Psychological abuse is the most prevalent type of child abuse. It lies at the core of child maltreatment because it is embedded in and interacts with physical and sexual abuse, as well as physical neglect. It also has a more extensive and destructive impact on the development of children than any other type of abuse. Yet, the current child protection system fails to adequately address the problem because the normative framework of the child protection system does not always include the psychological abuse of children. For the majority of states, the physical health, safety, and well-being of children are focal points in determining whether abuse or neglect has occurred. Although federal law requires that “serious emotional harm” be included in the definition of abuse for all states, less than one third of all states in America allow for children to be removed from their parents due to psychological abuse alone.

This Article proposes a way to fill the gap by incorporating psychological abuse into the larger doctrinal equation of child abuse and neglect treatment and prevention. First, recognizing that a primary challenge to including psychological abuse within the legal standard is the ability to determine the level of psychological harm that warrants state intervention, this Article offers a uniform definition of psychological abuse in order to expand the scope of the emergency removal standard. Second, this Article borrows from the European theory of subsidiarity to address prevention and treatment of abuse in American communities. This bold new paradigm is a prescriptive process that carefully constructs the law such that necessary interventions in a child’s life are allowed to prevent further psychological damage so that victims can start the road to recovery. Ultimately, applying the principle of subsidiarity to the legal framework of the child protection system should

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reduce the number of children who experience psychological abuse as well as reduce the overall cycle of abuse and neglect in our country.

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INTRODUCTION

“Elle” is a thirteen-year-old only child who is constantly left at the library past closing time. She is restricted from eating outside of set mealtimes by a lock and chains on the refrigerator door. Fed mostly hotdogs and other junk food, she hoards food from outside the home in her room, which is a mess. When she gets into fights with her mother, she usually winds up in a psychiatric facility for children. Her mother

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1 “Elle” is a former client of the W.W. Caruth, Jr. Child Advocacy Clinic. I served as the founding director and supervising attorney of the Caruth Child Advocacy Clinic for seven years. Elle’s name has been changed to protect her identity.
complained about her tantrums to the police the first ten times she called them out to her home. Elle is placed on three different types of psychotropic medication, which affect her ability to learn in school. By the eleventh phone call, the facility refuses to take Elle because she does not need their services. The police contact Child Protective Services (“CPS”) and refer her to the Promise House, a residential treatment center for runaway teens and teenage foster children. Though library personnel and teachers at Elle’s school have been concerned about her, nothing that bad appears to be going on at home. After all, her mother is a well-respected schoolteacher.

Elle is mostly lethargic and non-responsive to questions the first time she meets with the clinic student attorney and me. After a few visits, she eventually shares that her mother often told her “I hate you” and locked her in her room for hours. She tells us that she did not want to talk with or visit with her mother again. Neighbors later tell CPS, after she is removed, that Elle’s mother was verbally abusive and often kicked Elle out of the house late in the evening without food when she was upset with her. Fortunately for Elle, we identify a different teacher who often was a refuge for her after school and also happened to be a foster-adoptive parent. Her mother eventually relinquishes her parental rights. After Elle was taken off her medication and placed in what would be her new “forever home,” she becomes a completely different youth—excited about school, talkative, and all smiles. Though Elle suffered from emotional abuse and neglect, her story had a happy ending. Unfortunately, emotional abuse is more common than we think, and most children don’t find a pot of gold at the end of the rainbow.

In the most recent national study on child abuse and neglect, almost three million children have been identified as abused or neglected by their parents or caregivers. Almost half of this number experienced either emotional abuse or emotional neglect. The numbers are growing; although there has been an overall decline in the incidence of

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2 U.S. DEP’T OF HEALTH & HUMAN SERVS., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4) 3-15 (2010). The NIS-4 uses two standards to measure child abuse and neglect. The “Harm Standard” counts a child in the study only if he or she has already experienced demonstrable harm as a result of maltreatment. The “Endangerment Standard” includes all the “Harm Standard” children and also includes children who were not yet harmed by maltreatment, but who experienced abuse or neglect that placed them in danger of being harmed. The NIS-4 estimate for 2005–2006 using the Endangerment Standard for all child maltreatment is that 2,905,800 children were abused, a rate of 39.5 per 1000 children.

