . . if the welfare of the child . . . can be thus best promoted”). Under this doctrine, the state not only had the right but the obligation to establish standards for the child’s care. Mary Virginia Dobson, *The Juvenile Court and Parental Rights*, 4 FAM. L.Q. 393, 396 (1970).

20. *See* LOU, *supra* note 19, at 5 (“It has been generally maintained that the juvenile court is but an embodiment in the law and in a specific institution of an ancient doctrine and of modern methods in the exercise of the power of the state as the ultimate parent of the child.”).

21. *See id.* at 9 (“The tendency of American courts has been to repudiate the notion that there can be such a thing as a proprietary right to or interest in the custody of an infant.”); WILLIAM H. SHERIDAN, *CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH, EDUC., & WELFARE, STANDARDS FOR JUVENILE AND FAMILY COURTS 3* (1966) (observing that “some early writers . . . tended to consider parental rights as merely a privilege or duty conferred upon the parent in the exercise of the police power of the State”).

the child, not to punish the parent.²² Armed with this new conception of the state's role, reformers pushed for the creation of specialized juvenile courts, the first of which appeared in Illinois in 1899.²³ Immediately thereafter, other states followed. By 1904, ten states had established such courts.²⁴ By 1920, all but three had.²⁵ The public broadly accepted the emergence of these courts, and a consensus emerged supporting the state's newfound role as the protector of all children.

In the newly created specialized courts, juvenile court judges became the state's designee to exercise its *parens patriae* authority, and procedures were implemented to expedite the transfer of custody from parents to the state. Broad, subjective legal standards were adopted, allowing the judge vast amounts of discretion to determine in which cases to intervene.²⁶ For example, one common statute permitted the court to assume custody of a child if the child was "without proper parental care or guardianship," while another ground rested on whether the child lived "in surroundings dangerous to morals, health, or general welfare."²⁷ Courts often relied upon very general findings to base their decisions on whether a child was neglected.²⁸ Not surprisingly, a study of the first juvenile court in Chicago found that "only 6.0% of the 10,631 petitions filed were dismissed, while in 88.5% of the cases a finding of neglect was made."²⁹ As aptly summarized by a prominent scholar during that era, "In the case of the juvenile court, except in general terms, there is very little substantive law. To do something constructive for the child is the goal of the entire procedure."³⁰

Minimal procedural protections for parents complimented the broad legal standards for intervention.³¹ Hearings were kept informal³² and summary,³³ the

22. LOU, *supra* note 19, at 10 ("The most fundamental principle of the juvenile court—that juvenile-court acts are not criminal in their nature, because their purpose is not to punish but to save the child—has been almost universally affirmed by courts of last resort.").

23. Ventrell, *supra* note 16, at 132–33.

24. LOU, *supra* note 19, at 24.

25. *Id.*

26. *See id.* at 68 (noting that statutes give juvenile courts "broad jurisdiction and large discretionary powers"); ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 135 (1969) (arguing that "such high standards of family propriety [were set] that almost any parent could be accused of not fulfilling his 'proper function'").

27. LOU, *supra* note 19, at 54.

28. *See* Comment, *The Custody Question and Child Neglect Rehearings*, 35 U. CHI. L. REV. 478, 479 (1968) ("[T]he courts often rely on 'general grounds' rather than any precise finding when they find children neglected.").

29. Note, *Child Neglect: Due Process for the Parent*, 70 COLUM. L. REV. 465, 466 (1970).

30. LOU, *supra* note 19, at 99.

31. Ventrell describes the *parens patriae* mindset as one in which courts were entitled to take custody of a child, regardless of the status of the child as a victim or offender, "without due process of law, because of the state's authority and obligation to save children from becoming criminal[s]." Ventrell, *supra* note 16, at 126. One early court rationalized, "To save a child from becoming a criminal . . . the Legislature surely may provide for the salvation of such a child . . . by bringing it into one of the courts of the state without any process at all." *Commonwealth v. Fisher*, 62 A. 198, 200 (Pa. 1905).

32. *See* BERNARD FLEXNER & REUBEN OPPENHEIMER, *CHILDREN'S BUREAU*, U.S. DEP'T OF

rules of evidence were relaxed,³⁴ and the appearance of lawyers was strongly discouraged.³⁵ Since all parties were purportedly working towards a common goal—the best interests of the child—the proponents of this system rationalized that adversarial procedures were not only unnecessary but were counterproductive.³⁶ Often, decisions on the future custody of a child were determined summarily at the first court hearing, without giving the parents an opportunity to prepare or to seek counsel.³⁷ In these juvenile courts, neither the law nor strict procedural formalities were permitted to prevent the judge from making a decision which he deemed best for an individual child.³⁸ “[T]hat the hearing has been legally conducted and no law violated is no excuse if the child is finally lost.”³⁹

LABOR, PUB. NO. 99, THE LEGAL ASPECT OF THE JUVENILE COURT 8–9 (1922) (“The procedure of the court must be as informal as possible. Its purpose is not to punish but to save.”); SUSAN TIFFIN, IN WHOSE BEST INTEREST? CHILD WELFARE REFORM IN THE PROGRESSIVE ERA 223 (1982) (stating that staff in juvenile proceedings tried to make these proceedings as informal as possible). According to Tiffin, “[n]ormally the judge accepted the recommendation of the probation officer, since there was little time to devote to each case.” TIFFIN, *supra*, at 224.

33. The concept of summary, prompt procedures was key to the efficient juvenile court. For example, “[t]he original Illinois [Juvenile Court] Act provided that ‘the court shall proceed to hear and dispose of the case in a summary manner.’” MONRAD G. PAULSEN & CHARLES H. WHITEBREAD, JUVENILE LAW AND PROCEDURE 2 (1974) (quoting Ill. Laws 1899, 131-37 § 5).

34. See LOU, *supra* note 19, at 139 (suggesting that, especially in cases of dependency and neglect, juvenile courts should not refuse protection to child based on lack of “technical legal evidence”).

35. *Id.* at 138 (“The better juvenile courts have been successful in discouraging the appearance of attorneys in most cases.”); SHERIDAN, *supra* note 21, at 56 (observing that “in some courts counsel were not welcome – an attitude which was carried to the point of attempted exclusion”); Walter H. Beckham, *Helpful Practices in Juvenile Court Hearings*, FED. PROBATION, June 1949, at 10, 13 (“In most juvenile proceedings, lawyers are not required and the majority of cases are heard without them.”). Even as late as 1970, only a few states had extended a statutory right to counsel in abuse and neglect cases. Note, *supra* note 29, at 475.

36. See Monrad G. Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CAL. L. REV. 694, 703 (1966) (writing that “[i]n juvenile court there were to be no adversaries, only friends of the child united in their desire to help him”). Many justified the procedural informality of this system by characterizing it as not criminal in nature, but there to further the interests of the child. Thus, constitutional rights were not implicated and strict processes did not need to be followed. See LOU, *supra* note 19, at 10 (“If they are not of a criminal nature, they are not unconstitutional because of their non-conformance to certain constitutional guarantees.”); Wright S. Walling & Stacia Walling Driver, *100 Years of Juvenile Court in Minnesota – A Historical Overview and Perspective*, 32 WM. MITCHELL L. REV. 883, 893–94 (2006) (“The power of the juvenile court to operate in this informal fashion was almost universally sustained in state courts by characterizing the proceedings as civil rather than criminal – an exercise of *parens patriae* power.”).

37. ALFRED J. KAHN, A COURT FOR CHILDREN: A STUDY OF THE NEW YORK CITY CHILDREN’S COURT 100–01 (1953). Kahn describes one case in which the “judge so convinced himself” that the father was a gambler that he “became so angry that he sent the man out of the courtroom and did all the planning with the wife.” *Id.* at 112.

38. See LOU, *supra* note 19, at 129 (“In order to secure the utmost possible simplicity, it has been found necessary in the hearing of children’s cases to disregard the technicalities of procedure which are not absolutely necessary and which tend to confuse a child’s mind.”).

39. *Id.* at 129–30 (quoting Charles W. Hoffman, *Saving the Child*, 45 SURV. 704, 704–05 (1921)).

With a broad mandate to intervene and relaxed procedures that ensured that he would not be encumbered with needless formalities, in each case, the juvenile court judge quickly assumed the role of the child's parent. Rather than focus on whether each of the child's parents was unfit or which of the two maltreated her, the judge simply sought to determine whether the general condition of the child warranted a need for the court to intervene.⁴⁰ So long as the *child* was maltreated in some way by someone, the court could apply its dispositional powers to order the remedy that it deemed was in the child's best interest. In other words, if one parent committed an offense against the child, the court could obtain custodial authority over the child regardless of the fitness of the other parent.⁴¹ Again, since each parent's rights were deemed subservient to the court's *parens patriae* authority, the court's sole concern was the condition of the child, not the responsibility of the individual parent for the abuse or neglect.⁴²

A number of published cases in this period demonstrate these principles in practice. Take, for example, the case of *Bleier v. Crouse*,⁴³ an Ohio case decided in 1920 in which three children were committed to a children's home despite the trial court's failure to provide notice of the proceedings to the children's father.⁴⁴ On appeal, the county court of appeals affirmed the trial court's decision finding that the father misconstrued the nature of juvenile court proceedings.⁴⁵ The court found that "[t]here [was] no authority to support the contention that notice to the parent [was] a condition prerequisite to jurisdiction of the juvenile court over the child."⁴⁶ The court held that "[a]n examination of the juvenile law as a whole leads us to the conclusion that the jurisdiction of the court attaches to the child without regard to the citation of the parent."⁴⁷ Although the court acknowledged the father's right to challenge the placement of the children at a later time, "[i]n the interest of the child and in the interest of society the court can commit its custody to strangers, or to an institution for its moral training and education"⁴⁸ without notifying the child's parents. Any rights held by each parent to the child were subordinate to the court's *parens patriae* authority.⁴⁹

40. *See id.* at 54 (explaining that dependency and neglect are broadly defined to cover any child needing state's protection).

