

## SAFEGUARDING CHILDREN FROM STATE INTERVENTION

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This is the first article to explore a child's right to counsel during the investigatory stage of child welfare proceedings. The right to family integrity and a parent's right to raise their child how they see fit are two fundamental rights in constitutional law decisions in family law. In the context of child welfare investigations, there is frequent tension between these two fundamental rights. The tension exists where a parent cannot act to protect their child from state intrusion, often to the detriment of both parent and child. An investigation first begins with a call to the state's registry of child maltreatment to report suspected child abuse or neglect. This call starts an intrusion into the family in the form of an investigation by the government's child welfare agency, which results in trauma to children and their parents regardless of the investigation's outcome. The trauma is immediate, and its effects can be long-lasting.

The government attempts to protect children from potential harm when there seems to be a conflict between the children's best interests and their parents' or guardians' actions or choices. However, child welfare agencies often fail in this core mission by both "overprotecting" and "underprotecting" children. Various social justice and legal reform movements are attempting to minimize or prevent this trauma to children and families caused by unnecessary investigations and court cases when agencies act to "overprotect" children, as well as to reduce the disproportionate representation of communities of color in the Child Welfare system. One such effort seeks to ensure legal representation for parents facing a child maltreatment investigation before the case ever gets to court. With the aid of counsel, parents with investigatory stage representation

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can often address the concerns of child welfare agencies and head off court filing and or removal of children from their custody. Missing from this push for parent representation at the investigatory stage is a corresponding call for legal representation for children during this initial phase.

Parents counsel cannot represent children's interests where those interests diverge from the interests of their parents, as they do in some cases. Most states appoint counsel or other representation for children once a child welfare agency files a petition. Still, by this point, many children have already suffered substantial trauma from the investigatory actions of child welfare agencies. This article argues that states have a duty to better protect children's best interests by guaranteeing a child's right to counsel through their *parens patriae* power during the investigatory stage of these proceedings.

#### INTRODUCTION

This article argues that assigning children representation at the investigatory stage of child welfare cases will result in better outcomes for families.<sup>1</sup> The investigatory stage of a child welfare case begins with a report of alleged child maltreatment.<sup>2</sup> It continues until there is a determination of whether sufficient evidence supports a finding of maltreatment. The goal of representing parents in the investigatory stage of child welfare proceedings is to keep the family intact.<sup>3</sup> However, the legal strategies and services needed to achieve the goal can vary significantly between parent and child. The focus of a parent's attorney is to ensure that there is no court intervention by connecting clients with services and helping them navigate the child welfare system.<sup>4</sup> On the other hand, an attorney for the child focuses on the child's wishes and what is in the child's best interest.<sup>5</sup> There is both convergence and divergence in parent and child representation. Further complicating the issue is the tension between the government's *parens patriae* duties to protect the child and its administrative interest in reducing costs and timely processing of cases, in part to retain federal funding.

Attorneys representing children play a crucial role in shaping favorable outcomes in child welfare cases by serving as vital safeguards. They safeguard

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1. Scholars discuss the system using different terms relevant to the context in which they analyze it. The Child Welfare system is also called the Family Regulation System or the Family Policing System.

2. This article has coined the term "investigatory stage representation" instead of the often-used term "pre-petition representation" because it recognizes that the goal of assigning counsel in the investigatory stage of cases is to avoid the filing of a petition, thereby stopping the state's investigation into the family during the investigatory phase whenever possible.

3. See Julia Hernandez & Tarek Z. Ismail, *Radical Early Defense against Family Policing*, 132 YALE L.J.F. 659, 660 (2022-2023).

4. See generally *id.*

5. See generally ABA MODEL ACT GOVERNING REPRESENTATION OF CHILD. IN ABUSE, NEGLECT, & DEPENDENCY PROC. (ABA 2011) [hereinafter ABA MODEL ACT]; NACC RECOMMENDATIONS FOR LEGAL REPRESENTATION OF CHILD. & YOUTH IN NEGLECT & ABUSE PROC. (NACC 2021) [hereinafter NACC RECOMMENDATIONS].

their clients through a delicate balancing act, considering the child's expressed interests, the parents' potentially conflicting interests, and the state's authority. The ABA Model Act recommends specialized child development and communication training for attorneys representing children in child welfare proceedings.<sup>6</sup> Attorneys for Children are uniquely qualified because they connect children with services and assist in identifying any special needs.<sup>7</sup> In addition, appointing an Attorney for the child during the investigatory stage allows children to communicate with adults other than social workers investigating the case. Speaking with an adult other than the social worker, whose job is to represent the child's interest, is critical because the social worker's role is not to respect the child's familial integrity but to ensure the child's "safety," which can often result in "overprotection" and trauma to the child. An attorney appointed in the investigatory stage can zealously advocate for the child should an application for removal from the child's home be made early in the proceeding.

Generally speaking, children are assigned attorneys or other representatives in child welfare proceedings.<sup>8</sup> In states with higher population densities and greater availability of attorneys, children often have legal representation assigned to them during the initial court hearing when the state aims to remove them from their homes. Overall, children sometimes meet their legal representative at the initial court date and more frequently after that, which puts them at a disadvantage compared to the other parties when a parent has been assigned an attorney during the investigatory stage of the case. If children have legal representation from the onset of the investigation, they can seek to build a relationship of trust with their attorney, and the attorney can connect them with collateral resources. Gaining the child's trust helps the attorney to provide zealous representation and potentially reduce trauma to children who face potential removal from their families. A relationship of trust becomes particularly crucial because removing a child from their home can often cause more harm than good.<sup>9</sup>

This article argues that when children are assigned attorneys who are qualified and trained to represent them,<sup>10</sup> in the investigatory stage of a child welfare case, the result would be better outcomes. While such an assignment in this limited instance would create an additional intrusion into the family, it is warranted because (1) children would be protected from undue intrusion by the state on their person, (2) it would help to protect the child's right to family integrity, and (3) they would have a healthier relationship with the legal system because they would be more likely to feel heard and be participants in the legal process that significantly affects their lives. While other scholars have argued

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6. See generally ABA MODEL ACT, *supra* note 5; NACC RECOMMENDATIONS, *supra* note 5.

7. See NY CLS RULES SUP. CT. § 835.4.

8. 42 U.S.C. § 5106a.

9. *Nicholson v. Scopetta*, 3 N.Y.3d 357, 375 (2004).

10. Stated interest representation references when an attorney for the child advocates for the child based on the child's stated interests instead of assessing and advocating for what is in the child's best interest.

that children must have the right to protect themselves when their parents do not have the power to do so,<sup>11</sup> the standard proposed here is a new contribution to the literature.

This article proposes that children be assigned legal representation in the investigatory stage in the following circumstances: (1) where the call to the state's maltreatment hotline alleges severe abuse, physical abuse, or sexual abuse of the child, or (2) when the local department of social services is seeking a mental or physical examination of the child. A trained and qualified attorney representing the child's stated interest would be assigned to provide legal representation. When representing the child, the attorney would be required to represent the child based on the presumption that the child remaining with their parent is in their best interest. A child at an age where the child is capable of knowing and voluntary judgment, which states that they do not wish to stay in the care of their parents, rebuts the presumption. A child incapable of knowing and voluntary judgment or unwilling to state their interest rebuts the presumption when the attorney uncovers evidence that the child is at imminent risk to life or health or there are no means of eliminating the risk without removing the child from home.<sup>12</sup> Requiring an attorney to assess evidence, and not a feeling, regarding imminent risk mitigates the risk that the attorney would act according to their thoughts of what is in the child's best interest and force an independent inquiry into collateral resources to determine how to keep the child at home and in their parent's care.

In addition to legal representation for the child in the investigatory stage, ideally, a lived experience expert who has lived experience in the foster care system would be assigned when available. A social worker would also be an ideal addition to the child's legal team to offer a multidisciplinary approach to representation. Together, the legal team would conduct an independent investigation and identify appropriate services for the child while also seriously considering the negative impacts of the foster care system and how they can work to reduce the potential trauma to the child to the extent it is possible, should the investigation result in the removal of the child from their home.

An overview of the system, the state's role, and the rights of parents and children to counsel upon case filing is needed to fully explore the need to represent children in the investigatory stage. Further, discussing parental, child, and familial rights in the context of constitutional law also explains why representation at this stage is essential.

Part I provides an overview of the Child Welfare system and discusses the history of the state's role and parents' and children's right to counsel. Part II

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11. Catherine E. Smith, "Children's Equality Law" in *the Age of Parent's Rights*, 71 U. KAN. L. REV. 539, 540–45 (2023) (Professor Smith argues that children's rights must be recognized because, [t]here are times when parents do not possess the requisite political power to protect their children, and young people-and their rights-play a formidable role in protecting themselves and the groups to which they belong." While Professor Smith's analysis focuses on children's rights in the context of protection from discrimination, the argument holds for children's rights in the investigatory stage of child welfare proceedings.).

12. See N.Y. FAM. CT. ACT § 1028; see also Clare Huntington, *The Child-Welfare System and the Limits of Determinacy*, 77 LAW & CONTEMP. PROBS. 221, 242 (2014).

explores the rights of families, parents, and children in constitutional law. Part III discusses legal representation in child welfare proceedings for parents and children. Part IV argues that the state has a duty to assign children counsel in the investigatory stage of the case to protect them from unjust intrusion and enable them to participate in decisions that can have long-lasting impacts on their lives. It also argues for independent representation for children due to the inherent conflict in dual representation.

#### I. OVERVIEW OF THE CHILD WELFARE SYSTEM, THE HISTORY OF THE STATE'S ROLE, AND HISTORY OF LEGAL REPRESENTATION

The child welfare system is complex. It often involves multiple cases being heard simultaneously in various courts. It is not uncommon for an administrative investigation, subject only to the review of an administrative body, to take place concurrently with dependency and criminal court proceedings. An in-depth discussion of the child welfare system's administrative and criminal law aspects is beyond the scope of this paper. However, this section will provide an overview of the child welfare system, the state's role, and the history of parents' and children's rights to legal representation. This overview will lay the groundwork for discussing the present state of legal representation for children and parents and highlight the importance of providing legal representation for children in the investigatory stage of child welfare proceedings.

##### A. Overview of the Child Welfare System

Contact with the Child Welfare System<sup>13</sup> is initiated by a call to a State's Registry on Child Abuse and Maltreatment.<sup>14</sup> When a reporter calls the state central registry and is accepted, the local social services department ("the local department") investigates the report.<sup>15</sup> An investigation of child maltreatment allegations typically requires seeing the home where the subject child (ren)<sup>16</sup> lives to assess for safety and adequate food and shelter; one-on-one interviews of the subject children; interviews of the parent(s); and any collateral resources with relevant information.<sup>17</sup> During an investigation, children may undergo physical examination, where they must get undressed, and other medical evaluations.<sup>18</sup> Investigations can also include a psychiatric or psychological

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13. The Child Welfare System is also called the Family Regulation or Policing System.

14. 42 U.S.C. § 5106a (Each state is required to have a procedure to make a report. Some states have a hotline, while in others, a government office is designated as the entity responsible for receiving and processing calls of maltreatment).

15. *Id.*

16. The term "subject children" refers to the children who are the subject of the report to the state's hotline.

17. See Merrill Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 *TOURO L. REV.* 745, 786 (2006).

18. See *id.* at 786.

assessment of the parent or other person legally responsible for the child (ren)'s care.<sup>19</sup>

When concerns arise regarding a parent's ability to care for a child without assistance during or after a child welfare investigation, a case can take two different paths.<sup>20</sup> In the first path, in some states, the local department can offer a "differential response" when there are minimal child safety concerns.<sup>21</sup> Families on the "differential response" track receive services voluntarily to keep their children safe without court intervention.<sup>22</sup> The local department does not seek court intervention if families cooperate with the differential response service plan.<sup>23</sup> In the second path, the local department initiates a case in court if it determines that a child is in immediate danger after an assessment or if the parents do not voluntarily comply with the differential response program.<sup>24</sup>

Where a child is removed from their home due to imminent risk to their life or health,<sup>25</sup> a child can be placed in stranger foster care, a group home, or with a kinship placement (a close family friend or relative).<sup>26</sup> The parent can then request a hearing to have the child returned to their care.<sup>27</sup> This application is often made at the first court date and generally must begin within a statutorily prescribed time.<sup>28</sup> The child will remain in either stranger foster care, kinship care, or residential placement if, after a hearing, the child is not returned to their parents' care.<sup>29</sup>

Federal law requires that states initiate termination of parental rights proceedings after a child has been in care for the most recent fifteen out of twenty-two months.<sup>30</sup> Child welfare proceedings can take years to achieve permanency.<sup>31</sup> Representation of parents, children, and social services varies

19. See Sobie, *supra* note 17, at 786.

20. When there is a child welfare case, there is often a parallel case in criminal court. However, criminal court involvement is beyond the scope of this article.

21. See 42 U.S.C. § 5106a.

22. *Id.* (The federal government showed further support of preventive services through its passage of the Family First Prevention Services Act ("FFPSA"), which provides funding for preventive services. Pub. L. No. 115-123, 132 Stat. 232 (2018)).

23. 42 U.S.C. § 5106a.

24. See 42 U.S.C. § 5106a.

25. 42 U.S.C. § 675(13).

26. See 42 U.S.C. § 672.

27. See *generally* Patterson v. Armstrong Cnty. Child. & Youth Servs., 141 F. Supp. 2d 512 (2001).

28. See *generally id.*

29. See *generally* 42 U.S.C. § 672.

30. 42 U.S.C. § 675(5)(E).

31. Martin Guggenheim, *Parental Rights in Child Welfare Cases in New York City Family Courts*, 40 COLUM. J.L. & SOC. PROBS. 507, 508–15, 523–24 (2007) (Guggenheim highlights how New York Family Court and the court system operate on the schedule of agencies and employees, leading to delays and dysfunction in proceedings affecting families. These delays can result in cases being drawn out for years, causing families to remain in limbo. Guggenheim also notes that children can be kept in foster care longer than necessary due to delays in the system. This dysfunction

by state. While most states do provide parents with representation, it is not universal.<sup>32</sup> Some states have pilot programs that provide parents with representation in the investigatory stage of a child maltreatment investigation.<sup>33</sup> In contrast, other states only provide representation once a termination of parental rights petition has been filed.<sup>34</sup>

There are three different models of representation for children in child welfare proceedings: (1) the Guardian ad Litem Model of Representation (“GAL” or “LGAL”), (2) Best Interests of the Child Representation, and (3) Stated Interest Representation.<sup>35</sup> Part III will discuss these models in more detail. Since children first gained the right to representation in child welfare cases through the Child Abuse Prevention Act (“CAPTA”), various scholars have analyzed which representation model best serves the child. However, an in-depth analysis of which model of representation is best is beyond the scope of this article. This article is premised on the stated interests’ representation model by a trained and qualified attorney, as best serving the child in the investigatory stage of child welfare proceedings.

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continues to be prevalent in today’s New York City Family Court system and court systems across the country.).