3 Id. The NIS-4 estimate for 2005–2006 using the Endangerment Standard for emotional abuse is 302,600, a rate of 4.1 per 1000 children. The NIS-4 estimate for 2005–2006 using the Endangerment Standard for emotional neglect is 1,173,800, a rate of 15.9 per 1000 children.
maltreatment since 1986, the largest increase in the estimated number of children who suffered abuse and neglect in 2005–2006 was in the area of emotional neglect. What does emotional abuse and neglect look like? Elle’s case is one example. The “Cinderella syndrome” is another common form of emotional abuse. In these cases, parents designate one child as a scapegoat. They require her to do more household tasks than their other children and do not give her the same privileges and opportunities as they do the other children. Both methods of abuse include ignoring, rejecting, and isolating a child, which typically causes depression and low self-esteem.

Notably, children who suffer from emotional/psychological abuse elude the legal assistance of the child protection system. The normative framework of the child protection system does not always include the psychological abuse of children. For the majority of states, the physical health, safety, and well-being of children are focal points in determining whether abuse or neglect has occurred. Although federal law requires that “serious . . . emotional harm” be included in the definition of abuse for all states, less than one-third allow for children to be removed from

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4 Id. at 3-10. “The estimated number of children who suffered Harm Standard emotional neglect in 2005–2006 is nearly four times as large as the 1986 estimate.” The NIS-4 indicates that there was a 293% increase in the total number of emotionally neglected children from the time of the NIS-2, and a 225% increase in the incidence rate.

5 JAMES GARBARINO, EDNA GUTTMAN & JANIS WILSON SEELEY, THE PSYCHOLOGICALLY BATTERED CHILD 36 (1986). The case of “Cindy” is set forth as an eight-year-old who was suspected of being a victim of the “Cinderella syndrome.” She was the child in the family who always wore cast-off clothing and was required to do more household tasks than the other children. The other children were allowed to join Brownie troops and Boy Scouts, but Cindy was not allowed to participate in any outside activities. The rest of the family ate in the dining room, but Cindy ate in the kitchen standing at the drain board. The mother did not visit Cindy’s classroom or inquire about her progress. Cindy is seen by her parents as a difficult child who needs rigid discipline and control. Her brother and sisters see her as the problem of the family. Cindy is unhappy about her inability to participate with the family or other children, and she feels that she does not deserve to be included.

6 Id.

7 The terms “emotional” and “psychological” as they refer to abuse, neglect, injury, or harm will be used interchangeably throughout this article.


9 Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5106a(2), 5106g(2) (West Supp. 1998). The Act states that “the term ‘child abuse and neglect’ means, at a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm.”
their parents due to emotional harm alone. This discrepancy in emergency removal legal standards does not adequately protect children who are being psychologically abused. In law, and in practice, many children's emotional injuries are being ignored.

It is important to recognize that children's long-term physical health and development may be significantly harmed by childhood psychological abuse. Research shows that psychological abuse is the core component of child abuse and neglect. It is embedded in and interacts with all other forms of maltreatment, including physical abuse, physical neglect, and sexual abuse, and therefore contributes to and influences the impact of these forms of maltreatment. Because it is the central dimension of child maltreatment, psychological abuse must be considered to fully understand the nature of child abuse and neglect. It also has a more extensive and destructive impact on the development of children than other types of abuse and neglect, with the exception of those that result in death. A twelve-year Adverse Childhood Experiences (ACE) study being conducted by the Center for Disease Control suggests that emotional, physical, and sexual abuse, as well as other household dysfunctions, including exposure to violence in the home, are major risk factors for the leading causes of illness, death, and poor quality of living in the United States. Though psychological abuse co-occurs with all other forms of abuse, standing alone it is very difficult to specifically identify and diagnose.

Defining psychological abuse and determining what terms to use in identifying it have been the source of much disagreement within the

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10 See infra p. 274 and note 161.
13 Id.
14 Id.
15 Id. at xii.
17 Peggy S. Pearl, Psychological Abuse, in RECOGNITION OF CHILD ABUSE FOR THE MANDATED REPORTER 63, 80 (Angelo P. Giardino & Eileen R. Giardino eds., 3d ed. 2002).
legal and psychological professional arenas. It seems this discourse has frozen efforts to further establish intervention on behalf of children experiencing this form of abuse. Since social workers have very little guidance from the law regarding how it will consider evidence of psychological or emotional abuse, they often do not identify or screen this type of abuse unless it co-occurs with other types of maltreatment or there is proof of a persistent pattern of severe emotional abuse.