41. *See id.* at 8 ("Whether the rights of the parents are superior to those of the state or whether the state occupies the position of primary parent, it has been well conceded that the welfare of the child is the paramount consideration, and, in the matter of custody, this principle governs court decisions.").

42. *Id.* at 8-9.

43. 13 Ohio App. 69 (Ct. App. 1920).

44. *Bleier*, 13 Ohio App. at 70, 74.

45. *Id.* at 76-77.

46. *Id.* at 74-75.

47. *Id.* at 75.

48. *Id.*

49. *Bleier*, 13 Ohio App. at 74-75.

Similarly, in *Allen v. Williams*,⁵⁰ the Supreme Court of Idaho upheld a trial court's decision to remove a child from her mother's custody despite failing to serve a petition on her, give her any notice, or provide her with an opportunity to be heard.⁵¹ The Idaho Supreme Court dismissed the mother's argument that procedural due process required that her constitutional rights be determined prior to the juvenile court assuming temporary custody over her child.⁵² Instead, the court reasoned:

Our statute was enacted as a matter of protection to the child and for the welfare of the state. The Legislature, in enacting this law, no doubt saw the wisdom of prompt commitment of a child, who is upon the high road to becoming a moral degenerate and perhaps a future charge upon and a disgrace to the state. To drag such a case through a lengthy and formal criminal or civil proceeding, without prompt detention and commitment of the child, would in many cases thwart the object of the law.⁵³

These two cases typify the approach embodied by the original juvenile courts.⁵⁴ In this system, the state's paternalism trumped all other interests. The state, acting upon the assumption that its powers superseded all authority conferred by birth on natural parents, granted itself the immediate right to determine the child's best interests without deference to the parent's wishes. Appeals by parents based on the core concepts underlying due process—notice and a meaningful opportunity to be heard—were largely rejected, which signified that the parent's role in the decision-making process was, at best, marginal.⁵⁵ Assertions of a parental right to custody based on fitness were ignored and instead yielded to the state's subjective determination of what was best for "its" child. The summary transfer of decision-making authority from parents to juvenile court judges in order to "save" children represented the core of the *parens patriae* approach to child welfare.

III. EMERGENCE OF CONSTITUTIONALLY PROTECTED PARENTAL RIGHTS

At nearly the same time as the emergence of specialized juvenile courts, the United States Supreme Court began recognizing a substantive due process right

50. 171 P. 493 (Idaho 1918).

51. See *Allen*, 171 P. at 493 (setting forth mother's allegations).

52. *Id.* at 494.

53. *Id.*

54. Other cases during this period reflected the fundamental belief that the transfer of child custody from a parent to the court could occur in a summary manner without much regard to due process. See, e.g., *Farnham v. Pierce*, 6 N.E. 830, 831-32 (Mass. 1886) (stating that "proceeding is intended to be summary" and that no notice needs to be given and no complaint is required prior to committing child); *State ex rel. Jones v. West*, 201 S.W. 743, 744 (Tenn. 1918) ("The State, thus acting upon the assumption that its parentage supersedes all authority conferred by birth on the natural parents, takes upon itself the power and right to dispose of the custody of children, as it shall judge best for their welfare.").

55. See, e.g., *Farnham*, 6 N.E. at 832 (explaining that notice and trial are unnecessary in child commitment proceedings); *Jones*, 201 S.W. at 744 (recognizing that state has ultimate power to serve child's best interests).

to parent protected by the Fourteenth Amendment. The recognition and expansion of this right, which encompasses decisions by both custodial and noncustodial parents, ultimately led to enhanced procedural protections for offending parents in child welfare cases. This section will briefly outline the development of this right and how it led to the rejection of the *parens patriae* model of decision making. In the next section, it will be argued that the treatment of nonoffending parents is a lingering remnant of the *parens patriae* mindset.

A. *Recognition of Substantive Due Process Right to Parent*

The Court first recognized the existence of a substantive due process right to direct the upbringing of one's child in *Meyer v. Nebraska*,⁵⁶ a case appealing the conviction of a schoolteacher who taught German to young children.⁵⁷ The Court, in ruling that the conviction should be overturned, had the opportunity to consider what rights were encompassed by the word "liberty" in the Fourteenth Amendment, which it determined, "[w]ithout doubt," to include the right of the individual to "establish a home and bring up children."⁵⁸ Two years later, the Court, in *Pierce v. Society of Sisters*,⁵⁹ again found a substantive due process right for parents "to direct the upbringing and education of children under their control."⁶⁰ The Court famously declared that "[t]he 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."⁶¹ In *Prince v. Massachusetts*,⁶² the Court reaffirmed the vitality of this parental right in the context of a Jehovah's Witness appealing a conviction for violating state child labor laws.⁶³ Though the Court affirmed the conviction, it elevated the stature of the parental right, describing it as a "sacred private interest[], basic in a democracy."⁶⁴ In the years after *Meyer*, *Pierce*, and *Prince*, the parental right has been used to insulate an array of parental decisions from state intervention in areas such as directing a child's religious upbringing,⁶⁵ choosing with whom the child should associate,⁶⁶ and making medical decisions

56. 262 U.S. 390 (1923).

57. *Meyer*, 262 U.S. at 396–97.

58. *Id.* at 399.

59. 268 U.S. 510 (1925).

60. *Pierce*, 268 U.S. at 534–35.

61. *Id.* at 535.

62. 321 U.S. 158 (1944).

63. *Prince*, 321 U.S. at 159, 165.

64. *Id.* at 165.

65. *Wisconsin v. Yoder*, 406 U.S. 205, 207, 234–36 (1972) (finding that First and Fourteenth Amendments prohibited state from making Amish children attend school until age sixteen when doing so violated parents' decisions about children's religious upbringing).

66. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 60–63, 67 (2000) (holding unconstitutional state statute that permitted judge to allow grandparent visitation against parent's consent solely on determination that visits were in child's best interests).

on behalf of the child.⁶⁷ The conception of the state as the primary protector, guardian, and decision maker for the child, as theorized in Plato's *Republic*, has been soundly rejected.⁶⁸

B. Constitutional Rights of Noncustodial Parents

The changing dynamic of the family structure, primarily the increasing prevalence of children being raised by unmarried and separated parents, forced the Court to confront the question of who—or what type of parent—is entitled to protection under the Fourteenth Amendment. Prior to the 1970s, unwed fathers held no legal rights to their children and states commonly usurped parental decision making upon the death of the child's mother if she was unmarried.⁶⁹ The unwed father had no presumptive legal right to make decisions and care for the child.⁷⁰ All of this changed in the landmark case of *Stanley v. Illinois*.⁷¹

In *Stanley*, the Court evaluated an Illinois law under which the state automatically placed children of unwed fathers in foster care upon their mother's death.⁷² The record revealed that Mr. Stanley had intermittently cared for his children throughout their lives, and upon their mother's death had located friends to care for the children.⁷³ The State, emphasizing its *parens patriae* authority, argued that it assumed full responsibility for the child immediately upon the death of the unmarried mother since unwed fathers were presumed to be unsuitable parents.⁷⁴ It sought to shift the burden of proving parental fitness onto the noncustodial father, whom it said could establish his ability to care for the child by filing for guardianship or adoption, options any legal stranger to the child could pursue.⁷⁵

The Court rejected the state's argument and held that the Constitution requires, as a matter of due process, that the father have a "hearing on his fitness

67. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 620–21 (1979) (finding formal due process procedures were not constitutionally required when parents were seeking to commit their children to mental health institutions).

68. In *Meyer v. Nebraska*, the Court described Plato's conception of the Ideal Commonwealth: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent." 262 U.S. 390, 401–02 (1925). The Court soundly rejected that idea. It stated, "Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest." *Id.* at 402; see also *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children.").

69. *Stanley v. Illinois*, 405 U.S. 645, 646–47 (1972) (nothing that under state law children became wards of state upon death of unwed mother regardless of father's fitness as parent).

70. See *id.* at 647 (noting that state law presumed unwed fathers to be unfit).

71. 405 U.S. 645 (1972).

72. *Stanley*, 405 U.S. at 646.

73. *Id.*; Brief for the Petitioner at *4, *Stanley*, 405 U.S. 645 (No. 70-5014).

74. *Stanley*, 405 U.S. at 647–50.

75. *Id.* at 648–49.

as a parent before his children were taken from him.”⁷⁶ The State’s interest in efficiency did not permit it to presume all unmarried fathers to be unfit:

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.⁷⁷

In other words, the Court made clear that depriving both custodial and noncustodial parents of rights to their child without a judicial determination of their unfitness violated the Constitution.⁷⁸

Decisions after *Stanley* elaborated on the level of involvement noncustodial parents had to establish in their child’s life in order to grasp the bundle of rights the Constitution afforded to parents. A common principle emerged from these cases. “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.”⁷⁹ Thus, in *Lehr v. Robertson*,⁸⁰ the Court upheld a New York statute that did not require that a father be notified of his child’s impending adoption because the father had failed to take meaningful steps towards establishing a parental relationship with his child.⁸¹ The Court reasoned:

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 accepts 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.⁸²

Similarly, in *Quilloin v. Walcott*,⁸³ the Court held that a biological parent, who had minimal contact with the child, could not disrupt a child’s adoption into a family with whom the child had already been living.⁸⁴ In both decisions, the Court prevented parents who had not made efforts to establish a relationship with their child from using the Constitution as a sword to disrupt the child’s permanent placement.

76. *Id.* at 649.

77. *Id.* at 656–57.

78. *See id.* at 651 (noting parent’s rights to raise children should only be limited by strong countervailing forces).

79. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (citation omitted).

80. 463 U.S. 248 (1983).

81. *Lehr*, 463 U.S. at 264, 266–68.

82. *Id.* at 262.

83. 434 U.S. 246 (1978).

84. *Quilloin*, 434 U.S. at 255.