32. ALA. CODE § 12-15-305 (2024); ALASKA CHILD IN NEED OF AID R. PROC. § 12(b)(1); ARIZ. REV. STAT. ANN. § 8-843(B)(1); CAL. WELF. & INST. CODE § 317(a) (Deering 2024); COLO. REV. STAT. § 19-3-202(1); CONN. GEN. STAT. § 46b-135; D.C. CODE § 16-2304(b); FLA. STAT. § 39.013(9); GA. CODE ANN. § 15-11-262(j)(2); HAW. REV. STAT. ANN. § 587A-17(a); IDAHO CODE § 16-2009; 705 ILL. COMP. STAT. § 405/1-5 (2024); IND. CODE ANN. § 31-32-4-3 (LexisNexis 2024); KAN. STAT. ANN. § 38-2205(b); KY. REV. STAT. ANN. § 620.100(1)(b) (LexisNexis 2024); LA. CHILD. CODE ANN. art. 608 (2024); ME. REV. STAT. ANN. tit. 22, § 4005(2) (LexisNexis 2024); MD. CODE ANN. FAM. LAW § 5-1405; MASS. ANN. LAWS ch. 119, § 29 (LexisNexis 2024); MICH. COMP. LAWS SERV. § 712A.17c(4)(b); MINN. STAT. ANN. § 260C.163(3)(a) (LexisNexis 2024); MISS. CODE § 43-21-201 (LexisNexis 2024); NEV. REV. STAT. ANN. § 432B.420(1); MO. ANN. STAT. § 211.211(4) (LexisNexis 2024); MONT. CODE ANN. § 41-3-425(2)(a) (2023); N.H. REV. STAT. ANN. § 169-C:10 (LexisNexis 2024); N.J. STAT. ANN. § 9:6-8.43 (a); N.Y. FAM. CT. § 262(a) (LexisNexis 2024); N.C. GEN. STAT. § 7B-602(a) (2024); N.D. CENT. CODE § 27-20.2-12(4) (2023); OHIO REV. CODE ANN. § 2151.352 (LexisNexis 2024); OR. REV. STAT. § 419B.195(1) (2024); 42 PA. CONS. STAT. § 6337 (2024); 40 R.I. GEN. LAWS § 40-11-14(c); S.C. CODE ANN. § 63-7-1620(3) (2024); S.D. CODIFIED LAWS § 26-7A-31 (2024); TENN. CODE ANN. § 37-1-126(a)(2)(A)–(B); UTAH R. JUV. P. 35(a); VT. STAT. ANN. tit. 13 § 5232(3); VA. CODE ANN. § 16.1-266(D); WASH. REV. CODE ANN. § 13.34.090(2); W. VA. CODE ANN. § 49-4-601(f)(2); WYO. R. P. JUV. CT. § 5 (a).

33. Adam Ballout & Melinda L. Drawing, *The F.I.R.S.T. Legal Clinic: A New Frontier of Partnerships to Stop Trauma*, ABA CHILDREN’S RIGHTS LITIGATION (July 14, 2022), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2022/summer2022-the-first-legal-clinic/>.

34. IOWA CODE ANN. § 232.113 (1) (LexisNexis 2024); NEB. REV. STAT. ANN. § 43-279.01(1)(b); TEX. FAM. CODE ANN. § 107.013(a) (LexisNexis 2023); WISC. STAT. § 48.23(2)(b) (2023–2024); N.M. STAT. ANN. § 32A-5-16(E); Sweetin v. State, 90 P.3d 571 (2004).

35. The Guardian ad Litem (“GAL”) Model representation model utilizes trained lay persons to advocate on behalf of the child. GALs advocate for what they believe is in the child’s best interest. The “best interests of the child” representation is where an attorney advocates for the child’s best interest. Stated Interest Representation is where an attorney advocates for what the child has stated their position to be.

*B. History of the Child Welfare System, State Involvement, and Legal Representation*

The history of the child welfare system is one fraught with disparate impact on marginalized families and families of color.<sup>36</sup> There is a disproportionate representation of children of color in the child welfare system, with Black and Indigenous children being the most overrepresented.<sup>37</sup> The system can devastate families when it seeks to “overprotect” and when it “underprotects.”<sup>38</sup> When the state “overprotects,” the result is separating families and subjecting children to unnecessary invasion of their bodily autonomy when intervention is either not needed or an alternative response can both ensure the child’s safety and keep the family intact. When the state “underprotects,” the result for children can be fatal. The history of the state’s role in child welfare proceedings underscores the importance of legal representation. Just as the history of the state’s role is inundated with examples of its failures, so the history of legal representation of parents and children highlights the gaps in ensuring the rights of parents and children are protected.

1. History of the Child Welfare System

In the early 1950s, Black and Indigenous children were generally not placed in foster care because they were “below the radar” of the child welfare system.<sup>39</sup> At the time, Black leaders were concerned that Black children were being housed in jails instead of in stable families when needed and were, therefore, not getting the same opportunity as White children to grow up in stable families.<sup>40</sup> The efforts to place Black and Indigenous children differed significantly. There was an organized effort to place Black children in the homes of Black families, while Indigenous children were to be placed in White homes to be adopted by White families.<sup>41</sup>

After World War II and the passage of the New Deal, the perception of parents and children who were the subjects of the child welfare system changed.<sup>42</sup> Experts believed that the passage of the New Deal resolved poverty as a reason for using the foster care system.<sup>43</sup> Before the war, poverty was the

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36. CATHERINE E. RYMPH, *RAISING GOVERNMENT, RAISING GOVERNMENT CHILDREN: A HISTORY OF FOSTER CARE AND THE AMERICAN WELFARE STATE* 130–31 (2018).

37. U.S. DEP’T OF HEALTH & HUM. SERV. CHILD.’S BUREAU, *AFCARS REP. 30, ADOPTION & FOSTER CARE ANALYSIS & REP. SYS.* (2022).

38. KENNETH BURNS ET AL., *CHILD WELFARE REMOVALS BY THE STATE: A CROSS-COUNTRY ANALYSIS OF DECISION-MAKING SYSTEMS* 7, 204 (Kenneth Burns et al. eds., 2017) (The authors found that the principle underpinning child welfare systems is to protect children and parents from arbitrary state interventions. They noted that in the United States, courts can intrude into family privacy during investigations, with an overall negative impact of state intervention.).

39. RYMPH, *supra* note 36, at 124.

40. *Id.* at 125.

41. *Id.* at 126–28.

42. *Id.* at 114–17.

43. *Id.* at 115.



cause of foster care placement.<sup>44</sup> In contrast, postwar foster children were placed in foster care due to some form of depravity in the family, whether it was mental illness, the unwillingness of a father to provide, or a mother having a child out of wedlock, to name a few perceived reasons.<sup>45</sup> When Aid to Dependent Children (“ADC”) was established under the New Deal, states were left to create eligibility criteria.<sup>46</sup> In response to public school desegregation, states across the country drafted the criteria for ADC to exclude Black families “to push Black families out of the community to limit their children’s school enrollment.”<sup>47</sup> Despite this discrepancy in the availability of aid, experts believed that poverty was no longer part of the equation of reasons for foster care placement; therefore, experts focused on psychological and emotional issues that could be treated instead of the underlying reasons for these issues that could be directly linked to poverty.<sup>48</sup>

The Flemming Rule was implemented in 1961 to combat the disparate treatment of Black people’s access to ADC.<sup>49</sup> The rule prohibited states from denying ADC based on their prior exclusionary rules that prevented Black families from receiving assistance.<sup>50</sup> However, the rule created an exception that permitted a state to withhold aid if the child resided outside the family home.<sup>51</sup> At the same time the Flemming Rule was implemented, there was the passage of a law that permitted the use of Social Security funds to assist with the support of children in foster care; the removal of Black children from their families increased at an alarming rate.<sup>52</sup> There was an overrepresentation of Black children in the foster care system in the early 1960s, in a manner disproportionate to their “proportion in the general population.”<sup>53</sup> This overrepresentation still holds today.<sup>54</sup> Indigenous children also suffered as a result of insufficient support from ADC.<sup>55</sup> The result was Indigenous children entering the foster care system due to their family’s inability to support them financially.<sup>56</sup> The Indian Child Welfare Act (“ICWA”) sought to solve the problem of the overrepresentation of Indigenous children in the foster care system.<sup>57</sup> Even with the passage of ICWA, the current trend as it relates to

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44. *Id.* at 115–16.

45. *Id.*

46. A.B.A. Res. 606 § III(B) (2022).

47. A.B.A. Res. 606 § III(B)(i) (2022).

48. RYMPH, *supra* note 36, at 117.

49. A.B.A. Res. 606 § III(B)(i) (2022).

50. *Id.*

51. *Id.*

52. *Id.*

53. RYMPH, *supra* note 36, at 130.

54. U.S. DEP’T OF HEALTH & HUM. SERV. CHILD.’S BUREAU, AFCARS REP. 30, ADOPTION & FOSTER CARE ANALYSIS & REP. SYS. (2022); Marcia Zug, *ICWA’s Irony*, 45 AM. INDIAN L. REV. 1, 19 (2020) (showing that Black children in foster care overall fare more poorly than white children in foster care.).

55. RYMPH, *supra* note 36, at 131.

56. *Id.*

57. Zug, *supra* note 54, at 8.

Indigenous families is that Indigenous parents have a higher likelihood of having their rights terminated than non-indigenous parents.<sup>58</sup> The history of the child welfare system and its role in families of color is an essential factor to consider when assessing the need to decrease children's entry into the foster care system through investigatory stage representation.

## 2. History of State's Role in Child Welfare Proceedings

The state's role in child welfare proceedings is complex. The state's primary objective in child welfare cases is safeguarding the child's well-being. However, the actions of local departments in litigation challenge this premise, suggesting that the state's overarching goal in such situations may be more concerned with protecting itself from potential legal repercussions. Case law highlights the tension between the state's role in safeguarding children's well-being and the legal frameworks that govern these efforts.

In the context of child welfare proceedings, the local department is responsible for prosecuting cases of abuse or neglect referred by the State's Child Abuse and Maltreatment hotline.<sup>59</sup> Throughout its investigation, the state evaluates the child(ren)'s safety by conducting unannounced home visits and providing services as needed.<sup>60</sup> However, when the state fails to fulfill this role, its initial response is to shield itself from potential liability. The landmark Supreme Court case of *DeShaney v. Winnebago County Department of Social Services* exemplifies this dynamic quite vividly.

*DeShaney* is a landmark example of the complexities involved in child welfare proceedings. In *DeShaney*, the minor child, Joshua, brought a Due Process claim against the Department of Social Services for their failure to protect him from his abusive father, which he argued violated his rights under the Fourteenth Amendment.<sup>61</sup> Joshua had previously come to the Department's attention when his father's ex-wife accused the father of causing physical harm to Joshua. The case was closed after the father denied the allegations.<sup>62</sup> Joshua was brought to a local hospital a year later with signs of physical abuse. The Department of Social Services then intervened again.<sup>63</sup> After assessing Joshua's case, the Department determined that there was insufficient evidence to remove him from his father's care permanently.<sup>64</sup> The Department recommended that Joshua attend school, that his father comply with services, and that his father's girlfriend move out of the home.<sup>65</sup> Eventually, Joshua returned to his father's care.<sup>66</sup>

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58. *Id.* at 41.

59. Child Abuse Prevention and Treatment (CAPTA) Act of 1974, Pub. L. No. 118-71, § 3(a), 124 Stat. 3474 (current version at 42 USCS § 5106(f)).

60. See Sobie, *supra* note 17, at 786 (2006).

61. *DeShaney v. Winnebago*, 489 U.S. 189, 191 (1989).

62. *Id.* at 192.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

A month after the initial hospital report, the hospital again reported that hospital staff suspected that Joshua's father was abusing him due to Joshua's bruises, which the hospital staff treated.<sup>67</sup> The assigned social worker should have taken action.<sup>68</sup> Throughout the next six months, as the worker visited the home, she noted a lack of compliance with the voluntary agreement the father had entered into, as well as additional suspicious bruises on Joshua.<sup>69</sup> Almost a year later, hospital staff made another report that they suspected that Joshua's father was abusing him.<sup>70</sup> The worker twice visited Joshua's home after that and was told that Joshua was too ill to see her.<sup>71</sup> The worker took no further action.<sup>72</sup> Approximately four months later, the father beat Joshua so severely that Joshua went into a coma.<sup>73</sup> Joshua's brain injuries were so severe that he was permanently incapacitated and would have to live the rest of his days in the facility for mentally incapacitated persons.<sup>74</sup> *DeShaney* exemplifies the complex balance the state must strike between protecting children from harm and safeguarding itself from legal repercussions in child welfare proceedings.

The stark example of the *DeShaney* case highlights how a state can fail to protect children. However, the Supreme Court found that the state could not be held responsible for its inaction under the United States Constitution.<sup>75</sup> The Court found that the government has no independent duty to protect private citizens from each other.<sup>76</sup> The Court further held that the government is only obligated to protect private citizens, such as incarcerated persons, when the government has restrained a person's liberty.<sup>77</sup> The Court ultimately found that the state had placed Joshua "in no worse position than that in which he would have been had it not acted at all . . . ."<sup>78</sup>

Failures of the state in "underprotecting" children often have devastating and sometimes fatal results. However, sometimes, the state fails to meet its objective of protecting children, especially when exercising its *parens patriae* powers, by contradicting its intended goals through "overprotection." This type of "overprotection" can be equally devastating, albeit in different ways.

In the New York case of *Nicholson v. Scopetta*, mothers who were survivors of domestic violence sued the Administration for Children's Services for removing their children from their care due to exposing them to violence. In three cases, mothers alleged that the Administration for Children's Services ("ACS") had unconstitutionally interfered with their constitutional right to rear

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67. *Id.* at 193.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 197.

76. *Id.*

77. *Id.* at 200.

78. *Id.* at 201.

and raise their children solely based on their status of being survivors of domestic violence.<sup>79</sup> Before certifying constitutional questions to the New York State Court of Appeals, the Eastern District of New York issued a preliminary injunction against ACS, enjoining ACS from removing children from their mother's care solely because the mother was a survivor of domestic violence.<sup>80</sup> The court found that ACS was systematically removing children from their mothers' care based on the mother being a survivor of domestic violence.<sup>81</sup> The court ultimately found that the constitutional rights of both the mothers, who were survivors of domestic violence, as well as the children removed from their mothers' care, were violated.<sup>82</sup>

The cases of *Deshaney* and *Nicholson* serve as a reminder of the government's challenges in fulfilling its obligation to safeguard children. Moreover, a fundamental conflict arises between the state's imperative to manage the financial burden of legal procedures and its duty to protect the child.<sup>83</sup> This conflict persists alongside the troubling possibility of the state failing to fulfill its inherent responsibility, known as *parens patriae*, to safeguard the well-being of a child, as well as the risk of the state unjustly removing a child from parental custody.

Scholars have argued that a preventive-based approach to state intervention is preferable to a reactionary approach. Professor Clare Huntington posits that the state should approach the protection of children from a prevention-based approach.<sup>84</sup> In analyzing her recommendation, Huntington recognizes that the significant factor in child removal is unstable income, not abuse or neglect.<sup>85</sup>

Huntington proposes a process where families engage with the state to preserve "family self-determination."<sup>86</sup> The premise of Huntington's argument is that parental decision-making free of state influence is a fallacy. Huntington argues that the state influences parental decision-making by controlling the framework in which parents can make decisions and creating laws authorizing parents to make certain decisions.<sup>87</sup> State influence stems from the state's independent interest in ensuring the welfare of children by ensuring that children develop into "contributing members of society."<sup>88</sup>

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79. *Nicholson v. Scopetta*, 3 N.Y.3d 357, 366 (2004).