Despite the high frequency of psychological maltreatment, it remains the most elusive and difficult to prevent of all types of maltreatment for four primary reasons: (1) lack of proper definition in federal law and state family codes; (2) lack of state laws that support the emergency removal of a child at risk of experiencing psychological maltreatment; (3) lack of available, efficient assessments of psychological health of children and parents; and (4) underreporting. Each reason relies upon the prior in order to deny adequate protection for children in abusive home environments. The first two issues can and should be addressed by revisions to the controlling federal statute, CAPTA, and state family statutes. The second two issues would require a revised removal assessment policy, greater community education, and perhaps the permanent establishment of a coalition between the child abuse system and children’s health care systems.

In the quest to integrate child abuse intervention and treatment with prevention, it is necessary to ask whether the inclusion of psychological abuse in our legal framework of child protection prescribes an alternative comprehensive process. A review of literature on child abuse and neglect detection and prevention suggests ways states can more effectively deal with the harms adult caregivers inflict upon children. Borrowing from

19 Id. at 396; see also, U.S. DEP’T OF HEALTH & HUMAN SERVS., NIS-4, supra note 2, at 8-5 to 8-6 (noting that “[e]motionally abused children and neglected children had lower rates of CPS investigation (36% and 20%, respectively)”).
21 JOHN MYERS, CHILD PROTECTION IN AMERICA 134–227 (2006) (analyzing the causes of child abuse and how the child protection system can be improved to reduce abuse and neglect); Duncan Lindsey & Aron Shlonsky, Closing Reflections: Future Research Directions and a New Paradigm, in CHILD WELFARE RESEARCH 375–78 (Duncan Lindsay & Aron Shlonsky eds., 2008) (concluding that the child welfare system must shift its focus and work on efforts to prevent child maltreatment); JENNIFER A. REICH, FIXING FAMILIES: PARENTS, POWER, AND THE CHILD WELFARE SYSTEM 7 (2005) (reviewing CPS’s effectiveness as an agency); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 267–76 (2002) (noting that the child protection system is disproportional
the European theory of subsidiarity, a new paradigm for evaluating and monitoring child abuse and neglect within families would utilize public institutions better suited to deal with health and education issues that have come to the attention of the legal system because of the state’s responsibility to children. Since it is the core component of child abuse and neglect, psychological abuse and its treatment should be at the core of remedial efforts to maintain family integrity in child protection cases.

The principle of subsidiarity is based on the assertion that matters ought to be handled by the smallest, lowest, or least centralized competent authority. Given that health care institutions and schools are the major reporters of child abuse, they might also be able to provide professional assessment and assistance to families where abuse is found.
Public medical and educational systems are smaller authorities than child protection agencies in terms of the face of the state they represent to families. Local independent school districts and health care facilities are lower entities with respect to their close proximity to citizens within communities and with respect to their position in the state hierarchy of the child protection system. Schools and hospitals are the places where families interact with child care professionals on a daily basis. While they are at the bottom of the ladder regarding their authority to impact the outcome of state child abuse investigations and service provision to families, they are arguably more competent with respect to training, evaluation, and treatment than the child protection system.25

Following the principle of subsidiarity would shift the primary functions of child protective services to serving as child abuse/neglect investigator and as third-party government reporting authority. CPS would also retain the responsibility of oversight of the state’s foster care system. Local school personnel and medical professionals would be given the task of educating and treating parents and children in instances of abuse or neglect. Rather than transferring this role to CPS caseworkers, who may or may not have background or experience in social/human sciences, this part of the current case monitoring system can be handled by institutions that satisfy various criteria of the subsidiarity principle.26 Medical centers and local public schools are

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25 All states require some type of certification or license for medical doctors, nurses, and teachers. Moreover, medical professionals and teachers must study extensively in their respective fields and obtain degrees related to their profession. Many states do not require social workers who work in the field of child protection to have an undergraduate degree in social or human sciences. There is typically a six to eight week training that most case workers must complete before going out into the field. OFFICE ON CHILD ABUSE AND NEGLECT, U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD PROTECTIVE SERVICES: A GUIDE FOR CASEWORKERS 11–12 (2003), available at http://www.childwelfare.gov/pubs/usermanuals/cps/cps.pdf (noting that there is an effort to set educational standards for child welfare workers); BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, 2010–11 EDITION, available at http://www.bls.gov/oco/ (stating the education and licensing requirements of all fifty states for physicians, nurses, and teachers).