Where, however, the parent established such a relationship, the Court has prevented states from infringing upon that intact parent-child bond without providing adequate process. In *Caban v. Mohammed*,⁸⁵ the Court struck down a New York statute that denied a father the right to object to an adoption that the biological mother had already consented to.⁸⁶ Although the decision was based on equal protection grounds, the Court's holding centered on the fact that the father was as involved in the children's upbringing as their mother.⁸⁷ Although the Court has never prescribed the specific actions a noncustodial parent must take to grasp his constitutionally protected interest in his child, the Court's rulings clarify that the physical and legal custodial rights of parents who have established relationships with their children are constitutionally protected from state interference absent proof of unfitness.

C. *Enhanced Procedural Protections in Child Welfare Cases*

The Supreme Court's recognition of constitutionally protected parental rights has fueled enhanced procedural protections in child abuse and neglect cases. In *Santosky v. Kramer*,⁸⁸ the Court determined that the state had to prove parental unfitness by clear and convincing evidence prior to terminating parental rights.⁸⁹ In *Lassiter v. Department of Social Services*,⁹⁰ the Court held that in some termination proceedings the Constitution mandated the appointment of counsel for parents.⁹¹ In *M.L.B. v. S.L.J.*,⁹² the Court concluded that due process required courts to furnish indigent litigants trial court transcripts, free of cost, when appealing termination of parental rights decisions.⁹³ On numerous occasions, the Court has described the deprivation in child protective cases as a "unique kind of deprivation,"⁹⁴ implicated by even a temporary dislocation of a child from his or her parent's custody. This deprivation warrants heightened procedural protections not typically applicable in civil proceedings.

State legislatures have responded by affording parents accused of child abuse or neglect an increased panoply of statutory protections to safeguard their fundamental rights. Nearly every state appoints attorneys to represent the alleged offender at the outset of a civil child protective case.⁹⁵ The parent is given an opportunity to contest the emergency removal of the child, if it occurs,

85. 441 U.S. 380 (1979).

86. *Caban*, 441 U.S. at 382.

87. *Id.* at 389 (noting that "an unwed father may have a relationship with his children fully comparable to that of the mother").

88. 455 U.S. 745 (1982).

89. *Santosky*, 455 U.S. at 748.

90. 452 U.S. 18 (1981).

91. *Lassiter*, 452 U.S. at 31-32 (leaving decision "whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court").

92. 519 U.S. 102 (1996).

93. *M.L.B.*, 519 U.S. at 127-28.

94. *E.g., id.* (quoting *Lassiter*, 452 U.S. at 27).

95. See *supra* note 4 and accompanying text for a discussion of this point.

and has the chance to prepare for a full-blown evidentiary hearing, typically several months after the filing of the petition, to contest the allegations made against her.⁹⁶ In most jurisdictions, discovery rights are afforded, strict evidentiary rules apply, and appellate rights exist to remedy incorrect decisions.⁹⁷ If the state fails to meet its burden, the case is dismissed. Though many flaws continue to permeate the child protective system, the court system has been revolutionized over the past thirty years to safeguard the rights of the alleged offender, a transformation spurred by the seminal cases noted above, recognizing and reaffirming the sanctity of a parent's right to raise his or her child.

The decisions by the Supreme Court, along with the increased procedural protections in state statutes, evinced the rejection of the *parens patriae* mode of decision making in child protective cases. The prompt, summary transfer of children from their parents into state custody was repudiated and instead replaced by a process consistent with basic notions of due process—notice, an opportunity to be heard, and a presumption of fitness that must be rebutted by the state at a judicial hearing. Any doubt regarding the rejection of the *parens patriae* model was resolved in *In re Gault*,⁹⁸ a juvenile delinquency case in which the Court held that children accused of crimes were entitled to receive many of the protections afforded to adult criminal defendants, such as the receipt of notice, appointment of counsel, and the ability to cross-examine and confront witnesses.⁹⁹ In doing so, the Court issued a strong pronouncement against the informality so prevalent in juvenile court proceedings justified under the *parens patriae* rhetoric. The Court described the Latin phrase as “a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme”¹⁰⁰ but found that “its meaning is murky and its historic credentials are of dubious relevance.”¹⁰¹ The conclusion reached by the Court was clear: “[T]he admonition to function in a ‘parental’ relationship is not an invitation to procedural arbitrariness.”¹⁰²

One studying this line of cases and assessing the resulting changes made in state child protective laws would likely conclude that the transformation of juvenile courts has been completed and that a new structure emphasizing procedural fairness governs decision making. In many ways, particularly with respect to the treatment of parents accused of maltreatment, this may be true. Yet, in one important respect—the treatment of nonoffending parents—the

96. See, e.g., MICH. R. CT., STATE 3.965(C) (permitting parent to contest foster care placement of child); MICH. R. CT., STATE 3.972 (providing parent with right to trial within sixty-three days of child's removal from home).

97. See, e.g., MICH. R. CT., STATE 3.922(A) (providing parents with discovery rights); MICH. R. CT., STATE 3.972(C)(1) (applying rules of evidence to neglect trial); MICH. R. CT., STATE 3.993 (outlining appellate rights for parents).

98. 387 U.S. 1 (1967).

99. *In re Gault*, 387 U.S. at 41, 57.

100. *Id.* at 16.

101. *Id.*

102. *Id.* at 30 (quoting *Kent v. United States*, 383 U.S. 541, 555 (1966)).

antiquated mindset of a previous era lingers. In most jurisdictions, the state still maintains the right to summarily usurp custodial authority from a parent against whom no allegations of unfitness are made, based solely on the conduct of the other parent. The remainder of this Article discusses the various manifestations of this practice and how it harms children, and, in the final Part, proposes a policy solution that balances the constitutional rights of the nonoffending parent with the interests of the child and the other parent.

IV. THE TREATMENT OF NONOFFENDING PARENTS

The overwhelming majority of states currently maintain child welfare systems that disregard the constitutional rights of nonoffending parents. Although the manifestations of the deprivation vary, the justification for the different approaches has been consistent: the state's lingering *parens patriae* authority warrants it to take an active role in a child's life where there is evidence that one parent has maltreated the child even when the other has done nothing wrong.¹⁰³ Appellate decisions scrutinizing these systems have given scant attention to the constitutional rights of the nonoffending parent and have generally endorsed the state's ability to encroach on the nonoffending parent's rights based on its determination that such actions are in the child's best interest. Those few states that have rejected this encroachment have instead adopted an extreme approach that prevents juvenile courts from intervening in any way with respect to either parent or the child where the child has only been maltreated by one parent. In my estimation, the correct balance would permit the court, upon a finding that a child has been harmed by one parent, to assume limited jurisdiction over the case to remedy the effects of the maltreatment by the offending parent, while forbidding it to restrict the custodial rights of the nonoffending parent, except in limited circumstances. The strengths of this balanced approach will be discussed in Part IV.B.

A. *No Parental Presumption*

States have intruded upon the constitutional rights of nonoffending parents in several ways. A number of states, such as Michigan and Ohio, have adopted policies which permit courts to strip nonoffending parents of all custodial rights to their children immediately upon a finding that the other parent has abused or neglected the child.¹⁰⁴ In these jurisdictions, immediately upon a finding against

103. See *infra* Part IV.A for a discussion of cases relying on the best interests of the child to justify actions against nonoffending parents.

104. Numerous cases in Ohio have removed the custody rights of the nonoffending parent. See, e.g., *In re C.R.*, 843 N.E.2d 1188, 1192 (Ohio 2006) (concluding that court is not required to separately consider suitability of noncustodial parent before giving custody to nonparent); *In re Russel*, No. 06-CA-12, 2006 Ohio App. LEXIS 6565, at *5-6 (Ohio Ct. App. Nov. 27, 2006) (same); *In re Osberry*, No. 1-03-26, 2003 Ohio App. LEXIS 4922, at *8 (Ohio Ct. App. Oct. 14, 2003) (same). Michigan cases have been resolved in a manner similar to cases in Ohio. See, e.g., *In re Camp*, No. 265301, 2006 Mich. App. LEXIS 1620, at *1-2 (Mich. Ct. App. May 9, 2006) (explaining that there is no requirement to hold separate hearing before entering order involving placement of child with nonparent); *In re Church*,

one parent, the trial court obtains temporary custody of the child and can issue any order it deems to be in the child's best interest. Even without a finding of unfitness against the nonoffending parent, the court can place the child in foster care,¹⁰⁵ compel the nonoffending parent to comply with services,¹⁰⁶ and order that that parent's rights be terminated based on the failure to comply with those services.¹⁰⁷ These systems treat nonoffending parents as legal strangers to the child, and the burden is placed on them to prove to the court that it is in the child's best interest to be placed with them. In these jurisdictions, Supreme Court precedent has had little impact on shaping the jurisprudence involving nonoffending parents.

Take, for example, the Michigan case of *In re Church*,¹⁰⁸ which involved three children over whom the court assumed jurisdiction based solely on a plea entered by the children's father.¹⁰⁹ The father admitted that he had neglected the children by not financially supporting them and by failing to protect them from their mother's emotional and mental instability.¹¹⁰ Although the initial petition contained allegations against the mother, the prosecutor withdrew the allegations immediately after the father's plea was accepted. The trial court did not afford the mother a jury trial on the allegations against her, as she had requested.¹¹¹ Then, at the dispositional hearing, the court ordered that the three children be placed outside of the mother's custody, compelled the mother to comply with services, and determined that it would decide, at a later date, whether it was in the children's best interests to be returned to her custody.¹¹² At no point did the trial court find that the mother was unfit.

The Michigan Court of Appeals affirmed the trial court's actions.¹¹³ It stated that upon a finding against one parent, Michigan law permitted the trial court to dispense with holding an adjudicative hearing to substantiate the allegations against the mother and could enter any orders involving her, including those mandating compliance with services that it deemed were in the children's interests.¹¹⁴ It also concluded that Michigan statutes provided vast

No. 263541, 2006 Mich. App. LEXIS 1098, at *4-6 (Mich. Ct. App. Apr. 11, 2006) (same); *In re Stramaglia*, No. 256133, 2005 Mich. App. LEXIS 1339, at *5-6 (Mich. Ct. App. May 26, 2005) (same).