80. *In re Nicholson*, 181 F. Supp. 2d 182 (E.D.N.Y. 2001).

81. *Id.* at 185.

82. *Id.*

83. *See Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

84. Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1487 (2007).

85. *Id.*

86. *Id.* at 1510.

87. *Id.* at 1513–14.

88. *Id.* at 1516 (2007); Huntington, *supra* note 12, at 221–26, 230, 241–42 (Professor Huntington examined Mnookin's proposals for child welfare standards and found that while the recommendations for permanency were adopted, issues with the child removal standard persist. Most states still use a best interest standard, with no specific factors for removal decisions. Huntington concluded that Mnookin's focus on expeditious permanency negatively affected family

The prevention-based approach suggested by Huntington could aid in resolving both forms of the state's failures. However, the representation of children in the investigatory stage of proceedings would lead to an additional process for reducing the number of children who suffer from the state's failures. The instances of the state's "under protection" and "overprotection" highlight the need for counsel for both parents and children in child welfare proceedings and the need to consider early action in the form of investigatory stage legal representation to deter or prevent the need for state action. The next Part discusses the development of the right to representation for parents and children.

### 3. History of Legal Representation

One role of attorneys is to serve as gatekeepers in legal proceedings. In this role, attorneys ensure a just result and protect the client's rights. The legal representation of parents and children in the child welfare context is deficient and inconsistent. The problems with legal representation for parents and children are especially concerning given the history of the state's failures in the "overprotection" and "underprotection" of children discussed above. This Part provides an overview of the history of children and parental representation in child welfare proceedings. It highlights the inherent deficiencies of the framework of legal representation in these cases.

#### *A. History of Children's Rights to Representation*

The Supreme Court has never recognized a constitutional right to legal counsel for children in child welfare proceedings.<sup>89</sup> However, as previously noted, CAPTA gave children the right to representation in all proceedings if there were allegations that they were neglected or abused. Under CAPTA, a child's interest must be protected by a layperson trained to represent the child's interest or an attorney.

CAPTA established procedures for "prevention, identification, and treatment of child abuse and neglect."<sup>90</sup> CAPTA permits state governments to receive grants to meet CAPTA's goals.<sup>91</sup> Part of the requirements for states to qualify for funding is to appoint a guardian ad litem to represent the child in judicial proceedings.<sup>92</sup> Most states guarantee a right to counsel in child welfare proceedings, although the representation model varies between best interests, direct representation, or a hybrid model.<sup>93</sup> CAPTA's legislative history documents that one of the main focuses of the act was to protect abused children.<sup>94</sup>

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reunification and suggested that early-stage prevention could help preserve families before removal becomes necessary.).

89. Sobie, *supra* note 17, at 757–58 (2006).

90. 42 U.S.C. § 5106a.

91. *Id.*

92. *Id.*

93. See statutes cited *supra* note 32.

94. 119 CONG. REC. 39107 (1973).

The legislative history reflects that there were no significant discussions about neglected children.<sup>95</sup> It further documents that an advocate discussing the bill on the House floor noted that “thousands of innocent children are beaten, burned, poisoned, and otherwise abused by adults.”<sup>96</sup> A letter from Dr. Vincent J. Fontana, a pioneer in the prevention of child abuse, was entered into the congressional record to support the bill with statistics on child abuse and information about the long-term effects on society.<sup>97</sup> The pessimistic view towards parents is significant because the federal government, when enacting the bill, did so based on the premise that parents involved in the child welfare system were bad actors who treated their children poorly. During the discussion on the House floor, one Congressman stated on the record, “What do we do to help the parents because these are sick people?”<sup>98</sup> The focus was on the removal of the child from the “sick” parent.<sup>99</sup>

There are inevitably parents who abuse their children in some of the manners noted. However, the foster care system is comprised mainly of neglected, not abused, children.<sup>100</sup> Neglect is often associated with poverty, not abusive actions by a parent.<sup>101</sup> The discussion on the House floor recognized the fact that, at the time of CAPTA’s passage, there were no accurate statistics on child abuse or neglect.<sup>102</sup> An original proponent of CAPTA, in support of the bill’s passage, stated that the legislation’s goal was to “guarantee the right of every child to life and the opportunity for a hope of the future and decency.”<sup>103</sup>

CAPTA’s history and the promise of representation highlight the importance of protecting children. While the act erroneously focused mainly on preventing child abuse, although allegations of neglect are much more prevalent, it identified the problematic nature of social workers being the sole determinants of whether to remove a child from their family. It also recognized the importance of treating children as individuals entitled to their voice and protection. Representation for children at the investigatory stage of the proceedings would address both the concern of allowing social workers to be the sole arbiters in deciding to remove a child, as well as treating children as individuals entitled to protection.

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95. *See id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. U.S. DEP’T OF HEALTH & HUM. SERV. CHILD.’S BUREAU, AFCARS REP. 30, ADOPTION & FOSTER CARE ANALYSIS & REP. SYS. (2022).

101. Michael Fitzgerald, *New Bill Would Require States To Distinguish Poverty From Child Neglect*, THE IMPRINT: YOUTH & FAMILY NEWS (July 28, 2023, 3:56 PM), <https://imprintnews.org/child-welfare-2/new-bill-would-require-states-to-distinguish-poverty-from-child-neglect/243316>.

102. 119 CONG. REC. 39107 (1973).

103. 119 CONG. REC. 24025 (1973).

### B. History of Parents' Right to Legal Representation

The right to legal representation for parents in child welfare proceedings is greatly diminished compared to that in criminal proceedings. The Supreme Court has acknowledged the significance of legal representation in specific criminal proceedings.<sup>104</sup> The *Gideon v. Wainwright* court observed that even an “intelligent and educated” individual cannot match the expertise of competent trial lawyers in evaluating the credibility of evidence or formulating an effective defense strategy.<sup>105</sup> Despite acknowledging the importance of legal representation, the Court has not recognized impoverished parents’ constitutional right to legal counsel in every termination of parental rights proceeding.<sup>106</sup>

In *Lassiter v. Dep’t of Social Services*, the Court decided that parents do not have a constitutional right to counsel in termination of parental rights proceedings even though it is a settled “informed opinion” that indigent parents should be entitled to legal counsel in all proceedings where their access to their child is at risk of being intruded upon by the government.<sup>107</sup>

In *Lassiter*, the Court affirmed that the trial court is responsible for determining whether the constitutional guarantee of due process necessitates the appointment of counsel for indigent parents involved in termination proceedings, while acknowledging that such a determination is subject to review by an appellate court.<sup>108</sup> However, despite not recognizing a parent’s right to counsel in all termination of parental rights proceedings, the Supreme Court has recognized a state’s duty under the Constitution to allow parents access to appellate review, even where they cannot pay record preparation fees due to a lack of finances.<sup>109</sup> Based on the *Lassiter* decision, some states have not recognized an indigent parent’s right to counsel in the earlier stages of child maltreatment proceedings.

## II. RIGHTS OF FAMILY, PARENTS, AND CHILDREN IN CONSTITUTIONAL LAW

The right of parents to rear and raise their children is well-established as a constitutional right.<sup>110</sup> The family unit has constitutional protections when asserted by a parent or guardian.<sup>111</sup> However, the Supreme Court has never directly addressed whether children have a separate constitutional right to family integrity, and scholars disagree on whether such a right exists.<sup>112</sup> This

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104. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

105. *Id.*

106. *Lassiter v. Dep’t of Social Services*, 452 U.S.18, 27 (1981).

107. *Id.* at 34.

108. *Id.* at 32.

109. *M.L.N. v. S.L.J.*, 519 U.S. 102, 107 (1996).

110. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

111. *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977).

112. Shanta Trivedi, *My Family Belongs to Me: A Child’s Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L. REV. 267 (2021).

Part will discuss the constitutional rights of children, parents, and the family unit.

### A. *Children's Right to Family Integrity and Bodily Autonomy*

Children have the right to family integrity and bodily autonomy.<sup>113</sup> Therefore, when the state seeks to intrude on one of these rights or, in some other way, attempts to intrude upon the child during the investigatory stage of the case, an attorney should be assigned to protect the child. This Part concludes that a child's right to family integrity exists after briefly discussing the literature analyzing children's rights to family integrity and the challenges of recognizing family integrity. It will also discuss the child's right to bodily autonomy and how it relates to the investigatory stage of child welfare cases.

#### 1. A Child's Right to Family Integrity

One of the challenges related to children's rights in child welfare cases is the lack of agreement on whether children have the right to family integrity.<sup>114</sup> In one sense, unless parents have been found unfit, they are presumed to act in the best interests of their children and are deemed best suited to protect their children's needs.<sup>115</sup> An independent right for children may not be considered necessary. Additionally, even when children can assert their positions, they must do so through adult actors who may not adequately represent their wishes, thus not effectively advocating for the child, weakening the argument in favor of an independent right.<sup>116</sup> Some scholars who focus on children's rights argue that recognizing them would enable children to actively participate in the legal system, ultimately facilitating their transition to independent adulthood.<sup>117</sup>

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

114. Clare Ryan, *Are Children's Rights Enough?*, 72 A.M. U.L. REV. 2075, 2077, 2124 (2023) (arguing that while the right of parents to rear and raise their children is an established fundamental right, the scope and impact of children's rights in the United States are not fully developed, and there has been no recognized required right for children when assessing and analyzing children's rights in the family law context); Trivedi, *supra* note 112, at 267.

115. Ryan, *supra* note 114, at 278–80 (examining the potential impact of using a children's rights-based approach to decision-making and how it may lead to increased state control over the family unit in the context of the European approach).

116. *See* Ryan, *supra* note 114, at 121 (arguing that the children's rights approach may lead to adults making decisions for young children in court proceedings and explores a "middle ground" approach where children's rights emerge only when there is a divergence between the child and parent's rights).

117. Emily Buss, *The Law's Role in Raising Children*, 46 OHIO N.U. L. REV. 267, 268–69, 278–84 (2020). Professor Buss argues that incorporating developmental science into the legal system can empower children involved in legal cases to transition to independent adulthood. She suggests using the "authoritative parenting" approach, which involves warmth, supervision, and gradually increasing decision-making control for children interacting with the legal system. *Id.* Buss conducted a pilot program involving children in decision-making related to their legal cases, which resulted in positive outcomes. *Id.* This author agrees with Professor Buss' analysis and will adopt it when proposing how representation should develop in the investigatory stage of proceedings.



Professor Trivedi argues that children's rights have evolved to recognize that children have the right to family integrity based on various Supreme Court and other related federal court decisions.<sup>118</sup> While the Supreme Court has not recognized a child's right to family integrity, except in dicta, most Circuit courts have.<sup>119</sup> Trivedi posits that recognizing a child's right to family integrity supports, rather than undermines, a parent's right to rear and raise their children, thereby serving as a bulwark to state intervention.<sup>120</sup> As Trivedi notes, parent rights advocates, generists,<sup>121</sup> and scholars who advocate adopting a human rights approach could support children's right to family integrity.<sup>122</sup> Trivedi concedes that the Supreme Court has never explicitly recognized that children have a right to family integrity but argues that, when considering the Court's dicta and District Court decisions, children's right to family integrity is easily recognizable.<sup>123</sup>

Trivedi highlights the first time the Court applied the concept of family integrity to children in *Stanley v. Illinois*.<sup>124</sup> Trivedi concludes her analysis of Supreme Court decisions by positing that the Court's decision in *Obergefell v. Hodges* recognized a child's right to family integrity when discussing, in-depth, the negative impact of not permitting LGBT couples to marry on children's family life.<sup>125</sup> Trivedi concludes that the federal government recognizes a child's right to family integrity through district and circuit courts.<sup>126</sup> Trivedi ultimately posits that "the majority rule in the United States is that children may

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118. Trivedi, *supra* note 112, at 267.

119. *Id.* at 270.

120. *Id.* at 277.

121. Generists are scholars who believe children's autonomy is underrecognized in the law and should be at the forefront of legal decision-making. Trivedi, *supra* note 112, at 274–75.

122. Scholars who argue for a human rights approach suggest that such an approach focuses on meeting the child's needs instead of children's or parents' rights. Trivedi, *supra* note 112, at 275–76.

123. Trivedi, *supra* note 112, at 278 (arguing that the Court implied that children had family integrity rights in *Meyer v. Nebraska* when the Court discussed that learning a foreign language would not harm the child. Trivedi also discusses the Court's ruling in *Prince v. Massachusetts*, which "planted the seeds" to recognize that the recognition of "a constitutional interest in the familial relationship is owed in part because a child, and therefore society, ultimately benefits from her relationship with her parents.").

124. Trivedi, *supra* note 112, at 278–79 (discussing how the Court identified a child's right to family integrity as a basis to invalidate a statute that placed the children of unwed mothers in foster care upon the mother's death). The Court found the unenumerated right to family integrity established through the "Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment." Professor Trivedi also discusses the Court's suggestion that the right also extended to children through its decision in *Smith v. Organization of Foster Families for Equality and Reform*. *Id.*

125. Trivedi, *supra* note 112, at 281–82.

126. Trivedi, *supra* note 112, at 282–84 (recognizing that most circuit courts have recognized a child's independent right to family integrity, and, in two of the five silent circuit courts, the district courts have recognized the right. Trivedi also highlights the fact that "no federal court of appeals has explicitly held that this right does *not* exist.").

invoke a due process right to family integrity to prevent the destruction of their families.”<sup>127</sup>

Huntington argues that, in some ways, the concept of family integrity can be detrimental to the family in that it prevents a state from intervening until the family is in crisis instead of requiring a state to act proactively to preserve families, which can result in foster care placement.<sup>128</sup> Huntington also highlights the fact that foster care often has a detrimental impact on the well-being of children.<sup>129</sup> While this author agrees with Huntington’s assessment, recognizing a child’s right to family integrity in the limited context of the investigatory stage of a child welfare case would enable the child to assert the right to protection when the parents cannot protect them from the state’s intervention.

While acknowledging the challenges associated with recognizing children’s rights, this author supports the conclusion that children have a right to family integrity, and permitting them to participate in the legal system will positively impact their development into adults. Furthermore, when coupled with the requirements of CAPTA, there is a solid basis to find that the state has a *parens patriae* obligation to assign counsel to children in the investigatory stage of child welfare cases to protect their right to family integrity.

## 2. A Child’s Right to Bodily Autonomy

A child has the right to bodily autonomy and is entitled to due process before unwanted medical treatment.<sup>130</sup> This article argues that to protect the child from unwanted physical examinations without their consent, there should be an extension of a child’s right to due process before mental health treatment to physical and mental health evaluations in child welfare cases.

A child’s right to due process when receiving mental health treatment was recognized in *Parham v. J.R.* In *Parham*, the mother and stepfather institutionalized their son for mental health treatment.<sup>131</sup> After being institutionalized for many years, the son brought suit, arguing that permitting his parents to admit him for mental health treatment without a formal hearing violated his due process rights.<sup>132</sup> The Supreme Court held that the child was entitled to due process protection and therefore held that an inquiry by a neutral staff physician to assess the need for institutionalized mental health treatment, which should include speaking with the child, is required before admission.<sup>133</sup>

The child’s right to due process in *Parham* is directly applicable to mental and physical intrusions in the investigatory stage of child welfare cases. Just like the parents in *Parham* sought to protect the child by seeking institutionalization of the child against their will for mental health treatment, the

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127. Trivedi, *supra* note 112, at 283.