26 The four criteria of the principle of subsidiarity are adapted from the Treaty of Amsterdam, Amending the Treaty on European Union, the Treaties Establishing the European Communities, and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C340) I, 37 I.L.M. 56, available at http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html [hereinafter Treaty of Amsterdam]. They are (1) the close-to-the-citizen criterion ("to ensure that decisions are taken as closely as possible to the citizens of the Union"), (2) the sufficiency criterion (the action must bring value over and above that which could be achieved by individual Member-State’s government action alone), (3) the benefits criterion ("action at Community level would produce clear benefits by reason of its scale or effects
sufficient to diagnose and treat the family, closer to the family with regard to frequency and continuity of contact, more acceptable to the family with regard to receiving assistance, and more purposed to secure family and individual autonomy. The court system could keep legal oversight of the state’s case against the parents until the final assessment of the family’s progression in treatment. The court system would only continue to have jurisdiction over the family if the state decided to seek termination of parental rights, after which time the remedial efforts of the state through the medical, educational, and CPS systems would focus on supporting the children and family through what may be an alternative custodial arrangement or a permanent separation.

Part I of this Article explores the reasons why psychological abuse of children has been so elusive. This section scrutinizes various definitions of the term ‘psychological abuse’ and reveals the extent to which psychological abuse appears on the child abuse and neglect spectrum. Part II examines the general legal standard for emergency removals of children and reviews which states include serious emotional harm as part of the removal standard. This section also analyzes developing case law. Part III proposes an amendment to the Child Abuse Prevention and Treatment Act (CAPTA) that mandates a revised removal standard incorporating a comprehensive definition of psychological abuse. This definition is then used in a proposed compulsory review process, which would be part of the risk assessment done by the court in determining temporary orders when any type of abuse or neglect has been alleged. Part IV analyzes how this new law may affect the balance of parents’ rights, state power, and the child’s best interests and introduces a new framework for treatment of children and families through the public medical and educational systems. This section argues that psychological abuse, as the core component of all abuse and neglect, is best treated by utilizing the principle of subsidiarity and transferring certain roles and authority to entities more competent to handle what is essentially a health issue. Part V concludes by identifying challenges of the proposed legal standard and organizational methodology, including how they would affect cases involving child abuse allegations against racial minorities, some of whom are overrepresented in foster care, and outlier religious groups. Part V also examines how these proposed modifications impact the policy considerations of an overburdened child protection system.

compared with action at the level of the Member States”), and (4) the autonomy criterion (“the action should secure greater freedoms for the individual”).
I. THE DEFINITION & SCOPE OF PSYCHOLOGICAL ABUSE OF CHILDREN

A. WHAT’S IN A NAME

The child protection system contains many different definitions of psychological abuse, and a myriad of reasons for the difficulty in defining psychological abuse exists.27 CAPTA was the first federal law on child abuse that recognized the significance of psychological maltreatment, but its conceptualization was unclear.28 CAPTA ambiguously referred to psychological maltreatment as “mental injury” in the larger definition of child abuse, with no further explanation of the term.29 As a result, the child welfare system has been “slow to recognize and deal systematically with the mandate to protect” the psychological well-being of children.30 In order to capture psychological abuse on a wide-scale level, it is important to consider the current definitions and carve out a specific meaning of the term for the new framework.

Psychological abuse or maltreatment is generally defined as a repeated pattern of caregiver behavior or extreme incident(s) that convey to children that they are worthless, flawed, unloved, unwanted, endangered, or only of value in meeting another’s needs.31 The term has

27 See, e.g., Brassard & Hardy, supra note 18, at 392 ("[Psychological maltreatment] can result from acts of commission (abuse) as well as from acts of omission (neglect). It can occur in acute instances (e.g., specific threats to children), or it can occur as a chronic pattern of interaction (e.g., constant criticism). It can also occur as very subtle behaviors (e.g., emotional unavailability) or as extreme, pronounced behaviors (e.g., verbal assault."). There is also disagreement over whether the abusive parental behavior or the resulting mental injury of the child should be given more emphasis. Further, different definitions of psychological maltreatment have been developed for different purposes, such as research, judicial decision-making, and clinical intervention.