105. See, e.g., *In re C.R.*, 843 N.E.2d at 1192 ("When a juvenile court adjudicates a child to be abused, neglected or dependent, it has no duty to make a separate finding at the dispositional hearing that a non-custodial parent is unsuitable before awarding legal custody to a nonparent.").

106. See, e.g., *In re B.C.*, No. 23044, 2006 Ohio App. LEXIS 3197, at *8-9 (Ohio Ct. App. June 28, 2006) (finding that supervision of placement with birth fathers was appropriate even without proof of parental unfitness).

107. See, for example, *infra* notes 108-16 and accompanying text for a discussion of *In re Church*, in which the court required the mother to comply with services before it decided whether to terminate her parental rights regarding her three children.

108. No. 263541, 2006 Mich. App. LEXIS 1098 (Mich. Ct. App. Apr. 11, 2006).

109. *In re Church*, 2006 Mich. App. LEXIS 1098, at *2.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at *1-2.

114. *In re Church*, 2006 Mich. App. LEXIS 1098, at *4-5.

discretion for courts to enter orders “placing the children outside of the custodial parent’s care whose neglect did not factor into the assumption of jurisdiction over the children”¹¹⁵ as long as the court was acting “to ensure the children’s well-being.”¹¹⁶ Countless numbers of cases in Michigan have similarly treated nonoffending parents as legal strangers to the child.¹¹⁷

The Illinois case of *In re Y.A.*¹¹⁸ applied similar reasoning. In that case, the trial court obtained jurisdiction over the child after the child’s mother admitted that she had created a harmful living environment.¹¹⁹ No findings of maltreatment were issued against the father, and instead, the trial court explicitly found the father to be a fit parent.¹²⁰ Yet, the court still named the Department of Children and Family Services as the guardian of the child, which then determined that placement in foster care was warranted.¹²¹ The Court of Appeals, which affirmed the trial court’s decision, justified the decision by observing that, “[a]lthough it is true that the [father] was fit, the purpose of the dispositional hearing was for the trial court to determine whether it was in the best interests of the child to be made a ward of the court,”¹²² and thus it could place the child in foster care even after determining that a parent was fit. In other words, even without a finding of unfitness, the parent’s constitutional right to custody could be displaced by the court’s subjective determination of what was best for the child.

A third case, *In re M.D.*,¹²³ demonstrates the prevalence of this approach. A child entered foster care after her father was arrested.¹²⁴ The trial court subsequently found that the child came under its purview based on the father’s conduct, but made no findings against the child’s mother.¹²⁵ Despite the mother’s request for immediate custody, the court placed the child with her paternal

115. *Id.* at *7.

116. *Id.* at *8.

117. See *supra* note 104 for a sampling of these cases. Decisions in Michigan stripping nonoffending parents of their custodial rights have relied upon the holding of *In re C.R.*, in which the Michigan Court of Appeals held that “[o]nce the family court acquires jurisdiction over the children,” the court rule “authorizes the family court to hold a dispositional hearing ‘to determine measures to be taken . . . against any adult’” and “then allows the family court ‘to order compliance with all or part of the case service plan and may enter such orders as it considers necessary in the interest of the child.’” 646 N.W.2d 506, 515 (Mich. Ct. App. 2002) (emphasis omitted) (alteration in original) (quoting MICH. R. CT., STATE 5.973(A)).

118. 890 N.E.2d 710 (Ill. App. Ct. 2008).

119. *In re Y.A.*, 890 N.E.2d at 711–12.

120. *Id.* at 713.

121. *Id.*

122. *Id.* at 714.

123. No. CA2006-09-223, 2007 Ohio App. LEXIS 4181 (Ohio Ct. App. Sept. 10, 2007). Although the court recognized that both the United States and Ohio Constitutions afford a parent a fundamental right to the custody of his children, the court held that “[t]he best interest of the child is the primary consideration’ in such cases.” *In re M.D.*, 2007 Ohio App. LEXIS 4181, at *6 (quoting *In re Allah*, No. C-040239, 2005 Ohio App. LEXIS 1163, at *10 (Ohio Ct. App. Mar. 18, 2005)).

124. *Id.* at *3.

125. *Id.*

grandparents, determining that it was best for the child to live with them.¹²⁶ On appeal, the Ohio Court of Appeals upheld the court's actions. The court ruled that a juvenile court "has no duty to make a separate finding at the dispositional hearing that a noncustodial parent is unsuitable before awarding legal custody of a child to a non-parent relative."¹²⁷ Instead, an adjudication of abuse or neglect "is a determination about the care and condition of a child and implicitly involves a determination of the unsuitability of the child's custodial and/or noncustodial parents."¹²⁸ Thus, based on one parent's conduct, the presumption that the other parent is fit is implicitly extinguished and the burden shifts to that parent to prove his or her adequacy.

These three cases typify the common practice of completely disregarding the nonoffending parent's rights in juvenile courts. Treated as a stranger to the child, the nonoffending parent has no legal rights to the child and instead must convince the state of his or her suitability, a tough burden of persuasion especially in a setting in which parents are routinely viewed with suspicion. These cases only give passing reference to the nonoffending parent's substantive due process right to raise his child and rarely address the Supreme Court's *Stanley v. Illinois*¹²⁹ decision, which seemingly requires juvenile courts to make findings of unfitness prior to interfering with a parent's custodial rights.¹³⁰ Despite serious constitutional infirmities, these approaches have survived numerous challenges on appeal.

B. Limited Parental Presumption

A number of other jurisdictions have adopted a more nuanced approach while continuing to deprive nonoffending parents of their full custodial rights. In these courts, judges recognize the parental presumption but only apply the presumption with regards to the physical custody of the child. Absent a finding of unfitness, nonoffending parents are granted physical custody of their children, but the court still retains legal custody, that is, the authority to make decisions regarding the child, and can order the nonoffending parent to comply with services.¹³¹ Though safeguarding the physical custody rights of nonoffending parents, these systems intrude on their legal custody.

126. *Id.* at *1.

127. *Id.* at *8 (quoting *In re C.R.*, 843 N.E.2d 1188, 1192 (Ohio 2006)).

128. *In re M.D.*, 2007 Ohio App. LEXIS 4181, at *8 (quoting *In re C.R.*, 843 N.E.2d at 1192).

129. 405 U.S. 645 (1972).

130. See *Stanley*, 405 U.S. at 658 (holding that failure to provide unwed father a hearing on parental fitness qualifications prior to state's assumption of child custody, while affording a hearing to other parents, denies unwed father equal protection of law).

131. See, e.g., *In re S.G.*, 581 A.2d 771, 781 (D.C. 1990) (observing that "child's best interest is presumptively served by being with a parent, provided that the parent is not abusive or otherwise unfit"); *In re M.K.*, 649 N.E.2d 74, 80–82 (Ill. App. Ct. 1995) (permitting court to take jurisdiction over child based on conduct of one parent but finding that physical custody of child should be awarded to fit parent); *State v. Terry G. (In re Amber G.)*, 554 N.W.2d 142, 149 (Neb. 1996) (permitting trial court to order nonoffending parent to comply with services after finding of neglect but holding that "court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is

Decisions in Florida and California best illustrate this approach.¹³² In *J.P. v. Department of Children and Families*,¹³³ the trial court found that a child was dependent due to the actions of the mother but determined that evidence of the father's unfitness was insufficient.¹³⁴ The court recognized that Florida law imposed a requirement to transfer physical custody of the child to the nonoffending parent upon the completion of the home study, but proceeded to condition that placement on the father submitting to a psychological evaluation and complying with any recommendations made by the evaluator.¹³⁵ The father appealed, arguing that since he was found to be a nonoffending parent, the court lacked the authority to order him to participate in services.¹³⁶

The Florida Court of Appeals disagreed. The court interpreted the juvenile code to permit any parent, regardless of his or her responsibility for the child's abuse or neglect, to participate in treatment and services as the court determined was necessary.¹³⁷ Specifically, even after the restoration of physical custody to the nonoffending parent, the Florida statute in question permitted the court to order "that services be provided solely to the parent who is assuming physical custody in order to allow that parent to retain later custody without court jurisdiction, or that services be provided to both parents."¹³⁸ Few limits exist to constrain the juvenile court's ability to intrude on the nonoffending parent's decision-making authority. Despite the lack of an unfitness finding, the law presumes that the court is in a better position than the nonoffending parent to make decisions regarding the child's.¹³⁹

affirmatively shown that such parent is unfit"); *In re Bill F.*, 761 A.2d 470, 476 (N.H. 2000) (finding that court must give nonoffending parent full hearing at which state must prove unfitness prior to deprivation of physical custody, but noting that "[n]othing in this opinion should be read to prevent the State from . . . providing social services for the benefit of a child"); New Mexico *ex rel. Children, Youth & Families Dep't. v. Benjamin O.*, 160 P.3d 601, 609–10 (N.M. Ct. App. 2007) (noting that reversal of findings against father did not deprive trial court of ability to order him to comply with court-ordered services but required presumption that custody with father was in child's best interest); *In re Christina I.*, 640 N.Y.S.2d 310, 310 (N.Y. App. Div. 1996) (finding that although trial court dismissed allegations against mother, it still had jurisdiction to enter orders pertaining to her); *In re J.A.G.*, 617 S.E.2d 325, 332 (N.C. Ct. App. 2005) (finding that trial court erred in denying fit parent physical custody but still retained authority to proceed with case); *In re N.H.*, 373 A.2d 851, 856 (Vt. 1977) (permitting court to adjudicate child as neglected based on findings against one parent but mandating that child be placed with other parent absent evidence of unfitness); *State v. Gregory (In re Gregory R.S.)*, 643 N.W.2d 890, 901 (Wis. Ct. App. 2002) (stating that "children can be adjudicated to be in need of protection or services even when only one parent has neglected the children").

132. Cases from other jurisdictions are also instructive. *See, e.g., Meryl R. v. Ariz. Dep't of Econ. Sec.*, 992 P.2d 616, 618 (Ariz. Ct. App. 1999) (finding that juvenile court correctly dismissed dependency case because child had noncustodial father who was ready and willing to parent him); *In re Welfare of T.L.L.*, 453 N.W.2d 355, 357 (Minn. Ct. App. 1990) (holding that child is not dependent if nonoffending, custodial parent is adequately meeting child's needs).