128. Huntington, *supra* note 84, at 1503.

129. *Id.* at 1491–92.

130. *Parham v. J.R.*, 442 U.S. 584, 588 (1979).

131. *Id.*

132. *Id.*

133. *Id.* at 608.

state, in the investigatory stage, seeks to protect the child through investigations of maltreatment against their parents, which at times requires physical and mental health evaluations. The state, in this instance, is both acting *in loco parentis*, as well as exercising its *parens patriae* powers. This exercise of state intervention entitles the child to due process before the intrusion on their person. Just as the court in *Parham* decided that a medical professional is required to conduct an independent inquiry into whether a child needs unwanted mental health treatment, a qualified and trained attorney should be assigned to conduct an independent investigation to assess whether mental and physical examinations are needed to protect the child.

### B. Parent's Right to Rear and Raise Their Children

A parent's right to rear and raise children "under their control" is a liberty interest protected by substantive due process under the Fourteenth Amendment.<sup>134</sup> When assessing the development of constitutional law from the perspective of a fit parent's right to raise their children how they see fit, the sole check on a parent's rights has been through the government's *parens patriae* power. When examining the development of parents' constitutional rights to their children, the constitutional rights of parents trump children's rights.<sup>135</sup>

In *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, the Supreme Court recognized parents' right to rear their children as a fundamental liberty. In the landmark case of *Meyer*, the Court acknowledged that a parent's fundamental right to direct the upbringing and education of their children is entitled to constitutional protection.<sup>136</sup> In *Meyer*, the Court held that this right includes a parent's freedom to arrange for their children to learn in a language other than English, even before the eighth grade.<sup>137</sup> The Court recognized that the state's interest in mandating the sole use of English in education through the eighth grade must yield to the parents' right to impart their cultural and linguistic heritage to their children.<sup>138</sup> This decision underscores the importance of protecting parents' fundamental rights to shape their children's education and development.<sup>139</sup>

In *Pierce*, the Supreme Court invalidated a state statute that sought to impose a compulsory education requirement for all children in public schools.<sup>140</sup> The law at issue prohibited children from attending private religious schools.<sup>141</sup> The Court held that such a mandate would unduly infringe on parents' fundamental right to direct their children's upbringing and education, a right

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134. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

135. *Wisconsin v. Yoder*, 406 U.S. 205, 243 (1972) (Douglas, J., dissenting in part).

136. *Meyer v. Nebraska*, 262 U.S. at 390.

137. *Id.* at 400.

138. *Id.*

139. *Id.* at 402.

140. *Pierce v. Society of Sisters*, 268 U.S. at 530.

141. *Id.*

recognized by the Due Process Clause of the Fourteenth Amendment.<sup>142</sup> The ruling unequivocally solidified the constitutional jurisprudence that state intervention in parental autonomy when raising children must be limited.<sup>143</sup>

Where the rights of parents and children perceivably diverge, parents' rights generally prevail except in decisions regarding a child's mental health.<sup>144</sup> In *Wisconsin v. Yoder*, a parent's right to Free Exercise of Religion overrode consideration of their children's rights.<sup>145</sup> In *Yoder*, the state criminally charged the parents for failing to comply with the state's compulsory education law. The Supreme Court found that the parents had a right to the free exercise of religion and, therefore, were not required to send their children to school beyond the age found appropriate in their Amish faith.<sup>146</sup> The parent's right to the free exercise of religion was the only consideration when the Court determined that the children did not have to continue their education.<sup>147</sup> The Court did not consider the long-term implications of not finishing their education on the children.<sup>148</sup>

Similarly, the landmark case of *Troxel v. Granville* reinforced the notion that parents retain a fundamental right to raise and care for their offspring without undue interference from governmental entities.<sup>149</sup> In *Troxel*, paternal grandparents sought visitation with their grandchildren after the death of the children's father.<sup>150</sup> The mother did not object to visitation with the grandparents but rather the amount of visitation they sought.<sup>151</sup> The pertinent statute allowed any individual to pursue visitation with a child, provided such visitation is in the child's best interest.<sup>152</sup> The United States Supreme Court declared the statute in question unconstitutional.<sup>153</sup>

The Court's decision relied on its previous legal precedents, which had firmly established parents' fundamental right to make decisions concerning the upbringing and care of their children.<sup>154</sup> In addition, the Court acknowledged the long-standing presumption that competent parents would act in their

142. *Id.* at 535.

143. *Id.*

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

145. *Wisconsin v. Yoder*, 406 U.S. 205, 208, 222–23, 230–31, 239–40 (1972). In *Yoder*, the parent's failure to comply with Wisconsin's compulsory attendance law resulted in their conviction. *Id.* The Court held that the parents' right to observe their Amish faith, which did not permit a secular education beyond the eighth grade, was protected by the First and Fourteenth Amendments. *Id.* The Court's decision did not consider the children's positions. The law aimed to ensure that children received the education they were entitled to. *Id.* Although the parents were the subjects of the criminal proceedings, the children were the ones who were impacted by their parent's choice not to send them to school past the eighth grade. There was no assessment of the children's wishes. *Id.*

146. *Id.* at 208.

147. *Id.*

148. *Id.*

149. *Troxel v. Granville*, 530 U.S. 57 (2000).

150. *Id.* at 61; *Wisconsin v. Yoder*, 406 U.S. at 208.

151. *Id.*

152. *Id.*

153. *Id.* at 67.

154. *Id.*

offspring's best interests.<sup>155</sup> The Court noted no allegations or determinations of parental incapacity during the litigation.<sup>156</sup> When determining if the children should visit with their paternal grandparents, the Court did not in any way consider the children's preference regarding visitation.<sup>157</sup> The doctrine surrounding parents' constitutional rights thus suggests that those rights seemingly trump their children's constitutional rights where fit parents make decisions regarding their children.

The government's duty to protect the welfare of children, known as the *parens patriae* powers of the state, empowers the state to act as a legal guardian to protect a child's welfare.<sup>158</sup> Accordingly, the right of a parent to raise their offspring according to their discretion is not without limitations.<sup>159</sup> The concept that the duty to protect the well-being of children extends beyond the duty of parents and into that of government first took shape in the United States in the Progressive Era.<sup>160</sup> Progressives argued that protecting children from things like child labor would improve the overall positive impact on the future.<sup>161</sup> Opponents argued that child labor laws, as well as compulsory education laws, were an unconstitutional infringement on parents' rights to rear and raise their children as they see fit.<sup>162</sup>

*Prince v. Massachusetts* documents the exercise of the state's power, which centered around whether a legal guardian has the right to authorize a minor under their care to engage in employment that violates state labor laws.<sup>163</sup> In its ruling, the Court determined that the state's *parens patriae* interest in safeguarding the child's welfare takes precedence over the parent's interest, thereby checking the authority of legal guardians to permit minors to engage in such employment practices.<sup>164</sup>

Parental rights scholars argue that recognizing parents' rights protects the family unit against the state. Professor Emily Buss examined the effect of the Supreme Court's decision in *Troxel v. Granville* on parents' rights.<sup>165</sup> While *Troxel* focused on a custody proceeding brought by third parties (the paternal grandparents) against the mother, the analysis regarding when and how a state should be permitted to intervene in the family unit is applicable in the child welfare context as well.<sup>166</sup> Buss argues that the Court attempted to find that parents had a constitutional right to rear and raise their children and that courts

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155. *Id.*

156. *Id.* at 68.

157. *Id.*

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

159. *Id.*

160. MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 1 (2005).

161. *Id.* at 2.

162. *Id.* at 2–3.

163. *Prince v. Massachusetts*, 321 U.S. at 159.

164. *Id.* at 171.

165. Emily Buss, *Adrift in the Middle: Parental Rights after Troxel v. Granville*, 2000 SUP. CT. REV. 279, 280–87 (2000).

166. *Id.*

could permit an intrusion on those rights by third parties, thereby diluting the right.<sup>167</sup> Buss proffers that the Court's decision in *Troxel* is not practicable.<sup>168</sup> Ultimately, Buss concludes that children would be "best served" by an approach that strengthens parents' rights to bulwark the family unit against state intervention.<sup>169</sup> Buss' recommendation relies on the assumption that parents are generally better equipped to make decisions regarding their children and will perform better than the state in making those decisions, even where they are not ideal parents.<sup>170</sup>

The application of Buss' argument does not extend to investigatory stage of child welfare proceedings. The reason that children need representation in the investigatory stage of child welfare proceedings is that their parents are not able to protect them. A fit parent who is alleged to neglect or abuse their children does not have parental decision-making abilities. The state can override the parents' ability to decide for their child without court intervention. The social worker has the authority to meet with the child without the parents' knowledge or consent to investigate the allegations against the parents. Therefore, a qualified and trained attorney representing the child could be critical in safeguarding the child's bodily autonomy and personal information.

In analyzing the importance of parental rights, Professors Huntington and Scott identify two main reasons why they should remain the "backbone of family law."<sup>171</sup> First, "parental rights promote the stability of the parent-child relationship by restricting the state's authority to intervene in families."<sup>172</sup> The second is that "parental rights ensure that parents, rather than a private third-party or state actor such as a judge or social worker, make decisions about what advances a child's interest."<sup>173</sup> Both reasons focus on the child's well-being perspective. Huntington argues that permitting the government and third parties to make decisions on behalf of children can harm the parent-child relationship and impose value judgments on people other than parents when making decisions on behalf of the child.<sup>174</sup> Huntington and Scott posit that protecting and promoting parental rights ensures "stability of the parent-child relationship, parents are in the best position to understand and make decisions about children's needs, and to protect low-income families of color against an intrusive state."<sup>175</sup>

Safeguarding a parent's right to nurture and raise their child strengthens the bond between parent and child, reinforcing the foundation of the family dynamic. However, this author's approach would respect the parents' rights

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167. *Id.*

168. *Id.* at 279–80.

169. *Id.* at 287.

170. *Id.*

171. Clare Huntington & Elizabeth Scott, *The Enduring Importance of Parental Rights*, 90 *FORDHAM L. REV.* 2529, 2529 (2022).

172. *Id.*

173. *Id.*

174. *Id.* at 2530.

175. *Id.* at 2533.

and protect the child from undue invasion by the state. While it is true that assigning an attorney at the investigatory stage of the proceedings would place a third party in the position of potentially making decisions about a child instead of a parent, requiring that the attorney represent the child's stated interest based on the presumption that remaining with their parents is in the child's best interest would be a stop-gap in allowing the attorney to exercise their judgments instead of what is best for the child, to stay with their parents if safe to do so.

### C. Family Unit as a Constitutional Right

Nearly fifty years after the Supreme Court recognized parental rights, the broader concept of constitutional protection of the family unit as a liberty interest encompassed by the Due Process Clause was acknowledged.<sup>176</sup> In *Moore v. East Cleveland*, the city defined family in a way that precluded the grandmother from having her grandson, who was in her care, live with her.<sup>177</sup> The Supreme Court held that "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which the challenged regulation serves them."<sup>178</sup> The Court ultimately found that the city's ordinance was unconstitutional. The rights of the family unit are more important than children's rights, even in the context of liberty rights.<sup>179</sup>

The Court again affirmed the constitutional protection of the family unit in *Michael H. v. Gerald D.* In *Michael H.*, the mother of the child had an extramarital affair with her neighbor.<sup>180</sup> The affair resulted in the birth of a daughter.<sup>181</sup> A paternity test established that the neighbor was the child's biological father ("nonmarital father").<sup>182</sup> Throughout the early stages of her life, the child spent time with the nonmarital father, who publicly recognized her as his daughter.<sup>183</sup> The nonmarital father filed for visitation with the child when his attempts to visit with the child were unsuccessful.<sup>184</sup> The mother eventually reconciled with her husband ("legal father"), who intervened in the proceedings filed by the nonmarital father and filed a motion for summary judgment.<sup>185</sup> The legal father relied on California law, which presumed that any child born during a marriage was a child of the marriage.<sup>186</sup>

The child, through her attorney, sought visitation with the nonmarital father.<sup>187</sup> The Court held that the "marital unit," recognized as a long-standing

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176. *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977).

177. *Id.*

178. *Id.*

179. *See Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

180. *Id.* at 113–14.

181. *Id.*

182. *Id.* at 114.

183. *Id.* at 114–15.

184. *Id.* at 114.

185. *Id.* at 115–16.

186. *Id.* at 115.

187. *Id.* at 114.

institution and tradition in the United States, should be treated as paramount. Therefore, the Court rejected the nonmarital father and the child's arguments and denied the nonmarital father's application.<sup>188</sup> The Court did not find that a legal relationship existed between the nonmarital father and the child.<sup>189</sup> The family's right was above the child's right when the Court recognized that the marital unit's fundamental protection was above that of a child's right to a relationship with a biological parent.<sup>190</sup>

In *Santosky v. Kramer*, the Supreme Court analyzed the interests of parents and children in the context of a termination of parental rights proceeding.<sup>191</sup> In *Santosky*, the mother appealed the termination of parental rights evidentiary standard in New York State.<sup>192</sup> When determining that the fair preponderance of the evidence standard was insufficient due to the fundamental rights at stake, the Court recognized that parents and children share a common interest in avoiding the erroneous dissolution of parental rights.<sup>193</sup>

It is reasonable to surmise that parents and children share a common interest in preventing the wrongful termination of parental rights and a mutual interest in avoiding erroneous removal from a parent's care in the investigatory stage of these proceedings.<sup>194</sup> The principles underlying the *Santosky* decision, which emphasize the importance of protecting the fundamental rights of parents and children in matters of parental rights, support this conclusion.<sup>195</sup> Before a finding of parental unfitness in the fact-finding stage of abuse and neglect proceedings, children and parents who are the subjects of those proceedings are not presumptively in an adversarial relationship.<sup>196</sup> Notably, the interests of a parent and their child generally converge before a determination of parental unfitness.<sup>197</sup> Nonetheless, it is imperative to acknowledge that these interests are different. This article recognizes the non-adversarial relationship generally present during the investigatory stage of child welfare proceedings and proposes, based on this premise, the representation of children in this stage.

### III. LEGAL REPRESENTATION IN CHILD WELFARE PROCEEDINGS

There is presently no representation for children in the investigatory stage of child welfare cases. However, several states have started pilot programs to represent parents during this stage.<sup>198</sup> The lack of representation for children in the investigatory stage creates an imbalance in the protection of the rights of significantly disadvantaged children. A child's right to family integrity cannot

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188. *Id.* at 131–32.

189. *Id.* at 132.

190. *Id.* at 131–32.

191. *Santosky v. Kramer*, 455 U.S. 745 (1982).

192. *Id.* at 752.

193. *Id.* at 766.

194. *Id.* at 761.

195. *See id.*

196. *See id.* at 760.

197. *See id.* at 761; *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

198. Ballout & Drawing, *supra* note 33.



be protected where both the state's counsel and parent's counsel are thoroughly familiar with the facts and family during the most critical early stage of the case, and the children's attorney is not. It may be too late to protect the child's family integrity and bodily autonomy by the time the playing field is even.