28 BINGGELI ET AL., supra note 12, at 1–2.

29 Child Abuse Prevention and Treatment Act, Pub. L. 93–247, 88 Stat. 5 (1974) (codified as amended at 42 U.S.C. §§ 5101 to 5106i, 5116 to 5116i (2006)) (defining child abuse as “the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child under the age of eighteen, or the age specified by the child protection law of the state in question, by a person who is responsible for the child’s welfare under circumstances which indicate that the child’s health or welfare is harmed or threatened thereby, as determined in accordance with regulations prescribed by the Secretary” (emphasis added)).

30 Brassard & Hardy, supra note 18, at 393.

often been used synonymously with the terms emotional abuse, emotional maltreatment, psychological battering, and soul murder. A survey of psychological abuse identified four key features common to definitions of psychological abuse: (1) adverse parental behavior; (2) a sustained pattern of negative interaction; (3) child vulnerabilities; and (4) damage in terms of emotional and psychological functioning. A more thorough definition is as follows:

Psychological abuse is the sustained, repetitive, inappropriate behavior which damages or substantially reduces the creative and developmental potential of crucially important mental faculties and mental processes of a child; these faculties and processes include intelligence, memory, recognition, perception, attention, imagination, and moral development. Examples of such sustained, repetitive, and pervasive behavior may be domestic violence, desertion, unpredictability, lies, deception, exploitation, and various other forms of abuse (particularly sexual abuse, violence, and neglect).

As definitions varied, guidelines for determining psychological maltreatment were developed by the American Professional Society on Abuse of Children (“APSAC”). APSAC is a leading national nonprofit organization that offers expert training and educational activities to various professionals who serve children and families affected by child maltreatment and violence, including medical doctors, psychiatrists, psychologists, police detectives, social workers, therapists, and lawyers. The organization sets forth six major types of psychological maltreatment: spurning, terrorizing, isolating, exploiting/

36 Hart et al., supra note 31, at 80–82. Spurning is defined as hostile rejecting or degrading of a child. It includes shaming and/or ridiculing a child for showing normal emotions, public humiliation, and consistently singling out one child to criticize and punish, perform most of the household chores, or receive fewer rewards. It is also referred to as verbal assault.
37 Id. Terrorizing includes caregiver behavior that threatens or is likely to physically hurt, kill, abandon, or place the child or child’s loved ones or objects in recognizably dangerous situations.
corrupting,\textsuperscript{39} denying emotional responsiveness,\textsuperscript{40} and mental health, medical, and educational neglect.\textsuperscript{41} Two additional categories are overpressuring a child with subtle but consistent pressure to mature quickly and achieve too early, and overexposing the child to domestic and community violence and other behaviors that threaten children's personal safety.\textsuperscript{42} While these categories and definitions are generally accepted, they have not been universally adopted, and commenters have suggested improvements.\textsuperscript{43}

Various definitions and categories of psychological abuse are used to achieve the purpose of specific professional areas, such as the medical and mental health fields. For the purpose of clinical treatment, eight different types of psychological abuse have been identified: ignoring, rejecting, isolating, terrorizing, ritualistic abuse, corrupting, verbal assaulting, and over-pressuring.\textsuperscript{44} Many of these characteristics of psychological abuse are similar to the definitions in the APSAC Guidelines or are incorporated into more than one category. Ritualistic abuse is the only type of abuse identified that involves the use of religion or religious activities to systematically misuse children physically, socially, sexually, or emotionally.\textsuperscript{45} Nine subtypes of psychological abuse are identified by the Childhood Experience of Care and Abuse ("CECA") interview, a process designed to measure childhood and adolescent experience in order to investigate lifetime risk factors for mental health

\textsuperscript{38} Id. Isolating is defined as confining the child or placing unreasonable limitations on the child’s freedom of movement within his or her environment. It also includes placing unreasonable limitations or restrictions on social interactions with peers or adults in the community.

\textsuperscript{39} Id. Exploiting or corrupting is synonymous with the encouragement and reinforcement of destructive, antisocial behavior, with a resulting impairment in the child’s social development that prevents interaction in normal social environments. This would include encouraging or coercing abandonment of developmentally appropriate autonomy through extreme over-involvement, intrusiveness, or dominance (allowing little or no opportunity or support for child’s views, feelings, and wishes).