133. 855 So. 2d 175 (Fla. Dist. Ct. App. 2003).

134. *J.P.*, 855 So. 2d at 175.

135. *Id.* at 176.

136. *Id.*

137. *Id.*

138. FLA. STAT. ANN. § 39.521(3)(b)(2) (West 2008 & Supp. 2009).

139. *See B.C. v. Dep't of Children and Families*, 864 So. 2d 486, 490 (Fla. Dist. Ct. App. 2004)

California courts approach child welfare cases in the same way. California law mandates that courts must place a child with the nonoffending parent “unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child.”¹⁴⁰ Even after the transfer of physical custody, the court may subject that parent to the “supervision of the juvenile court” and may order that the parent comply with services it deems necessary.¹⁴¹ For example, in *Mendocino County Department of Social Services v. Shawn P. (In re Jeffrey P.)*,¹⁴² the trial court ordered the child to be placed with his nonoffending father after the mother’s unsuitability was proven, but then ordered the father to attend parenting classes and to accept the services of a parent aide.¹⁴³

The Court of Appeals affirmed the lower court’s decision to compel the nonoffending father to comply with services.¹⁴⁴ It explained that the trial court decided to give the father physical custody of the child while giving the state agency legal custody, a decision that was “within the juvenile court’s discretion.”¹⁴⁵ In reaching this conclusion, it emphasized that a child protection case was brought “on behalf of the child, not to punish the parents” and any imposition placed on the parent only occurred to further the child’s interests.¹⁴⁶ Thus, interfering with a fit parent’s legal custody was permissible so long as the interference furthered the court’s determination of the child’s best interest.

Even in these jurisdictions where courts appear cognizant that parents possess a constitutional right to custody of their child, courts have created an artificial distinction between physical and legal custody, one that has never been recognized by the Supreme Court. These courts interpret the Constitution to only protect the physical custodial rights of fit parents, while permitting the state to intrude upon that parent’s legal rights to make decisions for the child. Never has the Supreme Court recognized this distinction, and in fact, the decisions discussed in Part III reflect the Court’s strong protection of both physical and legal custodial rights of fit parents. For example, in *Stanley*, the Court prevented the state from removing children from the physical custody of their father absent proof of unfitness.¹⁴⁷ In *Troxel v. Granville*,¹⁴⁸ the Court barred courts from second-guessing the decisions made by a presumptively fit parent regarding with whom her child should associate.¹⁴⁹ But despite these and other holdings, in many states, once one parent is found to be unfit, the nonoffending parent is

(finding that, despite having superior right to custody of child, nonoffending parent could be ordered to comply with case plan).

140. CAL. WELF. & INST. CODE § 361.2(a) (West 2008).

141. *Id.* § 361.2(b)(3).

142. 267 Cal. Rptr. 764 (Ct. App. 1990).

143. *In re Jeffrey P.*, 267 Cal. Rptr. at 766.

144. *Id.* at 766, 768–69.

145. *Id.* at 768.

146. *Id.*

147. *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

148. 530 U.S. 57 (2000).

149. *Troxel*, 530 U.S. at 78–79.

viewed with suspicion and his ability to make sound decisions for the child is afforded no deference. Guilt by association pervades the process. “[A] finding against one parent is a finding against both in terms of the child being adjudged a dependent.”¹⁵⁰

C. *No State Involvement*

Two states, Maryland and Pennsylvania, have recognized that nonoffending parents have constitutionally protected rights and have adopted an approach completely at odds with those described above.¹⁵¹ There, if a nonoffending parent exists, the court may not assume jurisdiction over the child for any purpose, even to offer services to the offending parent or the child.¹⁵² The juvenile court must dismiss the case and the only limited action it may take is to grant custody to the nonoffending parent before dismissal.¹⁵³ Once the transfer of custody is made, all court involvement or oversight must be terminated.¹⁵⁴

Two cases illustrate this approach. In *In re M.L.*,¹⁵⁵ a trial court found that a child was dependent because her mother was making repeated, false accusations that the child was being sexually abused by her father, subjecting the child to intrusive medical examinations.¹⁵⁶ While assuming jurisdiction of the child, the court found the father to be a fit parent and immediately placed the child in his care under the court’s supervision.¹⁵⁷ The father appealed, arguing that the court had no basis to maintain any oversight over the case since he was a fit parent.¹⁵⁸

The Pennsylvania Supreme Court agreed with the father and reversed the trial court’s decision to exercise jurisdiction over the child because the child had a fit, nonoffending parent.¹⁵⁹ The court determined that “a child, whose non-custodial parent is ready, willing and able to provide adequate care to the child, cannot be found dependent.”¹⁶⁰ If the noncustodial parent is immediately available to care for the child, then the court must grant that parent custody and dismiss the case.¹⁶¹ The court concluded that any retention of power by the trial court to make decisions regarding the child would be “an unwarranted intrusion

150. L.A. County Dep’t of Children & Family Servs. v. John D. (*In re James C.*), 128 Cal. Rptr. 2d 270, 278 (Ct. App. 2002) (quoting *In re Nicholas B.*, 106 Cal. Rptr. 2d 465, 472 (Ct. App. 2001)).

151. E.g., *In re Sophie S.*, 891 A.2d 1125, 1133 (Md. Ct. Spec. App. 2006); *In re S.J.-L.*, 828 A.2d 352, 356 (Pa. Super. Ct. 2003).

152. See *In re Sophie S.*, 891 A.2d at 1133 (noting court previously held that where one parent is “able and willing” to care for child, court may not adjudge child to be in need of assistance).

153. *Id.*

154. *Id.*

155. 757 A.2d 849 (Pa. 2000).

156. *In re M.L.*, 757 A.2d at 850.

157. *Id.*

158. *Id.*

159. *Id.* at 851.

160. *Id.* at 849.

161. *In re M.L.*, 757 A.2d at 851.

into the family,” which is only appropriate “where a child is truly lacking a parent.”¹⁶²

Maryland’s Court of Special Appeals, in *In re Russell G.*,¹⁶³ reached a similar conclusion. There, court intervention was requested to protect the child from his alcoholic mother; the child was committed to the Department of Social Services for placement in the care and custody of his father.¹⁶⁴ After the court determined that the allegations against the mother were true, the court declared that the child was dependent and placed him in the physical custody of his father, but subjected that placement to the supervision of the Department of Social Services, a decision which both parents appealed.¹⁶⁵

The Court of Special Appeals agreed that the court intervention was inappropriate due to the willingness of the nonoffending parent to assume immediate custody of the child.¹⁶⁶ “A child who has at least one parent willing and able to provide the child with proper care and attention should not be taken from both parents and be made a ward of the court.”¹⁶⁷ Thus, the court determined that a finding that a child was dependent was erroneous since a nonoffending parent was willing to care for the child.¹⁶⁸ Subsequent to the court’s decision, the Maryland State Legislature amended its statute to permit the juvenile court, before dismissing the child protective case, to award the nonoffending parent custody after finding evidence that the child was harmed by the other parent.¹⁶⁹ In Maryland and Pennsylvania, other than making this custody determination, juvenile courts are prohibited from taking any actions regarding the child where a nonoffending parent asserts his right to custody over the child.¹⁷⁰

V. SHORTCOMINGS OF CURRENT APPROACHES

The three approaches described above fail to offer the correct balance between safeguarding the constitutional rights of the nonoffending parent while providing courts with the much-needed flexibility to address the needs of the child and the other parent. The jurisdictions which permit trial courts to deprive nonoffending parents of legal and/or physical custodial rights to their children

162. *Id.*

163. 672 A.2d 109 (Md. Ct. Spec. App. 1996).

164. *In re Russell G.*, 672 A.2d at 111.

165. *Id.*

166. *Id.* at 115.

167. *Id.* at 114.

168. *Id.* at 116.

169. See MD. CODE ANN., CTS. & JUD. PROC. § 3-819(e) (LexisNexis 2006 & Supp.2008) (“If the allegations in the petition are sustained against only one parent of a child, and there is another parent available who is able and willing to care for the child, the court may not find that the child is a child in need of assistance, but, before dismissing the case, the court may award custody to the other parent.”).

170. See *In re Sophie S.*, 891 A.2d 1125, 1133 (Md. Ct. Spec. App. 2006) (stating that court could not make adjudication as to whether child was in need of assistance where nonoffending parent was able and willing to care for child); *In re M.L.*, 757 A.2d 849, 851 (Pa. 2000) (holding that court lacks authority to remove child where noncustodial parent is available and willing to care for child).

run afoul of constitutional guarantees that prevent the state from encroaching on these rights without a finding of parental unfitness.¹⁷¹ These systems are ripe for constitutional challenges.

In addition to their constitutional flaws, the policy of interference with the custodial rights of fit parents is likely to produce bad outcomes for several reasons. First, the stress that foster care systems across the country face is well known, and all efforts to safely reduce the numbers of children in care will only promote their best interests.¹⁷² Yet, in states like Michigan and Ohio, children are unnecessarily placed in overburdened foster care systems despite the willingness and availability of fit parents to care for their children immediately. In these states, courts are permitted to ignore the nonoffending parent and place children in foster care even if that parent is fit. Restoring constitutional rights to nonoffending parents will force courts to seriously consider those parents as placement options unless clear evidence of unfitness exists, thereby reducing the number of children completely dependent on the state. As aptly described by the Washington State Court of Appeals, “A parent cannot be denied his right to parent his child on the off-chance that he may have a problem unknown to the State.”¹⁷³ This is precisely the approach endorsed by these states.

171. See *supra* Part III for a discussion of the constitutional requirement that the state prove parental unfitness prior to depriving a parent of legal and physical custody of a child.