*A. Parental Representation in the Investigatory Stage*

Family law proceedings, and more specifically, child welfare proceedings, have a representation structure that is unique from other areas of practice. Cases are three-party cases with the attorney for the child either siding with the local department or the parent. In most states, when a case begins in court, children subject to child welfare proceedings are automatically assigned a legal representative, regardless of age.<sup>199</sup> Parents in these proceedings are also generally assigned counsel when they cannot afford to hire an attorney.<sup>200</sup>

In recent years, a movement for representation before official state court intervention into family life through the filings of neglect and abuse petitions has emerged.<sup>201</sup> The movement seeks to assign counsel to represent parents when reporters first report child maltreatment to a state's child maltreatment hotline.<sup>202</sup> An essential aspect of the pilot programs that provide such representation is to avoid an indicated finding in the state's maltreatment registry, which can have a long-lasting negative impact on the family.<sup>203</sup>

Attorneys represent the parents throughout the legally mandated investigation into the allegations received by the hotlines to connect parents with services and advocate on their behalf in the context of the inquiry.<sup>204</sup> Studies have shown that representation of parents at the investigatory stage results in more positive outcomes for families and fewer removals when cases end up in family court.<sup>205</sup>

The investigatory stage model of legal representation provides representation to parents at risk of losing their children to foster care when the local department is conducting a child maltreatment investigation. Generally, investigatory models of representation have some or all of the following components: (1) focus on the representation of parents, not children; (2) have client-focused and lead representation; (3) focus on building and creating relationships with communities; (4) build relationships with the Department of

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199. Child Abuse Prevention and Treatment (CAPTA) Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (current version at 42 U.S.C. § 5101).

200. See statutes cited *supra* note 32.

201. Ballout & Drewing, *supra* note 33.

202. Vivek Sankaran, *Using Preventive Legal Advocacy to Keep Children from Entering Foster Care*, 40 WM. MITCHELL L. REV. 1036, 1038 (2014); Hernandez & Ismail, *supra* note 3, at 660.

203. Hernandez & Ismail, *supra* note 3, at 668–69 (noting that indicated findings after a child protection investigation have long-lasting impacts on the family that can negatively impact a parent's ability to find employment and serve as a relative resource for other family members, and future investigations often consider indicated findings).

204. See Sankaran, *supra* note 202, at 1041–42.

205. Sankaran, *supra* note 202, at 1042–43.

Social Services; and (5) use a multidisciplinary approach to representation including using parent advocates who have lived experience.<sup>206</sup>

During investigatory-stage representation, one of the primary objectives is to educate parents about their legal rights in the context of child maltreatment investigations and link them with appropriate services.<sup>207</sup> The purpose is to reduce the risk of removal of children from their parent's care in cases where the allegations are due to poverty or lack of access to services.<sup>208</sup>

Pilot programs also seek to build community trust by presenting programming to educate parents about their rights and building relationships with community partners to provide services to parents needing assistance.<sup>209</sup> Establishing relationships with community partners builds trust and fosters an environment where parents are comfortable accepting and interacting with assigned counsel.<sup>210</sup>

An essential aspect of these programs' success is forming a relationship with the local department. This relationship permits pilot programs to identify parents accused of maltreating their children so that parents can receive representation.<sup>211</sup> Lastly, pilot programs use a multidisciplinary approach to representation, working with investigators and social workers to provide clients with a multifaceted approach.<sup>212</sup>

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206. CHILDREN'S LAW CENTER OF CALIFORNIA, *Multidisciplinary Advocacy*, <https://www.clccal.org/our-work/multidisciplinary-advocacy/> [<https://perma.cc/BNK6-HKVG>]; Jody Leibman Green & Kaveh Landsverk, *Breaking the Foster Care Cycle, One Young Family at a Time*, ABA CHILDREN'S RIGHTS LITIGATION (July 1, 2021), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2021/summer2021-breaking-the-foster-care-cycle-one-young-family-at-a-time/> [<https://web.archive.org/web/20230311194021/https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2021/summer2021-breaking-the-foster-care-cycle-one-young-family-at-a-time/>]; Gianna Giordano & Jey Rajaraman, *Increasing Pre-Petition Legal Advocacy to Keep Families Together*, ABA CHILDREN'S RIGHTS LITIGATION (Dec. 15, 2020), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2020/winter2021-increasing-pre-petition-legal-advocacy-to-keep-families-together/> [<https://web.archive.org/web/20210123090652/https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2020/winter2021-increasing-pre-petition-legal-advocacy-to-keep-families-together/>]; Brianna Harvey et al., *Reimagining Schools' Roles Outside the Family Regulation System*, 11 COLUM. J. RACE & L. 575 (2021); Ballout & Drewing, *supra* note 33; Katie Joh et al., *Cornerstones of Interdisciplinary Prevention Advocacy*, ABA CHILDREN'S RIGHTS LITIGATION (Feb. 9, 2023), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2023/winter2023-cornerstones-of-interdisciplinary-prevention-advocacy/>; Hernandez & Ismail, *supra* note 3, at 672.

207. Hernandez & Ismail, *supra* note 3, at 672–73.

208. See Sankaran, *supra* note 202, at 1041.

209. Hernandez & Ismail, *supra* note 3, at 84.

210. See Hernandez & Ismail, *supra* note 3, at 685.

211. See Hernandez & Ismail, *supra* note 3, at 691.

212. Hernandez & Ismail, *supra* note 3, at 672.

### B. *Children's Right to Counsel and Models of Representation*

Since the inception of models of representation for children, various scholars have analyzed which representation model best serves the child. However, an in-depth analysis of which model of representation is best is beyond the scope of this article. This author adopts the stated interests' representation model as best suited to serve the child in the investigatory stage of child welfare proceedings.

#### 1. Guardian Ad Litem Model of Representation

After the initial passage of CAPTA, most states selected the most cost-effective model: a guardian ad litem appointment.<sup>213</sup> The representation structure was investigative and reporting.<sup>214</sup> Law Guardians, or, depending on the State, Guardians ad Litem, were assigned to represent children.<sup>215</sup> The representation model involved meeting with children, visiting the home, and investigating by speaking with collateral resources.<sup>216</sup> A written or oral report would then be provided to the court to inform the court's decision.<sup>217</sup>

Court-appointed special Advocates ("CASA") are layperson volunteers who complete training to learn about their role and often fulfill the statute's requirements.<sup>218</sup> CASA volunteers mostly acted in a capacity similar to that of a social worker. Due to their lack of legal training, their representation does not involve legal strategies.<sup>219</sup> Further, this approach is an investigating and reporting model, so no confidentiality exists between a CASA volunteer and their child client.<sup>220</sup>

A guardian ad litem or a legal guardian ad litem who advocates for a child's best interest can negatively impact the child's outcome based on the GAL's biases.<sup>221</sup> Deciding what is in the child's best interests requires the GAL to use their value judgments about parents and children.

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213. Merrill Sobie, *Representing the Child in Child Protective Proceedings: Toward a New Paradigm*, 28 WIDENER COMMONWEALTH L. REV. 169, 176 (2019).

214. *Id.* at 177.

215. *Id.* at 176–78.

216. *See id.* at 180–81.

217. *Id.*

218. *The CASA/GAL Model*, CASA/GAL: COURT APPOINTED SPECIAL ADVOCATES, GUARDIANS AD LITEM FOR CHILDREN, <https://nationalcasagal.org/our-work/the-casa-gal-model/> [<https://perma.cc/R4AC-42GJ>].

219. *Id.*

220. *Id.*

221. *See* Matthew L.M. Fletcher & Kathryn E. Fort, *Indian Children and Their Guardians Ad Litem*, 93 B.U. L. REV. ANNEX 61, 64 (2013). Professors Fletcher and Fort discuss how the inherent bias of GALS and LGALS against Indigenous children often goes against the purpose of ICWA. *Id.* While their discussion focuses on GALS in the ICWA context, the analysis can easily apply to children from other racial or ethnic groups who are overrepresented in the child welfare system, just like Indigenous children are.

## 2. Best Interests of the Child Representation

The legal approach of best interests of the child representation involves appointing a specially trained attorney to represent the child in legal proceedings, with the primary responsibility of advocating for the child's best interests.<sup>222</sup> This approach differs from traditional legal representation, where the attorney solely advocates for their client's stated desires, regardless of whether it aligns with the child's best interests. The attorney appointed for the best interests of the child representation is required to conduct an in-depth investigation and analysis of the child's unique circumstances, including their emotional, physical, and psychological needs, and use that information to make informed recommendations to the court.<sup>223</sup> The top priority throughout the legal process is to give the child a voice and protect their well-being.<sup>224</sup>

## 3. Stated Interest Representation Model of Representation

In approximately half of the states in the United States, attorneys represent children using a stated interest representation model. According to this model, the attorneys gather crucial information about the child and their situation from various sources, such as the child, their parents or guardians, medical professionals, therapists, teachers, and other relevant parties. This information is then carefully analyzed and used to build a strong case that supports the child's stated interests and protects their rights throughout the legal process. The ethical rules governing the attorney's role are the same as those that apply to attorneys representing adults, with a few exceptions.<sup>225</sup>

One notable exception is the attorney for the child's ability to "substitute judgment" in certain circumstances. Substituting judgment means that if a child is incapable of making a "knowing, voluntary and considered judgment," or if the child's position places them at "substantial risk of imminent, serious harm," the attorney can step in and make decisions on behalf of the child.<sup>226</sup> However, these decisions must always be based on guidelines specified by state-specific rules, ensuring that the child's best interests are always the top priority.

Scholars like Professor Guggenheim have argued that assigning children counsel in child welfare proceedings gives the state more power. An attorney for the child will advocate for what they prefer instead of what the child wants due to their interest in winning, which is more likely if they side with the agency.<sup>227</sup>

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222. Sobie, *supra* note 17, at 787.

223. *See generally* Sobie, *supra* note 17, at 793.

224. *See generally* Sobie, *supra* note 17, at 793.

225. Sobie, *supra* note 17, at 794.

226. *See generally* Sobie, *supra* note 17, at 795.

227. Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L.J. (SPECIAL ISSUE) 805–06, 812, 816, 830, 832 (2006) (arguing that children should not be provided with counsel in most cases, as the attorneys may prioritize their preferences and interests over the children's). However, Guggenheim recognized that JRD veered from its usual support of the department's position by strongly opposing the unwarranted removal of children from their mothers' care solely because the children had witnessed domestic violence. *Id.*

While Professor Guggenheim's concerns are valid, adopting Professor Duquette's stated interest representation by qualified and trained attorneys' model has proved successful. Where an attorney is representing the child based on stated interest representation in the investigatory stage of the case, the assignment of an expert with lived experience in foster care will further mitigate this risk by aiding the attorney in understanding the implications of placement in foster care and the need to advocate for placement only when truly needed.

Scholars overwhelmingly support a targeted approach to representation where children are entitled to quality legal representation and attorneys trained in core aspects of representation; representation should include multidisciplinary representation and ABA<sup>228</sup> and NACC<sup>229</sup> standards should be adopted.<sup>230</sup> When an attorney must advocate for a child's best interest, they should still express their stated interest in court.<sup>231</sup> Last, children should be able to seek remedies against their attorneys when they do not meet their ethical obligations.<sup>232</sup> Studies exploring which representation best serves children have found that where children receive quality legal representation, the stated interest model consistently results in better outcomes in the courtroom and beyond.<sup>233</sup>

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228. ABA MODEL ACT, *supra* note 5, at § 3(a) (requires that lawyers representing children have the same obligation "to the child as is due an adult client"); *id.* §§ 1(c), 3(d), 7(a) (requiring representation at all stages of the proceeding.); *id.* § 5 (b) (recognizes the right of all children to quality representation.); *id.* § 3 (urging states to establish minimum training requirements for lawyers.); *id.* § 4.

229. NACC RECOMMENDATIONS, *supra* note 5.

230. Wendy Shea, *Legal Representation for Children: A Matter of Fairness*, 47 MITCHELL HAMLIN L. REV. 732, 747 (2021) (defining quality legal representation as manageable caseloads, sufficient staffing, adequate training about child development, zealous advocacy, and a multidisciplinary approach to child representation); Donald Duquette, *How to Improve Legal Representation of Children in America's Child Welfare System*, UNIV. MICH. L. SCH. SCHOLARSHIP REPOSITORY, Feb. 2022, at 1, 4, 6, 20 (taking an early multidisciplinary approach, with attorneys respecting social workers' skills, led to a positive outcome in Duquette's study. It resulted in a best practices model at the Center, identifying "Six Core Skills" for attorneys representing children. These skills included "Entering the Child's World," "Assessing child safety," "Actively Evaluate Needs," "Advance Case Planning," "Develop Case Theory," and "Advocate Effectively." The project trained attorneys to understand and guide children, focus on removing danger, assess family problems, develop a case theory, and collaborate in finding solutions.).

231. Shea, *supra* note 230, at 746 (arguing that children should receive quality legal representation if a court has jurisdiction over the family). Representation of children is needed because children are interested in the "integrity of the family unit," and the proceedings directly affect "a child's immediate and potentially long-term health, welfare, and safety." *Id.* Therefore, all parties should be represented in the proceedings to protect these interests. Professor Shea argues that Alicia LeVezu's recommendations should be adopted, which call for mandated legal representation by attorneys in all child welfare cases. *Id.* Whether attorneys follow a stated interest representation or a best interest representation, the attorney should be required to state the child's expressed interest on the record.

232. Shea, *supra* note 230, at 746.

233. Alicia LeVezu, *Alone and Ignored: Children Without Advocacy in Child Abuse and Neglect Courts*, 14 STAN. J.C.R. & C.L. 125, 130, 138, 157–58, 161 (2018). (When writing her article, LeVezu was an Instructor at the University of Washington School of Law Children and Youth Advocacy Clinic.). LeVezu conducted a study in Washington State to determine the

#### IV. CHILDREN SHOULD BE ASSIGNED LEGAL COUNSEL IN THE INVESTIGATORY STAGE OF CHILD WELFARE PROCEEDINGS

The history of the child welfare system documents the overrepresentation of Black and Indigenous children in the foster care system. It also highlights the flaws in the system, such as gaps in parental representation and state failures in protecting children, all supporting the need for representation of children in the investigatory stage of proceedings. Stated interest representation by qualified attorneys who have received training in best practice representation of children can aid in reducing the unnecessary entry of children into foster care where parents do not have the power to do so. This Part will discuss the reasons for the need for representation and suggest a model of representation for children.

##### *A. Reasons Investigatory Stage Representation is Needed*

This Part will discuss the representation of children at the investigatory stage of the proceedings. Counsel must represent children: (1) to safeguard them from both “underprotection” and “overprotection” by the state; (2) because dual representation by parent’s counsel creates an inherent conflict; (3) representation is needed to protect family integrity; and (4) representation is needed to protect bodily autonomy.