172. The foster care system should be seen as a place of last resort for children. Over half a million children remain in the system, and each year more children enter foster care than exit it. CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY FY 2006 ESTIMATES AS OF JANUARY 2008, at 1, 3–4 (2008), available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report14.pdf. Social workers and attorneys handling these cases are overwhelmed. See THE ANNIE E. CASEY FOUND., THE UNSOLVED CHALLENGE OF SYSTEM REFORM: THE CONDITION OF THE FRONTLINE HUMAN SERVICES WORKFORCE 9 tbl.1 (2003) (observing that annual turnover rate in child welfare workforce is twenty percent for public agencies and forty percent for private agencies); Editorial, *A Legal Hand for Foster Children*, S.F. CHRON., Sept. 28, 2005, at B8 (“[W]ith many of these lawyers burdened with overwhelming student loans, poorly compensated posts and outrageous caseloads, many are being forced out of these roles that foster children so desperately need.”). Child abuse investigations are not completed in a timely fashion, social workers and attorneys do not visit children in their placements, and court hearings do not take place in accordance with federal guidelines. See Ben Kerman, *What is . . . the Child and Family Services Review?*, VOICE, Fall 2003, at 35, 35–36, available at http://www.caseyfamilyservices.org/pdfs/casey_whatis.pdf (explaining that majority of states reviewed were not in “substantial conformity” with number of outcomes factors, including protecting children from abuse and neglect and providing them with stable living conditions). On numerous occasions, child welfare agencies have lost track of children in their custody or have failed to monitor a child’s placement, resulting in serious harm to the child. *E.g.*, *Michigan Agency Loses 302 Children*, ASSOCIATED PRESS, Aug. 30, 2002. Not surprisingly, children in foster care experience a wide range of problems, including mental health issues, poor academic performance, and involvement with the juvenile delinquency system. See, *e.g.*, CHILDREN’S DEFENSE FUND, SUMMARY: IMPROVING EDUCATION FOR HOMELESS AND FOSTER CHILDREN WITH DISABILITIES IN THE INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT OF 2004 (IDEA 2004) (P.L. 108-446), at 1 (2005), <http://www.childrensdefense.org/child-research-data-publications/data/summary-improving-education-homeless-foster-children-disabilities-idea.pdf> (observing that children in care are twice as likely to drop out of school and almost forty percent of children who age out of care will never receive a high school diploma).

173. *State v. Gallardo-Cruz* (*In re S.G.*), 166 P.3d 802, 806 (Wash. Ct. App. 2007).

Second, scarce public funds are wasted by ordering nonoffending parents to comply with services which may or may not be necessary.¹⁷⁴ In most states, nonoffending parents are presumed to be unfit upon a finding against the other parent and are often put through a standard regimen of court-ordered services, typically including parenting classes and psychological evaluations, to test their fitness.¹⁷⁵ Since evidentiary hearings detailing that parent's deficiencies are not legally required, these services are mandated without any evidence of the problem they are trying to solve or the connection between the problem and the underlying abuse or neglect of the child.¹⁷⁶ A system which requires the state to introduce reliable evidence of parental unfitness prior to intruding upon a parent's custodial rights would ensure that the state's response is narrowly tailored to the specific problems facing that parent.

Third, the approach hurts children by disempowering their parents and increasing the likelihood that their parents will disengage from the process. Research reveals that parents who are provided with procedural protections and are given "their day in court" are much more likely to stay involved in the process and comply with court mandates. Repeated studies by social psychologists provide compelling evidence that a key determinant in retaining the support of those involved in court systems is the utilization of fair procedures to make decisions.¹⁷⁷ Trust in the motives of authorities and judgments about the

174. Each year, states disburse more \$10 billion in federal and state funds to pay for housing and support services for children in foster care. Rob Geen et al., *Medicaid Spending on Foster Children*, in 2 CHILD WELFARE RESEARCH PROGRAM 1 (The Urban Inst., 2005); see also CYNTHIA ANDREWS SCARCELLA ET AL., THE URBAN INST., THE COST OF PROTECTING VULNERABLE CHILDREN V: UNDERSTANDING STATE VARIATION IN CHILD WELFARE FINANCING 6 (2006), available at http://www.urban.org/UploadedPDF/311314_vulnerable_children.pdf (reporting that, in 2004, states spent over \$23 billion on child welfare programs). States spend an additional \$1.8 billion on administering the child welfare system. *Id.* at 11 tbl.2. The costs of placements vary from state to state and by type of placement. For example, it costs New York City roughly twenty-eight dollars a day to keep a child in foster care. Leslie Kaufman, *Bill to Save Foster Care Costs Is Stalled in the Legislature*, N.Y. TIMES, July 21, 2004, at B2. A North Carolina study revealed the following daily costs for children's foster care placements: \$12.01 (family foster care), \$66.30 (specialized foster care), \$129.93 (large group home), \$132.86 (small group home), and \$148.17 (emergency and other placements). Richard P. Barth et al., *A Comparison of the Governmental Costs of Long-Term Foster Care and Adoption*, 80 SOC. SERV. REV. 127, 136 tbl.1 (2006). After a child is placed with a nonoffending parent, many of these costs would disappear.

175. See, e.g., *B.C. v. Dep't of Children & Families*, 864 So. 2d 486, 490 (Fla. Dist. Ct. App. 2004) (finding that court could order nonoffending parent to comply with case plan).

176. The Washington State Court of Appeals emphasized this point in reversing a termination of parental rights decision in *In re S.G.*, 166 P.3d 802, 803 (Wash. Ct. App. 2007). In that case, the state required the father to participate in services to address deficiencies without first proving the existence of those deficiencies. *Id.* at 805-06. The court held that "the more basic problem is that it is impossible to evaluate the sufficiency or efficacy of services as to [the father] when, at this point, the State failed to show he required any. Without a problem, there can be no solution." *Id.* at 806.

177. See E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 71 (1988) (stating that individuals' perception of fairness strongly informs their satisfaction and general affect towards encounters with procedural justice); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 51, 93 (2002) (discussing procedural justice models and stating that cooperative overtures by authorities and courts

fairness of procedures are strong influences on acceptance and satisfaction of court mandates.¹⁷⁸

In assessing what is “fair,” litigants look to a number of factors. Most importantly, procedures that permit individuals to present arguments and to exert control over the process are deemed just whereas those that silence litigants only exacerbate feelings of mistrust.¹⁷⁹ Central to these findings is a person’s need to have his story told, regardless of whether the telling will ultimately impact the outcome of the case.¹⁸⁰ Fairness is also enhanced by adequate representation and confidence that the decision maker is neutral and unbiased.¹⁸¹ Courts that reaffirm one’s self-respect and treat a person politely while respecting one’s rights earn the trust of those before it, regardless of the substance of the orders they issue.¹⁸²

Yet, the crux of the approaches adopted in these jurisdictions does exactly the opposite. Nonoffending parents are stripped of presumptions that their children shall be placed in their legal and physical custody and are explicitly denied the right to an evidentiary hearing at which the state must prove parental unfitness. Instead, their unfitness is presumed, services the court believes are necessary are ordered, and the parent has no choice but to simply submit to the court’s orders or walk away.¹⁸³ These approaches are devoid of any procedural justice, which only exacerbates the likelihood that the parent will become frustrated with the process and perhaps disengage in some way. This disillusion can be avoided by restoring procedural rights to nonoffending parents and requiring constitutionally mandated burdens of proof on the state. Parental engagement will only enhance the quality of child protective proceedings.

Finally, allowing the court to interfere with the custodial rights of both parents based on findings against one raises the possibility of manipulation. A parent, in the context of an acrimonious divorce or custody battle, could make allegations that lead to the filing of a petition. Once the petition is filed, that

lead to reciprocal cooperative behavior by individuals); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 115, 129, 137 (1990) (stating that perceived fairness by individuals of justice system is influenced by factors such as efforts to grant greater process control and consideration of their views). *See generally* Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC’Y REV. 103 (1988) (analyzing interactions between citizens and legal authorities from procedural justice perspective to determine factors influencing procedural fairness).

178. *See* TYLER & HUO, *supra* note 177, at 90 (noting that courts can increase compliance by enacting procedures that are “fair and appropriate”).

179. *Cf.* Kees van den Bos et al., *When Do We Need Procedural Fairness? The Role of Trust in Authority*, 75 J. OF PERSONALITY & SOC. PSYCHOL. 1449, 1455 (1998) (discussing study of individuals’ reactions to authority in which individuals given opportunities to voice their opinions reported higher satisfaction levels than those who were not); Gary B. Melton & E. Allan Lind, *Procedural Justice in Family Court: Does the Adversary Model Make Sense?*, in LEGAL REFORMS AFFECTING CHILD & YOUTH SERVICES 65, 66 (Gary B. Melton ed., 1982) (discussing push for less adversarial procedures in child custody cases to avoid institutionalizing and exacerbating tensions among family members).

180. TYLER, *supra* note 177, at 116, 127.

181. *Id.* at 137; van den Bos et al., *supra* note 179, at 1452; Tyler, *supra* note 177, at 105, 107.

182. TYLER, *supra* note 177, at 138; Tyler, *supra* note 177, at 129.

183. *See supra* Parts IV.A–B for a discussion of this point.

parent could then admit to findings in the petition, which, in these states, would then allow the court to enter broad orders that encroach upon the physical and/or legal custody rights of both parents. Similarly, the child welfare agency could pursue allegations against one parent for the sole purpose of obtaining authority over the other parent, against whom allegations may be more difficult to prove.¹⁸⁴ As noted by the Colorado Court of Appeals, “To allow an adjudication under such circumstances would permit dependency and neglect proceedings to be used for manipulative purposes . . . to the possible detriment of the best interests of the child.”¹⁸⁵ These are but some of the reasons why ignoring the parental presumption of fitness, as it relates to nonoffending parents, will generate poor outcomes for children.

On the other hand, the approach implemented in Maryland and Pennsylvania, while zealously protecting the constitutional rights of nonoffending parents, deprives juvenile courts of the flexibility to craft orders to further the interests of the offending parent and the child.¹⁸⁶ In these states, the juvenile court cannot maintain any oversight over the family; if a nonoffending parent is able to care for the child, the case must be dismissed.¹⁸⁷ The only remedy available to the court is to grant the nonoffending parent custody of the child prior to dismissal.¹⁸⁸ This type of approach raises several concerns.