##### 1. Children Must be Safeguarded from the State

In the context of child welfare proceedings, the presumption that fit parents act in the best interest of their child generally limits the state’s ability to interfere with a parent’s relationship with their child.<sup>234</sup> However, this presumption is subject to exceptions, and one such exception arises during the investigatory phase of a child welfare case. At this stage, the state may exercise its *parens patriae* powers, even without a finding of parental unfitness. The assertion that the child is at imminent risk typically serves as the basis for

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importance of children representation in child welfare proceedings. She highlighted that the basis of quality representation for children should be the child’s stated interest and argued that a child’s voice must be heard in Court to protect their well-being. LeVezu also emphasized the significance of a fair process for a perception of judicial fairness and concluded that training and support are crucial in child representation to ensure that their voice impacts the outcome of the litigation. Additionally, she noted the positive influence of this type of representation beyond the courtroom. *See also* Duquette, *supra* note 230, at 3–4, 6, 10–11, 20. Professor Duquette’s research supports LeVazu’s findings, which summarize the recommendations of the National Quality Improvement Center on the Representation of Children in the Child Welfare System. The study found that children assigned an attorney trained by the Quality Improvement Center were 40 percent more likely to achieve permanency within six months compared to the control group in Georgia and Washington State. Based on the study’s findings, Duquette recommends that states adopt the 2011 ABA Model Act and the National Association of Counsel for Children’s 2021 recommendations regarding the representation of children in child welfare cases. The study also found that providing clear direction to attorneys regarding their duties to child clients led to compliance. *Id.*

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

exercising these authorities, as prompt intervention is imperative to safeguard the child's welfare and security.

Accordingly, the state has a duty to assign counsel in the investigatory stage of the proceedings to protect children who are the subject of the investigation because their parents cannot protect them. Children's constitutional rights to family integrity and bodily autonomy are the basis of the state's duty to protect the child during the investigatory stage.<sup>235</sup> During the investigatory phase of child welfare proceedings, while parents have not been deemed unfit and are thus presumed to act in the best interest of their children, their ability to do so is compromised by the extensive authority of the state to probe allegations of child maltreatment. As illustrated earlier, at this stage of the case, children are particularly susceptible to state intervention and frequently undergo intrusive physical and psychological assessments to investigate allegations of mistreatment leveled against their parents. Owing to the potential psychological impact on children subjected to such investigations, along with the possibility of unwarranted separation leading to additional distress, it is incumbent upon states to appoint legal representation to safeguard the rights of children to family integrity and bodily autonomy during the investigative phase of child welfare cases.

*Parens patriae* powers enable the state to enter a family's home, interview the children, and conduct physical examinations of the children. If a state can use its powers to investigate without parental unfitness, it can also use its powers to assign attorneys for children in the investigatory stage. The exercise of *parens patriae* powers during the investigatory phase of a child welfare proceeding by assigning counsel to children raises essential legal and ethical questions. Critics could argue that using these powers may infringe on a parent's fundamental right to parent their child and that such interference should be limited to cases where there is a clear and present danger to the child. However, an argument in favor of exercising *parens patriae* powers to assign counsel to children in the investigatory stage is that it is necessary to protect vulnerable children at risk of harm and that the state must act promptly to ensure their safety and well-being. To be clear, the harm that children potentially face in the investigatory stage of child welfare proceedings is arguably both alleged harms perpetrated by parents, as well as potential harm imposed by the state through misuse of its powers. Representation during the investigatory stage aligns to protect the child.

*DeShaney* further highlights the critical need for the state to exercise its parental powers to represent counsel for children during the investigatory stage of child welfare cases. In *DeShaney*, the case was never brought to court to seek court intervention on behalf of the child. Numerous calls were made to the state's hotline for child maltreatment by medical professionals concerned for the child's safety. After making the call to report the suspected abuse, it is reasonable to conclude that the medical professionals believed that no further action was necessary. In fact, after calling in a report to the state's hotline, there is no further action that a mandated reporter can take beyond a temporary hold

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235. *Id.*

in the hospital. After that, there is an assumption that the state will protect the safety and welfare of the child by utilizing the procedures put in place by the state to protect the child's well-being. The state itself is the only entity ensuring compliance with the state's measures. Furthermore, if the state fails to protect the child, *DeShaney* holds that there is no recourse for the child from a constitutional perspective. This reality results in dire prospects for children when caseworkers are often overworked and understaffed.

States' failures in "underprotecting" children are still prominent today, thirty-five years after the decision in *DeShaney*. In November of 2023, a local department in California was found not to have responded to almost a thousand cases of reported maltreatment significantly past the twenty-four-hour, ten-day investigation requirement.<sup>236</sup> During the investigation of the state's response to hotline calls, handwritten documentation of cases reported to the state's hotline was found, with one case alleging child abuse.<sup>237</sup> There was no response by the state to the report that alleged child abuse.<sup>238</sup> In West Virginia, "only about half of child abuse and neglect referrals were investigated within the state-mandated timeframe."<sup>239</sup> In one case, Family members reported to the local news that they placed a call to the state's maltreatment hotline to report concerns about the fourteen-year-old child who was found by police in a "skeletal state" and whose mother was ultimately charged with her death.<sup>240</sup>

In addition, the state's "overprotection" still exists today, despite the passage of twenty years since the *Nicholson* decision. Texas has recognized the negative impact of "overprotection" and that there were children in its foster care system who could be safely at home; it recently narrowed the definition of neglect in its state law.<sup>241</sup> However, even despite this change, child protection laws are still being disproportionately enforced in Black communities in Texas.<sup>242</sup> The change in the definition of neglect to rule out cases that previously fell into the definition due to poverty, as well as the decrease in foster care rates as well as fatality rates,<sup>243</sup> supports the conclusion that children were

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236. Christopher Damien, *Some Reports of Child Abuse in Imperial County Weren't Investigated for Months, State Says*, PALM SPRINGS DESERT SUN, <https://www.desertsun.com/story/news/local/2023/11/13/california-county-social-workers-failed-to-investigate-child-abuse-reports-for-months/71531117007/> [<https://perma.cc/P6CP-UXCC>] (last updated Nov. 28, 2023, 10:14 AM).

237. *Id.*

238. *Id.*

239. Amelia Ferrell Knisley, *State Denies Record Requests in High-Profile Death of Boone County Girl*, W. VA. WATCH (May 6, 2024, 8:11 PM), <https://westvirginiawatch.com/2024/05/06/state-denies-record-requests-in-high-profile-death-of-boone-county-girl/>.

240. *Id.*

241. See Annie Sciacca, *In Texas, New Laws and Policies Have Resulted in Far Fewer Children Removed by CPS From Their Homes*, THE IMPRINT: YOUTH & FAMILY NEWS (Apr. 23, 2024, 5:35 PM), <https://imprintnews.org/top-stories/texas-policies-fewer-foster-care-removals/248935>.

242. *Id.*

243. *Id.*



being removed unnecessarily from their homes due to the state's "overprotection."

A child's short-term removal from their family has long-term impacts, like disrupting the child's ability to form healthy attachments.<sup>244</sup> States returned most of the 25,000 children placed in stranger foster or congregate care each year for thirty days or less to their caregivers.<sup>245</sup> The data demonstrates that approximately ten percent of the children placed in foster care annually return to their caregivers in less than thirty days.<sup>246</sup> Data show that "[t]he median length of stay among short stayers was six days, with 75% discharged within two weeks of their removal."<sup>247</sup> The statutory framework in some states, where law enforcement is permitted to remove children from their homes, spurred instances of short stays in foster care.<sup>248</sup> In contrast, caseworker decision-making drives other short stays in foster care.<sup>249</sup>

It is often the case in child welfare cases that a parent's ability to make decisions in the child's best interest is handicapped due to the invasive nature of the investigation conducted by the state.<sup>250</sup> This handicapping of a fit parent's ability to protect and guide their children requires the active participation of children in decisions that affect the outcome of their lives, which is paramount to minimizing the trauma that children who are the subjects of child welfare investigations face.<sup>251</sup> While this author does not advocate for children being the ultimate decision-makers in the case, even when represented by counsel, allowing them to be active decision-makers who contribute to the investigation by sharing their positions and experiences will reduce the likelihood of them feeling alienated.

Representation at the investigatory stage for children would recognize that parents often do not have the power to protect them at this stage and thus would minimize the risk of children falling through the cracks due to the state's failure to act, as well as children being removed unnecessarily from their homes. Attorneys representing children have an ethical obligation to meet with their clients from the time of appointment through the critical stages of the proceedings and can, therefore, monitor the case.

An attorney who follows the model guidelines for child representation would be well aware if the state failed to intervene where a child client was in

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244. See Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 212 (2017).

245. *Id.* at 216–18.

246. *Id.*

247. *Id.* at 217.

248. *Id.* at 221.

249. *Id.* at 224–25.

250. KELLEY FONG, INVESTIGATING FAMILIES: MOTHERHOOD IN THE SHADOW OF CHILD PROTECTIVE SERVICES 91–97 (2023).

251. See BURNS, *supra* note 38, at 210, which conducted a study finding that many children in the child welfare court system feel unheard and have negative feelings towards the process. Those who understand the system and process have more positive attitudes and want to be empowered and listened to.

danger, as well as if a state overexerts its powers to remove a child where it is not warranted. Ensuring such representation would provide a check on the state to increase the chance of compliance. Furthermore, where there is a lack of proper oversight by the state, in some states, attorneys for children can initiate a child neglect or abuse case in court.<sup>252</sup> Suppose a parent placed a child's life at imminent risk. In that case, an attorney representing the child will investigate independently of the local department. That attorney could aid in identifying potential kinship resources to care for the child should the child need to be removed from the parent's care. The attorney could independently assess whether considering a kinship resource ruled out by the state for decades of history in the system would be appropriate. In addition, the attorney could assist in expeditiously identifying and connecting their client with services to address the double trauma of abuse and removal from their home.

While arguably, the child's attorney would duplicate the function of the state in some ways, any overlap would be minimal. The focus of the child's attorney is the child's best interests and the child's stated interest. Even when an attorney uses the stated interest representation model to represent a child, the attorney still considers the child's best interests. Although the attorney cannot advocate against their client's stated interest, they can still counsel their client on the positives and negatives of their position. The child's attorney would also create a legal theory of the case to advocate for the child if court intervention is sought. Conversely, the state's role as *parens patriae* is safeguarding the child's welfare and safety. Still, this responsibility only sometimes coincides with what is in the child's best interest, as is evident from *Nicholson v. Scopetta*.<sup>253</sup>

Though legally distinguishable in some sense, when the state is exercising its *parens patriae* powers in the context of child welfare proceedings, it is also acting *in loco parentis*. However, as highlighted in *DeShaney*, the state has a conflict of interest when exercising its powers. The state is obligated to protect the welfare and safety of the child while protecting its interest to minimize cause and insulate itself from liability. Therefore, just as in cases where a parent with the power to make decisions regarding their child's life has a conflict of interest with the child, to adequately protect children from that conflict, another form of representation should be assigned. An example of such a conflict is cases where a parent seeks assistance from the state in reigning in a child who is not following the parent's rules; there is an assignment of a guardian ad litem to make decisions on behalf of the child that a parent would make absent a conflict. Similarly, the state must designate a legal representative to advocate zealously for the child and protect it from the state's powers.

## 2. Dual Representation Creates an Inherent Conflict

Child welfare cases create an unavoidable conflict between parents' and children's rights and interests and place both the parent's and children's right to family integrity at risk. By their very nature, child welfare cases place parents in a defensive stance against allegations that they have maltreated their children.

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252. See, e.g., N.Y. FAM. CT. ACT § 1032(a).

253. 3 N.Y.3d 357, 366 (2004).

There is tension between the parents' need to defend their actions (or inactions) and ensure they act within the child's best interests. This tension between parents and children is present even in the investigatory stage, where parental unfitness is not found. In this scenario, the assignment of counsel for parents and children to act on their behalf in the investigatory stage of a child welfare case is essential to ensure that the parents can defend their constitutional rights to their children. Children should, in turn, be allowed to have someone independent from their parents advocate on their behalf to mitigate the risk of the child's unnecessary removal from their family and an invasion of their bodily autonomy.

The role of a parent's attorney in a child welfare proceeding is necessarily to defend the allegations against their client. Their investigation in preparation for that defense does not begin with a neutral approach to assessing the facts. In contrast, an attorney for the child has ethical obligations that require more than that of a parent's attorney. An attorney for the children must, of course, act in their client's interests. However, despite their allegiance to their clients, their ethical duties demand that they conduct an impartial inquiry into the claims to prevent themselves from breaching their ethical obligations by advocating for a stance that may put their clients in danger either due to harm caused by a parent or an unnecessary removal by the state. An attorney for the child's seemingly neutral stance at the beginning of their representation places them in the position of being given more of the court's deference in practice than a parent's attorney or even the attorney for the local department. Therefore, the preparation and advocacy of an attorney for the child on behalf of their client can, at times, fortuitously support the parent's defense. Arguably, two attorneys with the analogous interest of keeping the family together by ensuring that the child is only removed from their parent's care, if necessary, will have a greater chance of success.

In contrast, the task of a parent's attorney when representing the family as a whole, including the children's needs, when assessing the family's needs to avoid court filing and potential removal divides the attorney's focus between representing the parent's interest and safeguarding the child. When forming a relationship with a parent, it is plausible that an attorney could interact with the child(ren) and potentially inadvertently obtain information that would otherwise not be so readily available if the child had independent counsel. For example, if a child is receiving therapy, a parent's attorney may wish to review the child's records or speak with the child's therapist if the child's therapy is related to potential court proceedings. Outside of court proceedings, a parent can sign a HIPAA for their attorney to speak with the child's therapist and gain information not so easily obtained if the matter was in court. If an attorney for the child were representing the child at this stage, the attorney would assess whether it would be appropriate for the parent's attorney to gain access to the information. It is likely that, to preserve the child's privacy, the attorney for the child would decline to consent to have the parent's counsel speak directly with the child's therapist. However, the attorney for the child could interact with the therapist and assist the family with resolving any issues resulting in a court filing if it is the child's wish and in the child's best interest to do so.

When independent counsel represents a child, the child's attorney can easily interact with collateral resources, including mandated reporters. It would be easier for a child's attorney to interact with these collateral sources than a parent's attorney because it is the role of the child's attorney to represent the child's stated interest and best interests. Presumably, such sources may be more hesitant to interact freely with a parent's attorney because the objective of a parent's attorney is to represent their client's interests, which will most certainly be to avoid court intervention at all costs.

As noted, the objective of the parent's and child's counsel when representing their clients is often aligned. However, children still need independent representation whether or not their objectives are aligned. Where the state is "overprotecting," the child's counsel needs to ensure that the child's independent right to family integrity, as well as bodily autonomy, is protected. In those critical cases where they are not, the child needs to have independent representation. Where it appears from an attorney for the child's independent investigation that the child is at imminent risk to life or health in their parent's care, the attorney can take appropriate steps to ensure the child's safety. *DeShaney* and *Nicholson* highlight the state's inability to fulfill this role fully. The laws of some states recognize an attorney for the child's independent ability to initiate child welfare proceedings where necessary to protect the health and safety of the child. Where an attorney for the child has represented the child from the beginning of the local department's investigation, the attorney can assist with identifying potential relative placements where staying home is not a possibility, thereby reducing the placement of children in stranger foster care. Relative placements result in children having consistent contact with their parents more frequently than when placed in foster care, where an already overburdened agency only offers visitation once per week.

An argument under the guise of the parental rights doctrine that representation in the investigatory stage for children would improperly impose on a parent's rights misses one critical aspect of this stage of child welfare proceedings. In the investigatory stage of a child welfare case, the state has the power to intrude upon the parental sphere beyond the control or decision-making of the parents. The parent alone cannot stand up against the state. The state is yielding power that neither the parent nor their attorney can control without distracting from the parent's defense in some way. Their attorney can assist in keeping the family together but splits the parent's attorney's focus between zealous advocacy on behalf of the parent and zealous advocacy necessary to protect the child from unwarranted physical intrusion by the state. Therefore, the argument that a child should not be assigned counsel in the investigatory stage because a fit parent will presumably act in the child's best interest falls flat because the parent cannot act due to the government's intervention.