First, in many states, specialized services for children are only available to children with open dependency cases.¹⁸⁹ This unfortunate reality exists, in part, due to state budgetary constraints and policy choices and federal child welfare statutes that provide states with funds to offer services to children involved in the foster care system.¹⁹⁰ Thus, often, children not affiliated with the system are deprived of needed services.¹⁹¹

184. See *In re Irwin*, No. 229012, 2001 Mich. App. LEXIS 2088, at *12 (Mich. Ct. App. July 13, 2001) (Whitbeck, J., concurring) (observing that child welfare agency “could make a calculated guess concerning which parent was less likely to demand a jury trial [and] proceed only against that parent, . . . simply in order to preclude one parent from demanding a jury trial”).

185. *People ex rel. U.S.*, 121 P.3d 326, 328 (Colo. App. 2005).

186. See *supra* Part IV.C for a discussion of the hands-off approach of Maryland and Pennsylvania courts.

187. See, e.g., *In re Sophie S.*, 891 A.2d 1125, 1133 (Md. Ct. Spec. App. 2006) (holding juvenile court will not adjudicate assistance petition when one parent is “able and willing to provide care”); *In re S.J.-L.*, 828 A.2d 352, 356 (Pa. Super. Ct. 2003) (affirming termination of abused child’s dependency status proceedings where noncustodial parent was “ready, willing, and able” to care for child).

188. *In re Sophie S.*, 891 A.2d at 1133 (citing MD. CODE ANN., CTS. & JUD. PROC. § 3-819(e)); *In re S.J.-L.*, 828 A.2d at 355.

189. Statement by Lex Frieden, Chairperson, Nat’l Council on Disability, Statement to the U.S. Senate Committee on Governmental Affairs: Castaway Children: Must Parents Relinquish Custody in Order to Secure Mental Health Services for Their Children? (June 10, 2003).

190. *Id.*

191. See *id.* (observing that “[i]nadequate funding of mental health services and supports for children and their families is the major reason families turn to the child welfare system for help”). In his statement, Frieden cites to several studies supporting his statement, including one by the Commonwealth Institute for Child and Family Studies which found that, in sixty-two percent of states, the child welfare agency used a custody transfer to gain access to state funding for services for children

Take, for example, a child who was sexually abused by her father and placed immediately with her nonoffending mother. The mother wishes to enroll the child in sex abuse counseling, which if privately retained would be quite costly, but would be paid for by the state if an open dependency case existed. The mother wishes for the case to remain open until the child receives all necessary services, yet the approach adopted by Maryland and Pennsylvania does not permit such a result; the willingness of the nonoffending parent to care for the child mandates the dismissal of the case. The dearth of services outside the child welfare system would likely result in the child's needs going unmet.

Second, this approach deprives offending parents of their statutory right to receive an opportunity to reunify with their children and instead forces judges to make premature decisions contrary to the child's interests. Federal law requires states to make "reasonable efforts" to reunify the family if a child has been removed from the home.¹⁹² In Maryland and Pennsylvania, however, no opportunity for reunification is given.¹⁹³ After a child is placed with a nonoffending parent, the court only has two options. It may simply dismiss the case immediately, or it may grant the nonoffending parent custody of the child and then dismiss the case. No other choices exist.

Closing the case without granting the nonoffending parent permanent custody of the child may jeopardize the safety of the child and the nonoffending parent. Once the judge dismisses the case, all of the orders entered in the child protective case would lose their force and nothing would exist to protect the new family unit from the abusive parent.¹⁹⁴ The nonoffending parent would have no legal authority to prevent the other parent from having access to the child, yet in serious cases of child maltreatment, limiting access may be essential. The nonoffending parent's recourse would be to file a separate custody action to obtain such an order, but the time it may take to do so would be prohibitive.¹⁹⁵

with serious emotional and behavioral problems. *Id.* at n.16. Thirty-eight percent of the responding child welfare agencies used custody transfers to obtain funding for children's treatment. *Id.*

192. 42 U.S.C. § 671(a)(15)(B) (2006). State courts have interpreted this requirement to impose an obligation on states to reunify children with the parent from whose care they were removed. *See, e.g.,* State v. Daniel M. (*In re* Ethan M.), 723 N.W.2d 363, 370-71 (Neb. Ct. App. 2006) (finding state had to make efforts to reunify child with custodial parent). *But see* L.A. County Dep't of Children & Family Servs. v. Patricia O. (*In re* Patricia T.), 109 Cal. Rptr. 2d 904, 908-09 (Ct. App. 2001) (affirming trial court's decision denying offending parent reunification services when child was placed with nonoffending parent); R.W. v. Dep't of Children & Families, 909 So. 2d 402, 403 (Fla. Dist. Ct. App. 2005) (holding that substantial compliance with services did not mandate reunification with offending parent when child was placed with nonoffending parent); *In re* T.S., 74 P.3d 1009, 1018 (Kan. 2003) (finding that reasonable efforts requirement could be satisfied by reunifying child with noncustodial parent).

193. *In re Sophie S.*, 891 A.2d at 1133 (citing MD. CODE ANN., CTS. & JUD. PROC. § 3-819(e)); *In re S.J.-L.*, 828 A.2d at 356.

194. *See In re N.H.*, 373 A.2d 851, 855 (Vt. 1977) ("In lieu of such a finding and the concomitant lack of jurisdiction, there is a strong possibility that the child will be returned to the same situation from which it has been taken.").

195. This problem would be exacerbated by the fact that many family courts remain fragmented and, often, numerous judges hear cases involving the same litigants. *See* Judith D. Moran, *Fragmented Courts and Child Protection Cases: A Modest Proposal for Reform*, 40 FAM. CT. REV. 488, 488 (2002)

In the interim, the child and the nonoffending parent would be subject to a state of impermanence during which the abusive parent would continue to have equal rights to access the child.

Maryland and Pennsylvania have responded to this safety risk by giving courts the authority to grant the nonoffending parent permanent custody of the child prior to closing the child protective case.¹⁹⁶ But this too raises concerns because a child's interests may not be served by granting the nonoffending parent immediate custody prior to giving the other parent an opportunity to reunify with her child after participating in services.¹⁹⁷ Consider the example of the child who has been living with her mother for the past ten years, while visiting her father every other weekend. The child enters the foster care system after her mom lapsed into depression and hit her with a belt while intoxicated. The evidence reveals that this only happened once, and the mother is eager to participate in services. The child also wants to return to her mother's care but is placed temporarily with her nonoffending father, who played no role in the abuse.

Again, in Maryland or Pennsylvania, the juvenile court would have to close the case either immediately upon placing the child with her father or after granting the father long-term custody of the child.¹⁹⁸ But neither of these options seems appropriate. Closing the case immediately may place the child in danger for the reasons described above. Without receiving services, the mother may not be in a position to safely care for the child, but no legal orders would prevent her from having unlimited contact with her daughter or immediately resuming her care for the child.

(noting that family law matters span multiple categories and jurisdictions, sometimes proceeding in both criminal and civil arenas). Moran writes, "The ills created and perpetuated by this patchwork court system addressing family matters wreak havoc on the fabric of family life," and often, "[f]amilies lose precious time getting help because the system fails to facilitate connections to necessary services." *Id.* at 489. Some jurisdictions have responded by creating unified family courts permitting judges to hear all matters involving the same family. *See, e.g.*, D.C. CODE ANN. § 11-1104(a) (LexisNexis 2008) ("To the greatest extent practicable, feasible, and lawful, if an individual who is a party to an action or proceeding assigned to the Family Court has an immediate family or household member who is a party to another action or proceeding assigned to the Family Court, the individual's action or proceeding shall be assigned to the same judge or magistrate judge to whom the immediate family member's action or proceeding is assigned."); MICH. COMP. LAWS ANN. § 600.1023 (West Supp. 2008) ("When 2 or more matters within the jurisdiction of the family division of circuit court involving members of the same family are pending in the same judicial circuit, those matters, whenever practicable, shall be assigned to the judge to whom the first such case was assigned."). But, fragmented systems still characterize many jurisdictions across the country. Moran, *supra*, at 488.

196. *See* MD. CODE ANN., CTS. & JUD. PROC. § 3-819(e) (LexisNexis 2006 & Supp. 2008) (permitting court to award permanent custody to nonoffending parent after petition is sustained as to other parent); *In re M.L.*, 757 A.2d 849, 851 n.3 (Pa. 2000) (allowing trial courts to use their equitable powers to award nonoffending parent custody).

197. *See Harris, supra* note 15, at 306 (commenting that "the former custodial parent is not dead, and she and the child continue to have claims to a relationship with each other and statutory rights to state assistance to protect that relationship").

198. *See supra* Part IV.C for a discussion of how Maryland and Pennsylvania courts relinquish jurisdiction after the child is no longer dependent on the court.

Granting the father long-term custody may not be warranted either. The mother, who has been the child's custodial parent for the past ten years and still maintains residual rights to the child, is eager to regain custody of her child, is willing to comply with services, and has a child who wants to return to her care. She acknowledges that she made a mistake and desperately seeks to reunify with the child, and placement with her, after she receives services, may be the best outcome. Further, the child's father may not want to assume the role of the permanent custodial parent. Forcing the court to issue a long-term custody order based on one incident would deprive the mother of access to services to better herself and would impose a high burden on her in the future to modify the order.¹⁹⁹ Instead, a much better approach, described below, would be to place the child temporarily with the nonoffending parent, provide services to the offending parent, and permit the court to make a long-term custody decision after the mother has had the opportunity to participate in the services. This option is not available in most jurisdictions.

As described above, the current approaches either fail to protect the rights of the nonoffending parent or deprive courts of the much-needed flexibility to meet the needs of the child and the offending parent. The adoption of a new policy is required which balances all of these interests while surviving constitutional scrutiny. The final Part describes such an approach.

VI. SOLUTION

My proposed solution consists of two guiding principles. First, a juvenile court must be afforded the flexibility to assume jurisdiction over a child based on findings of maltreatment against one parent. This authority is essential to ensuring that the court has the ability to issue orders to remedy the abuse or neglect by the offending parent. Second, in order to respect the constitutional rights of the nonoffending parent, the court's power should be limited. While the case is ongoing, absent proof of parental unfitness, the court must grant custodial rights to the nonoffending parent to the satisfaction of that parent. The only authority the court could exert over the nonoffending parent would be to compel him to cooperate with reunification efforts, since the offending parent maintains residual rights to the child.²⁰⁰

199. A parent seeking to modify a custody order must prove that there has been a substantial and material change of circumstance and that the modification is in the child's best interests, a high burden as described by state courts. *See, e.g.*, *San Marco v. San Marco*, 961 So. 2d 967, 970 (Fla. Dist. Ct. App. 2007) (holding modifications must be in best interests of child and requiring materially altered conditions of substantial degree for approval of modification (citing *Wade v. Hirschman*, 903 So. 2d 928, 932-33 (Fla. 2005))); *Levin v. Levin*, 836 P.2d 529, 532 (Idaho 1992) ("The party seeking modification clearly has the burden of justifying a change in custody, . . . and although the threshold question is whether a permanent and substantial change in the circumstances has occurred, the paramount concern is the best interest of the child."); *Baxendale v. Raich*, 878 N.E.2d 1252, 1255 (Ind. 2008) ("Modifications are permitted only if the modification is in the best interests of the child and there has been 'a substantial change'.").

200. The Supreme Court has recognized that parents do not lose their constitutionally protected interest in their children because they have lost temporary custody of them. *Santosky v. Kramer*, 455

This solution would be straightforward to implement in practice. Upon finding that one parent abused or neglected the child, the court could obtain jurisdiction over the child and could use that power to issue orders to remediate the underlying abuse or neglect by the offending parent. This authority could be used to regulate the offending parent's contact with the child, compel her compliance with a case service plan, or even terminate her parental rights in extreme circumstances. Additionally, the court could also order the child welfare agency to provide services to the child and the nonoffending parent necessary to address the maltreatment.

Despite having broad authority over the offending parent, the court's jurisdiction over the nonoffending parent would be limited. As the case proceeded, absent an unfitness finding, the court would have to grant the nonoffending parent custodial rights to that parent's satisfaction. Any attempt to interfere with those rights, unrelated to reunification efforts, would require the filing of a petition against the nonoffending parent, which would then trigger all the procedural protections available under state law. Only after making a specific finding of unfitness against that parent could the court obtain authority over him. Such a finding would trigger the court's ability to remove the child from that parent's custody,²⁰¹ order the parent to participate in services, or override his determination of what is best for the child.

As noted above, one exception would apply. Since child protective cases implicate the constitutional rights of both parents, the court would have the authority, even without an unfitness finding, to issue orders to ensure that the nonoffending parent did not undermine the offending parent's ability to reunify with her child. For example, the court could mandate that the nonoffending parent make the child available for visitations with the other parent, institute family therapy, and order that the child be returned to the temporary custody of the offending parent. If the nonoffending parent refused to cooperate with reunification efforts, the court could use its contempt powers to enforce orders.

Under this approach, preserving the custodial rights of the nonoffending parent would not interfere with the opportunity of the other parent to reunify with her child. After giving the offending parent the chance to participate in services, the court would be well-positioned to make an informed decision about which parent should be the long-term custodian of the child. This approach, permitting the court to address the needs of the child and giving the offending parent the opportunity to reunify with her child, while prohibiting the court from intruding upon the rights of the nonoffending parent, strikes the appropriate balance between flexibility, safety, and adherence to the due process rights of all parents.²⁰²

U.S. 745, 753 (1982) ("Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.").

201. The court, however, would not need to find the nonoffending parent unfit prior to returning the child to the custody of the offending parent. Custody transfers from one parent to another can occur after the court makes a finding that the transfer is in the best interests of the child. *Kauten v. Kauten*, 261 A.2d 759, 760 (Md. 1970).

202. Few courts have adopted this type of approach. One example is seen in *People ex rel. U.S.*,

Critics of my approach may argue that giving nonoffending parents unfettered discretion with regards to children who have been found to be abused or neglected would jeopardize their well-being. They may assert that the state's interest in these children is heightened due to the maltreatment, and that state social workers are the experts in determining what the child needs. Under this view, social workers, and not the child's parents, should have the broad authority to make decisions for the child.²⁰³

This argument, however, is unpersuasive. It is important to remember that nonoffending parents, by definition, are those against whom no allegations of unfitness are made. No reason exists to doubt their decision-making abilities and thus the state has no justification to intrude. If such grounds exist, a petition alleging misconduct can be filed, an evidentiary hearing can be convened, and findings can be made against that parent which would then empower the court to issue orders related to that parent. While this process unfolds, the court could also issue emergency orders to protect the child, as it could with regards to any offending parent. But, without specific evidence of unfitness, the state has no interest in interfering with the nonoffending parent's custodial rights to the child.²⁰⁴

Additionally, given the states' poor track record in meeting the basic needs of children in foster care²⁰⁵—a record that includes federal court oversight of numerous state child welfare systems due to rampant violations of the

where the county Department of Human Services filed a petition alleging that the child's environment was harmful to his welfare. 121 P.3d 326, 326 (Colo. Ct. App. 2005). The father admitted portions of the petition, but the mother requested a trial before a jury, which found in favor of the mother. *Id.* The trial court entered a dispositional order in which it found that it had jurisdiction over the father, but not the mother, and required the father to participate in a treatment plan. *Id.* at 327. The guardian ad litem requested that the mother be required as well to comply with services but the court refused, concluding that it had no jurisdiction to do so. *Id.* The guardian ad litem appealed. *Id.*

The Colorado Court of Appeals sided with the trial court and ruled that findings made against one parent cannot form the basis for requiring the other parent to comply with the treatment plan. *People ex. rel. U.S.*, 121 P.3d at 328. The father's admissions gave the court limited jurisdiction as to him but not as to the mother. Thus, the trial court's decision to force the father to participate in services was appropriate as was its finding that it could not issue any orders affecting the mother's custodial rights. *Id.* ("Nothing in the statute grants a court the power to impose a treatment plan on a parent when the child has not been found to be dependent and neglected by that parent.").

203. One additional factor to consider is the high rate of turnover among caseworkers involved in the child welfare system. "Ninety percent of state child welfare agencies report difficulty in recruiting and retaining workers." Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 *FUTURE OF CHILDREN* 75, 83 (2004). The annual turnover rate in the child welfare workforce is twenty percent for public agencies and forty percent for private agencies. THE ANNIE E. CASEY FOUNDATION, *supra* note 172, at 9 tbl.1. Thus, often, caseworkers do not get to know children on their caseloads well.

204. See *Stanley v. Illinois*, 405 U.S. 645, 652-53 (1972) (observing that "the State registers no gain towards its declared goals when it separates children from the custody of fit parents" and, in fact, it "spites its own articulated goals when it needlessly separates [a child] from his family").

205. See *supra* note 181 for a description of some of the problems children face in foster care. For a comprehensive discussion of these issues, see generally GLORIA HOCHMAN ET AL., THE PEW COMM'N ON CHILDREN IN FOSTER CARE, *FOSTER CARE: VOICES FROM THE INSIDE*, available at <http://pewfostercare.org/research/voices/voices-complete.pdf>.

constitutional rights of foster children²⁰⁶—the argument that the state is the expert on addressing the needs of at-risk children is tenuous. Indeed, as the Supreme Court has observed, “[H]istorically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children.”²⁰⁷ No reason exists to deviate from this fundamental principle.

VII. CONCLUSION

Over the past hundred years, a consensus has developed recognizing a parent’s ability to raise his or her child as a fundamental, sacrosanct right protected by the Constitution. Federal courts have repeatedly rejected the *parens patriae* mode of decision making and have instead held that the Constitution requires the state to introduce proof of parental unfitness prior to the temporary or permanent deprivation of that right from a parent. Yet, juvenile courts have persisted to strip nonoffending parents of those rights without any procedural protections, a striking remnant of the *parens patriae* mindset. Such actions not only raise many constitutional questions, but also jeopardize the child’s safety and well-being by increasing the likelihood that he will unnecessarily enter foster care and that his parents will disengage with the process.

Current approaches to rectify the problem fail to reflect the correct balance between safeguarding the constitutional rights of the nonoffending parent and preserving the flexibility of juvenile court judges to issue orders regarding the offending parent and ensuring that appropriate services are available to the child. This balance can be achieved by implementing a policy which permits the court, upon a finding of abuse or neglect by one parent, to obtain limited jurisdiction in the case to enter orders addressing that parent and to order the child welfare agency to offer services to the child and the nonoffending parent. But, without a finding of unfitness against the other parent, the court would be prohibited from entering any orders that infringe upon the nonoffending parent’s custodial rights to the child, except to the extent necessary to further reunification efforts. This compromise would ensure that fit parents remain the prime decision makers in their child’s life.

206. Children’s Rights Inc., a nonprofit legal organization based in New York City, has litigated numerous class action cases which have resulted in federal court oversight over state child welfare systems. See Children’s Rights, Legal Cases, <http://www.childrensrights.org/reform-campaigns/legal-cases/> (last visited Nov. 6, 2009) (listing ongoing and completed cases handled by Children’s Rights Inc.). This list only represents a partial summary of successful systemic actions brought against dysfunctional child welfare systems. See, e.g., CHILD WELFARE LEAGUE OF AM. & ABA CTR. ON CHILDREN AND THE LAW, CHILD WELFARE CONSENT DECREES: ANALYSIS OF THIRTY-FIVE COURT ACTIONS FROM 1995 TO 2005, at 2 (2005), available at <http://www.cwla.org/advocacy/consentdecrees.pdf> (finding that twenty-one states were either currently under court-approved consent decree or court order, or had pending litigation brought against their child welfare agencies).

207. Parham v. J.R., 442 U.S. 584, 603 (1979).