Furthermore, relying on another party to protect children's rights creates an inherent conflict due to the potential for an adversarial position to develop at some point in the litigation.<sup>254</sup> Arguably, such a conflict could exist when

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254. LeVezu, *supra* note 233, at 161.

appointing counsel for children in the investigatory stage of child welfare proceedings. However, there is a presumption that a fit parent will act in their child's best interest, and, at this stage, there is no finding that the parent is unfit. In that sense, there is an alignment of the parents and the child's interest in ensuring the child's protection from the state's intrusion. However, due to the ethical obligations of parents' attorneys, parents' attorneys cannot zealously represent the child's interest. Furthermore, due to the state's intervention, the parents can neither protect the child independently nor fully through their counsel.

### 3. Investigatory Stage Representation is Needed to Protect Family Integrity

Children need representation before a case is filed in court to best protect the child's right to family integrity. Child welfare proceedings are socio-legal, which mix "social-administrative and legal decision-making systems."<sup>255</sup> Therefore, the most critical aspect of legal representation happens outside the courtroom due to the complex mixing of social and legal work.<sup>256</sup> The socio-legal aspect of child welfare cases exists before and after the local department's court intervention. Attorneys trained in the Duquette model<sup>257</sup> could appropriately communicate with their child client, assess the dangers, and propose solutions during the investigatory stage of proceedings. In this manner, the attorney could evaluate the need for removal from the child's stated interest perspective, presuming that remaining with their parent is in their best interest, and aid in ensuring that removal of children is limited to when there are no safe means to keep them at home. Providing representation during the investigation would assist in protecting family integrity.

This article proposes legal representation that promotes family integrity by requiring that the assigned attorney advocate for the child based on a stated-interest representation model, presuming that the child remaining with their parent is in their best interest. The presumption is rebuttable if a child, that is, at an age where they are capable of knowing, and voluntary judgment states that they do not wish to stay in the care of their parents. Where a child is not capable of knowing and voluntary judgment, the presumption would be rebuttable by evidence that the child is at imminent risk to life or health, and there is no means of eliminating the risk without removing the child from the home.<sup>258</sup> Requiring a presumption would mitigate the risk that the attorney would act according to their concepts of the child's best interest and force an independent inquiry into collateral resources to determine how to keep the child at home and in their parent's care.

An intervention of state into the family dynamic creates trauma that can last a lifetime. The invasive nature of investigations where children can

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255. BURNS, *supra* note 38, at 2.

256. Guggenheim, *supra* note 227, at 816.

257. The "Duquette model" refers to the stated interest representation model, which focuses on the six necessary core skills to represent children in child welfare proceedings effectively, as posited by Professor Duquette. See Duquette, *supra* note 230.

258. See N.Y. FAM. CT. ACT § 1028; Huntington, *supra* note 12, at 242.

undergo medical and psychological evaluations<sup>259</sup> is traumatic, as is having a stranger enter the family home to question the child and other family members. Investigations can go beyond the home when caseworkers go to the child's school or childcare facility to interview the child. Further, studies have shown that even when a child's removal is short-term with a return to their parents' care, trauma results. Ensuring that children have an attorney to represent them from the very inception of a child welfare case can aid in mitigating some of the trauma that children experience as a result of the investigation. Attorneys can advocate for less invasive investigations when appropriate. Further, where an attorney determines through their independent investigation that a removal from the child's home is unwarranted, an attorney for the child can not only align with the parent's counsel but also present their case in opposition to the local department's application for removal. An alignment of parents' and child counsel after an investigation by the child's attorney would increase the likelihood of preservation of the child's right to family integrity.

#### 4. Investigatory Stage Representation is Needed to Protect Bodily Autonomy

Children's bodily autonomy is at risk of state intrusion where there are allegations of severe abuse, physical abuse, or sexual abuse. When there are allegations of abuse made to the state's maltreatment hotline, the state often conducts physical and sometimes mental health evaluations of children to assess their safety. The assignment of an attorney at this stage is crucial for two reasons: (1) to protect children's bodily autonomy and (2) to give children a sense of control over the outcome of an investigation that will impact their lives in the long term.

*Parham* addressed the rights of children whose parents sought to institutionalize them for mental health treatment and required an independent investigation by a medical professional before commitment; the same analysis applies to treatment and evaluation in the investigatory stage of child welfare cases. Just as in *Parham*, during the investigatory stage of a child welfare case, the state is seeking to have the child, who is the subject of the child welfare investigation, medically evaluated without the child's consent. In this capacity, just like the parents in *Parham*, the state is acting *in loco parentis* to decide on behalf of the child that will intrude upon the child's right to bodily autonomy. Necessarily, just as *Parham* requires an independent investigation before the intrusion upon the child could occur, so must an attorney for the child act in the same capacity on behalf of a child who is the subject of a child welfare proceeding to determine if the intrusion is in the child's best interest.

The state is a bad parent. If the state unintentionally "overprotects" by subjecting a child to a physical or mental health evaluation based on allegations that may not be sound, an attorney for the child can step in and advocate for the local department not to subject the child to the examination. If the local department declines the attorney for the child's request, the attorney for the child can seek a protective order in court. While this would escalate the case to

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259. See FLA. STAT. ANN. § 39.301(8)(a) (LexisNexis 2024).

a court proceeding, it would also give the child a chance at not being evaluated on erroneous grounds. Even if the state's intended actions of seeking an evaluation of the child are sound, the attorney for the child can explain the process to the child and answer any questions the child has.

Another essential reason to assign children legal representation at the investigatory stage of proceedings is to give them the sense that they have some input on their lives and what happens to them. Assigning children representation in the investigatory stage permits the state to exercise its *patria potestas* powers authoritatively, as Professor Buss suggested in the context of juvenile justice proceedings.<sup>260</sup> Assigning children legal representation in the investigatory stage of child welfare proceedings allows them to be active participants in the outcomes of their lives instead of outside observers. Arguably, this can reduce or mitigate some of the trauma of the process. Assignment of stated interest representation will result in a positive interaction with the courts and government authorities, helping to support the child's development into a productive member of society.

Arguably, providing counsel for children at risk of removal in the investigatory stage would give children a much-needed sense of security<sup>261</sup>, knowing that they have an attorney advocating for their stated interest during the proceedings. The rights of children and parents align, except in the minority of cases where there are allegations of abuse of the child. Therefore, just as parents have familial rights and should have the right to counsel, so should children.<sup>262</sup>

#### B. Model of Investigatory Stage Representation for Children

Implementation of Investigatory Stage representation for children should occur in two ways, depending on the resources of the state or community implementing the program. First, when the child maltreatment hotline accepts a call, if the state or community has the resources to assign attorneys to individual children, a multidisciplinary team will be assigned to represent them. In communities that do not have the resources to assign a multidisciplinary team, forming a child representation and educational partnership will aid schools in avoiding unneeded calls to the child maltreatment hotline if the state or community has insufficient resources to assign an attorney to individual children.

In communities with resources for multidisciplinary team representation and communities with limited resources, a partnership could be formed with the local department to refer cases to child representation offices when a call is placed and accepted by the state's child maltreatment hotline. In addition, just like in parent investigatory stage representation pilots, child representation offices would work on creating trust in their local communities to educate them about the availability of investigatory stage representation and how to access it, if needed.

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260. Buss, *supra* note 117, at 278.

261. See GUGGENHEIM, *supra* note 160, at 37.

262. *Id.*

### 1. Stated Interest Representation

Just as permitting a child's voice to be heard in litigation is critical,<sup>263</sup> it is equally essential for the child to be heard during the investigatory stage of the case. A fundamental reason for children to be assigned counsel in the investigatory stage of the cases should be to ensure a just decision-making process<sup>264</sup> by the agency investigating the allegations. Six Core Skills form the basis of the best practice model.<sup>265</sup> Mandated quality legal representation of children would improve their outcomes in child welfare proceedings.<sup>266</sup> When assigned at the investigatory stage, children's attorneys can successfully help reduce the number of cases resulting in court filings and unnecessary removal of the child from their home by providing quality representation. They can also follow the proposed stated interest representation with a presumption that the child remaining with their parent is in their best interest.

Training of the attorney in the "Six Core Skills" identified by Professor Duquette in his study of child legal representation is essential, including (1) "Enter the Child's World," (2) "Assess Child Safety," (3) "Actively Evaluate Needs," (4) "Advance Case Planning," (5) "Develop Case Theory," and (6) "Advocate Effectively."<sup>267</sup> Using this approach, the attorney would represent the child's stated interest, presuming that the child remaining with their parent is in their best interest unless the presumption is rebutted by the child where they are capable of doing so or by the assessment of whether the child could safely stay with their parents if they are not capable of expressing their stated interest. The attorney would create and implement a legal theory to zealously advocate for their client. The social worker would assess what services are needed to safely keep the child in their parent's care. At the same time, the lived experience expert would use their expertise to educate the team about the foster care system and serve as a check to ensure that neither the attorney nor the social worker is replacing their judgments for that of the child.

#### *a. Analysis of Six Core Skills in the Investigatory Stage*

Attorneys representing children in the investigatory stage of the case must be qualified and trained in the Six Core Skills identified by Professor Duquette in his research. The first skill of "Enter the Child's World" is described by Duquette as, "Engage with the child, learn their needs, guide them, counsel them and advocate for their needs while accommodating their stated interests . . . ."<sup>268</sup> In the investigatory stage, an important aspect would be to learn the child's needs and guide them, just as a traditional attorney would guide their client.

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263. See LeVezu, *supra* note 233, at 130.

264. See Erik S. Pitchal, *From Paternalism to Process: Reflections from the Bench on 40 Years of American Child Advocacy*, 39 CHILD. LEGAL RTS. J. 1, 11 (2019).

265. See Duquette, *supra* note 230, at 6.

266. See Shea, *supra* note 230, at 747.

267. Duquette, *supra* note 230, at 6.

268. *Id.*



The proposed presumption that staying with their parents is in the child's best interest is essential to acknowledge that the parent has not been rendered unfit at this stage. If a child directly states that they do not wish to stay with the parent, an attorney following this model would not just run with the child's statement and advocate for removal. Instead, the attorney would engage with the child to determine why they do not wish to stay with their parents. Suppose the reason that the child does not wish to stay with their parents is not because the child is at imminent risk of life or health. In that case, the attorney's job is to counsel and guide the client by discussing the reasons and foreseeable outcomes of their stated interest decision. After the attorney has counseled the client thoroughly, the attorney should zealously advocate for the child's needs and accommodate their stated interest.

Duquette describes the second skill, "Assess Child Safety," as "[r]emove the danger, not the child," whenever that can be done consistent with child safety. This second skill teaches attorneys how to distinguish between a case plan and a safety plan.<sup>269</sup> This skill is an essential aspect of child representation at the investigatory stage. The trauma that children face when removed from their parents is significant and long-lasting. Making every effort to identify how to keep the child safe is paramount to representing the child under the presumption that staying with their parents is in their best interest. If, for example, one parent or other person in the home is perpetrating acts of domestic violence against the other parent in the presence of the child, the best practice would be to remove the parent or person from the home with the appropriate protective orders to keep the child safe. The attorney should also then, with the assistance of the social worker and lived experience expert where available, assess what services could be put in place to assist the child with processing the trauma faced by witnessing domestic violence.

The third skill, "Actively Evaluate Needs," is described as facilitating "an appropriate assessment of the needs of the child and his/her family. Diagnose the problem."<sup>270</sup> This skill should focus on both the short-term and long-term needs of the family to not only resolve the problem that resulted in allegations of child maltreatment but also any other problems that can lead to another report to the state's maltreatment hotline. If available, this diagnosis should be conducted with the attorney for the child's team and in conjunction with the parents' legal representation team. Assessing a diagnosis should be done while still adhering to the ethical obligations of a traditional attorney-client relationship. The attorney for the child should not disclose confidential information in the collaboration. A collaborative approach would provide the best chance at identifying and addressing all of the issues that placed the family in crisis or has the potential of placing the family in crisis in the future. This third skill lays a solid groundwork for facilitating the fourth skill, "Advance Case Planning," the title of which is self-explanatory.

The fifth and sixth skills come into play in preparation for a potential court filing. Duquette describes the fifth skill, "Develop Case Theory," as

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269. *Id.*

270. *Id.*

“[d]eveloping an active and forward-looking theory of the case . . . [p]rovid[ing] force and direction to the advocacy.”<sup>271</sup> The skills and role of an attorney are critical to ensure that advocacy for the child should the case result in a court filing on an even playing field. Suppose the attorney is unsuccessful in preventing an application for removal of the child, where consistent with the client’s stated interest and where there is insufficient evidence of imminent risk to life or health. In that case, the attorney must meet their client’s needs and develop a solid case theory to advocate for their client’s behalf successfully. Examples of case theory development should determine how to tell their client’s story beneficially through documentary evidence and witnesses. Attorneys could also plan for potential removal by identifying potential resources for visitation outside of the local department if the child is ultimately removed, as well as ensuring that there is a plan for the child client to have the opportunity to maintain relationships that are important to them, like, for example, sibling relationships.

Duquette describes the last skill, “Advocate Effectively,” as “Use advocacy corollaries in meeting a child’s needs that stress problem-solving and non-adversarial approaches—but which include traditional adversarial modes when appropriate.” From this author’s perspective, this last skill applies skills one through five in both the investigatory and court representation stages of the proceedings should the case be filed in court. As noted by Duquette, the Six Core Skills organize methods and practices used by attorneys for children across states to represent children.<sup>272</sup> It trains attorneys to utilize these skills daily to represent their clients. Providing representation by qualified attorneys trained in the Duquette model would significantly improve outcomes in investigatory stage representation.

The proposed Duquette model will mitigate the risk of adults misrepresenting a child’s position. Misrepresentation of a child’s position can also be avoided by requiring older children to appear in court *in camera* should the matter result in court intervention, which can reduce the chance that adults who represent children in the investigatory stage of proceedings may not authentically represent a child’s position. Doing so creates a record of the child’s position, which would be part of the record should the matter result in an appellate review. In the case of younger children, the court could require the child’s representative to file a report summarizing the collateral resources and information upon which the legal representative relied to formulate their position. There is no danger of violating attorney/client privilege where the rights of younger children who are too young to develop an opinion are at issue.

#### *b. Proposed Representation Model in Practice*

As previously discussed, attorneys for children in the investigatory stage of proceedings would occur in two potential situations: (1) where the call to the state’s maltreatment hotline alleges severe abuse, physical abuse, and sexual abuse, or (2) if the local department is seeking a mental or physical evaluation

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271. *Id.*

272. *Id.* at 7.

of the child. When representation would end depends on how the case progresses. Resolution of the case after the investigatory stage, with the determination that the family does not need assistance, would also end the attorney's representation of the child. However, placement of the family on a differential response track should result in a continuation of representation until services are complete, with the multidisciplinary team periodically checking in with the child to see how the child is doing. Last, representation should continue as it would have had the attorney been assigned at the beginning of a court case if the case results in filing a neglect or abuse petition.

Overall, the representation of children in the investigatory stage of the proceedings will protect children and promote family integrity as a whole. When families need to connect to resources, representation for parents can connect the parents to resources needed to stabilize the parent and family. Representation for the child can aid in ensuring that children do not unnecessarily undergo physical intrusions or exposure of their personal information to state agencies. Where best practices guide legal representation, multidisciplinary teams can make appropriate referrals to services for children to address concerns. While, admittedly, engagement before a call alleging child maltreatment is an optimal solution, the assignment of legal representation for children in the investigatory stage of proceedings is a workable solution under the present legal framework.

## 2. Legal and Educational Partnership

Not all communities will have the resources needed to create a legal team of an attorney for the child, a social worker, and a lived experience expert to represent the child. In communities where attorneys for children are scarce, an attorney trained in the quality representation of children using the six core principles established by Duquette, as well as other members of a multidisciplinary team, including a social worker and an expert with lived experience in foster care, would be assigned to local school districts or schools in a consultancy capacity.<sup>273</sup>

Schools place the majority of child maltreatment calls.<sup>274</sup> Further, the majority of those calls are unfounded.<sup>275</sup> Before calling a case into the child maltreatment hotline, the school employee with concerns about a child could meet with the attorney, who can then assess if the concerns rise to the definition of maltreatment and then assess whether any resources outside of the local department could assist in resolving the employee's concerns. The attorney would then discuss connecting the child to appropriate services with the employee. This role would differ from legal counsel for the school system

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273. This creation of a legal, educational partnership arises from Dr. Barry Zuckerman's medical-legal partnership, which connected legal help to resolve issues in families served by the healthcare system. See Sankaran, *supra* note 202, at 1039.

274. John Kelly, *What Do Schools Report to CPS? One State's Experience*, IMPRINT NEWS (Sept. 8, 2020, 5:45 AM), <https://imprintnews.org/youth-services-insider/what-do-schools-report-to-cps-one-states-experience/46817>.

275. *Id.*

because the attorney focuses on addressing the child's needs instead of protecting the school from liability. The source of payment for the attorney should not be the school district. Although a direct, stated interest representation would be ideal, such a partnership could still reduce the number of unnecessary calls to the state's maltreatment hotline that could result in an invasion of the child's bodily autonomy and family integrity. However, there would not be a formation of an attorney-client relationship between an attorney and an individual child. The relationship between the attorney and the school will be ongoing.

### C. Counterarguments

Given the literature that explores parents' rights as well as other approaches to reducing the likelihood of contact with the foster care system, it is likely that two main arguments against investigatory stage representation for children would emerge: (1) representation would divert funds from preventive care; (2) representation would impinge upon the rights of parents who have not been deemed unfit. However, given the nature of the recommendations proposed, this author concludes that, even if there is a temporary diversion of funds from preventive care, the diversion would still result in positive family outcomes. Furthermore, given parents' inability to protect their children at the investigatory stage of these proceedings due to the government's intrusion, investigatory stage representation for children protects not only the child but the family overall.

#### 1. Investigatory Stage Representation Would Divert Funds from Preventive Care

Parent-rights advocates will likely argue that representation for children in the investigatory stage of child welfare cases will unnecessarily divert preventive care and legal representation for parents' funds away from serving families. However, the Family First Prevention Services Act of 2018 shifts the focus of the child welfare system from family separation to family preservation and provides funding to support the Act's goal.<sup>276</sup> The Act authorized Title IV-E funds to cover fifty percent of the cost of representation for all stages "of foster care related legal proceedings."<sup>277</sup> These funds are in addition to funds earmarked for preventive services.<sup>278</sup> While an assessment of whether the Family First Act has met its goal successfully is beyond the scope of this article, this author argues that its funds permit investigatory stage representation for children to meet the Act's goals.

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276. Family First Prevention Services Act of 2018, Pub. L. No. 115-123, 132 Stat. 232.

277. Mark Hardin, *Claiming Title IV-E Funds to Pay for Parents' and Children's Attorneys: A Brief Technical Overview*, ABA CENTER ON CHILDREN AND THE LAW (Feb. 25, 2019), [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/january---december-2019/claiming-title-iv-e-funds-to-pay-for-parents-and-childrens-attor/](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/claiming-title-iv-e-funds-to-pay-for-parents-and-childrens-attor/).

278. *Id.*

Early-stage prevention in child welfare cases<sup>279</sup> would be the gold standard to achieve family preservation in child welfare. However, they do not need to be exclusive of other mechanisms to prevent a family's entry into the foster care system. This author supports the use of and increase in the availability of preventive services; however, given the negative impact of foster care on families, several blocks along the road to a potential child removal is prudent. Legal representation for children in the investigatory stage could assist in preventing the removal of children whose families are not in crisis mode but instead are exposed to poverty-related neglect and protect children from the physical and mental invasions that often occur during child welfare investigations. The process of child welfare proceedings invades the privacy of children through physical, mental, and psychological measures taken to protect the welfare of the child.<sup>280</sup> Safeguarding a child client from unjustified or misplaced state actions during the investigatory stage of legal proceedings is crucial.

The rationale for advocating for a preventive rather than a reactive approach supports the argument that children should have independent representation in the investigatory stage of child welfare proceedings. Statistically, the majority of cases called in to report cases of child maltreatment are called in based on allegations that reflect a lack of access to resources. Schools call in the majority of child maltreatment reports.<sup>281</sup> Most of the reports called in by schools' mandated reporters are unfounded.<sup>282</sup> Nothing suggests that these reporters are calling in reports for malicious reasons. It is far more likely that reporters are calling in due to a concern for the students that does not rise to neglect and to insulate the school from potential liability for being aware of a possible problem and not reporting it. This call for help leads to an unnecessary investigation into the family. However, it is an opportunity to aid the family in avoiding a potential crisis.

Of course, there is not an endless stream of funding for preventive services, parent legal representation, and child representation. However, the cost of foster care is a high one both emotionally for the families that are subjects in the system, as well as financially. Further, the proposed representation model focuses on a small percentage of cases. Narrowing the representation to cases where there are allegations of severe abuse, physical abuse, and sexual abuse, or where the local department requests a physical or mental health evaluation of the child would help to mitigate the cost of providing investigatory stage care for children in the investigatory stage of the proceedings.

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279. See Huntington, *supra* note 12, at 242.

280. Sobie, *supra* note 17, at 786.

281. John Kelly, *What Do Schools Report to CPS? One State's Experience*, IMPRINT NEWS (Sept. 8, 2020, 5:45 AM), <https://imprintnews.org/youth-services-insider/what-do-schools-report-to-cps-one-states-experience/46817>.

282. *Id.*

As previously discussed, there is a proportional overrepresentation of Black and Indigenous children in the foster care system.<sup>283</sup> Compounding this problem is that Black families, as well as other minorities, are less likely to receive in-home preventive services to prevent entry into the foster care system.<sup>284</sup> Furthermore, becoming a subject of the foster care system leads to adverse psychological and physical outcomes for children.<sup>285</sup> Foster care has also become an intergenerational issue. Approximately forty percent of foster care alums will give birth to children who become subjects of the foster care system.<sup>286</sup> These foster care alumni mothers suffer from “Complex Trauma, PTSD, and Post-Partum depression,” which ultimately impacts “these women’s ability to parent and their child’s development.”<sup>287</sup> The negative impact of foster care on families, especially families of color, is a devastating one that requires action to reduce the likelihood of ever entering the system.

With Title IV-E funding available for legal representation, representation of children in the investigatory stage of child welfare cases would further strengthen programs to prevent entry into the system. Strong advocacy on all fronts can form a shield to reduce unnecessary removals and, thus, entry into foster care. Parents’ attorneys zealously advocate for their clients to receive services, preserve the parents’ right to family integrity, and avoid court filings in states that offer pilot programs. If attorneys for children are assigned, they would zealously advocate for services for their clients and ensure that their right to family integrity and bodily autonomy is protected. This approach, along with preventative services, would result in a better outcome for families and presumably mitigate the traumatic effects of the investigatory stage of child welfare proceedings on children. Ultimately, better outcomes would reduce foster care costs and save money from the cost of foster care used for investigatory stage representation for children.

## 2. Assigning Investigatory Stage Representation Would Impede on Parent’s Rights

Although arguably, where there has been no showing of parental unfitness and a conflict between the parent’s rights and the child’s rights exists, the parent’s rights must necessarily prevail so that their constitutional right to rear and raise their children is protected. This perspective is flawed in the investigatory stage of child welfare proceedings. Despite the lack of a determination of parental unfitness, the state has already intervened in the parental sphere. Children at this stage of the proceedings are subject to removal from the home and an invasion of their autonomy. Children at this stage of the

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283. U.S. DEP’T OF HEALTH & HUM. SERV. CHILD. BUREAU, AFCARS REP. 30, ADOPTION & FOSTER CARE ANALYSIS & REP. SYS. (2023).

284. Eliana Schachter & Elizabeth Kroll, *The Intergenerational Effects of the Child Welfare System and the Legal Obligation to Rectify Them*, 19 RUTGERS J.L. & PUB. POL’Y 211, 215 (2022) (footnotes omitted).

285. *Id.* at 212.

286. *Id.*

287. *Id.* at 215.

proceedings have the potential to become subject to both physical and mental intrusion. To determine if children's allegations of abuse are accurate, government actors can subject the children to physical searches and mental and physical examinations. Therefore, a child should not only be protected based on their right to family integrity but also their right to bodily autonomy not from their parent but from the state. Safeguarding a child's personhood is a crucial aspect of human rights and, by extension, human dignity.<sup>288</sup> While constitutional jurisprudence presupposes that a fit parent will act in their child's best interests, this presumption is inapplicable in the investigatory stage of these proceedings. The presumption is not inapplicable because a parent in this situation is unfit or would not act in their child's best interest but because the state's actions have already trumped the power to do so. This intrusion warrants independent representation of the child in the investigation.

Even where a parent does not consent to a physical or mental examination of their child, an *ex parte* order can be sought to achieve the state's goal. Court intervention is especially unwelcome given the likely chance of a better outcome for the family without court intervention, where the allegations levied are those of neglect and not abuse. Parental rights should, as a general rule, reign supreme against a state's attempt to intervene absent a finding of a parent acting in a way that inflicts harm and where the "state has some special competence to assess."<sup>289</sup> The investigatory stage of child welfare proceedings is the limited instance where the child should be assigned counsel over the parent's wishes regardless of a finding of parental unfitness. The assignment of an attorney for the child at this stage allows the parent to have someone focused solely on protecting the child. Defending and advocating for the parent and safeguarding the child splits the focus of the parent's attorney if they are the only legal representation for the family. If only a parent's attorney is assigned.

*Nicholson* and *Deshaney* highlight that the state is a bad parent. Social workers making decisions regarding children subject to child welfare investigations base those decisions on their value judgments.<sup>290</sup> In contrast, an attorney representing the child's stated interests must represent what the child would like, including staying in their family unit. An assessment of whether a child's life is at risk, thereby warranting removal from the care of their parents, is a subjective one. Where decision-making is subjective regarding a child's well-being, courts often cannot help but consider their backgrounds.<sup>291</sup> Therefore, having two attorneys, where practical, represent both the parent and the child, independently investigate and make connections to services to avoid court intervention. In most cases, this serves the parent and child's joint interest in preserving the family unit. Further, should the state seek court intervention, two attorneys can highlight the importance of that familial unit and the joint interests in preserving it from the unique perspectives of their clients.

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288. Ryan, *supra* note 114, at 2131.

289. See Buss, *supra* note 165, at 288–89.

290. See GUGGENHEIM, *supra* note 160, at 38.

291. See *id.* at 40–41.

An argument in support of representation for children in the investigatory stage of child welfare proceedings does not support the abolishment of a parent's control of a child due to its oppressiveness.<sup>292</sup> On the contrary, protecting the child from over-intervention by the state against the family is the goal of such representation, considering the overwhelming likelihood that the child will need protection from the state's actions in these proceedings, not the parents'. Once a state is involved in a family's life, through an investigation, it is crucial to hear from the child and to protect their autonomy.<sup>293</sup>

As previously discussed, most allegations of neglect are due to poverty, not abuse; neglect is the main reason for placement in foster care for the vast majority of children. Therefore, it is more likely that a child will need protection from the overuse of state powers against their parents rather than from the parents themselves. The *Nicholson* case highlights this paradigm. A state's perception of a parent's actions rising to the level of placing a child's life at risk does not always align with the statutory scheme of the neglect and abuse statutes. A state's action that misinterprets the state's law can result in a violation of the parent and child's rights, as well as long-term trauma to the parent, child, and family unit. While a state can act swiftly in removing a child unnecessarily, undoing the mistake can take a long time when considering the demands of high caseloads on family courts across the nation.

The "middle ground" approach of only recognizing children's rights when they align with their parents in the limited context of children's rights in the investigatory phase of child welfare proceedings would fail. In the investigatory stage, there are limited instances where the protection of the child must prevail over the rights of the parents, precisely where there is evidence of abuse. Even in the vast majority of cases where there are allegations of neglect, the suggested "middle ground" through the use of an attorney to represent the child is preferred so that the child has the best chance of being safeguarded from a potential state of "overprotection."

### 3. Investigatory Stage Attorneys for Children Results in an Additional Intrusion by the State

This author acknowledges that assigning attorneys for children in the investigatory stage of the case would result in an additional intrusion upon the family. The child would need to meet with their attorneys numerous times throughout the investigatory stage so that the attorney can conduct an independent investigation and advocate for the child. Further, the investigation could be conducted by a social worker as it is on behalf of the local department.

However, a social worker could not effectively investigate on behalf of the child. As discussed above, attorneys are uniquely qualified to do this work. While conducting their investigation, attorneys for children are not only investigating the case to assist in service referrals. Still, they are also creating a legal theory of the case and legal strategy to advocate successfully on their client's behalf if the case results in a court filing.

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292. *Id.* at 34.

293. *See* LeVezu, *supra* note 233, at 152.



While the local department's social worker could protect the child through their investigation and referral for services, such an argument would be misplaced. The multidisciplinary approach described above has different pressures or motivations than social workers investigating child maltreatment calls on behalf of the department. While the primary role of social workers investigating a case on behalf of the local department is to assess child safety, they also have a secondary role of ensuring that the department is insulated from liability if they make the wrong call. While, as seen in *DeShaney*, a local department would likely be insulated from financial liability, they are subject to public outcry resulting from erroneous decision-making. Such public outcries often result in leadership changes, employment termination, or organizational restructuring that can directly impact the social worker investigating the case. In contrast, multidisciplinary teams are not the ultimate decision-makers on child removal and, therefore, avoid facing the same pressures as social workers during the investigatory stage of the case.

#### CONCLUSION

It is crucial to safeguard children's entitlement to family integrity and bodily autonomy. When parents are under investigation, they may be unable to shield their children from unwarranted state interference, particularly when the state "overprotects." Legal advocates for children, appointed at the onset of child welfare inquiries, play a pivotal role in upholding these rights and mitigating any risk of inadequate protection by the state. The current disparity in legal representation, especially in jurisdictions with parental investigatory stage initiatives, places children at a considerable disadvantage in ensuring their safety and family integrity. Consequently, it is imperative to strive for the appointment of legal representation for children at the outset of child welfare proceedings. In instances where this may be unfeasible due to resource constraints, establishing legal and educational collaborations becomes essential to curtail unwarranted reports to the state's maltreatment hotline.