\textsuperscript{40} Id. Denying emotional responsiveness includes caregiver acts that ignore the child’s attempts and needs to interact, i.e., failing to express affection, caring, and love for the child.

\textsuperscript{41} Id. Mental health, medical, and educational neglect includes unwarranted caregiver acts that ignore, refuse to allow, or fail to provide the necessary treatment for the mental health, medical, and educational problems or needs for the child.

\textsuperscript{42} Pearl, supra note 17, at 64.

\textsuperscript{43} Brassard & Hardy, supra note 18, at 393. The authors suggest using "threatening" rather than "terrorizing" because "terrorizing" implies the response to caregiver behavior rather than the act of maltreatment itself.

\textsuperscript{44} 1 JAMES A. MONTELEONE & ARMAND E. BRODEUR, CHILD MALTREATMENT: A CLINICAL GUIDE AND REFERENCE 185–86 (2d ed. 1998).

\textsuperscript{45} Id. at 17.
disorders. CECA clearly differentiates the definition from other adverse experiences with emotionally abusive elements such as hostile parenting, neglect, and role reversal. CECA's categories of psychological abuse include: humiliation/degradation, terrorizing, cognitive disorientation, deprivation of basic needs, deprivation of valued objects, extreme rejection, inflicting marked distress or discomfort, emotional blackmail, and corruption/exploitation.

Beyond CAPTA, the federal government derives the definition of emotional abuse from another source. The National Incidence Study ("NIS") is a congressionally mandated, periodic report of the United States Department of Health and Human Services that serves as the nation's needs assessment on child abuse and neglect. The NIS has been published four times, and it includes data on children who were investigated by CPS agencies as well as children who were not reported to CPS or who were screened out by CPS without investigation. The NIS-4, released in 2010, is the most recent report, and it defines emotional abuse and emotional neglect separately. Emotional abuse includes close confinement, verbal or emotional assaults, threats of sexual abuse (without contact), and threats of other maltreatment, terrorizing, administering non-prescribed substances, and other or nonspecific abuse. Emotional neglect includes inadequate nurturance of affections, chronic or extreme domestic violence in a child's presence, knowingly permitting drug or alcohol abuse or other maladaptive behavior, failure or refusal to seek needed treatment for an emotional or behavioral problem, overprotective treatment, inadequate structure, inappropriately advanced expectations, exposure to maladaptive behaviors and environments, and other inattention to a child's developmental or emotional needs.

Some psychology experts encourage a broad definition of psychological maltreatment so that it incorporates both community standards and scientific/professional expertise as criteria for judging the appropriateness and correctness of intervention on behalf of children. The crux of the issue is whether the definition should revolve around the behavior of the caregiver or the harm to the child. A child may be particularly vulnerable to damage from psychological abuse when he or

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47 Moran et al., supra note 33, at 213.
48 Id.
49 U.S. DEP'T OF HEALTH & HUMAN SERVS., supra note 2, at 1.
50 Id.
51 Id. at 3-7.
52 Id. at 3-9.
53 GARBARINO ET AL., supra note 5, at 20–21.
she has a low IQ, lacks nurturing adults, has a low developmental level, and regards parental misdeeds as malevolent. Some scholars argue that psychological abuse, as with other abuses, should be defined independently of child characteristics: "Taking into account the child's vulnerabilities in a definition of abuse implies that a hardier child subjected to the same abusive act as a more vulnerable child would be considered less abused."54 Children have several common areas of vulnerability. They are generally small, weak, and less able to protect or defend themselves or to escape.55 Children also have less control or choice about those with whom they associate.56 Children's rates of victimization appear to go down as they age, but they are still naïve and inexperienced.57 Children's status as minors affects their ability to protect themselves from harm and to change the dynamic of their relationships with parents or caregivers.

At the heart of the effect of parental behavior on a child is the relationship, rather than an event or series of events.58 The relationship may actually or potentially harm the child, but ascertaining when this abuse threshold is reached is somewhat difficult, considering the general unwillingness of observers to impose their judgment on witnessed behavior and the fact that a child may be resilient to the abusive condition. Much debate surrounds the significance of perpetrators' intentions.59 The child's perceptions of parental intent will influence the impact of the parental act rather than the act's nature. Certainly, "[e]vidence of the perpetrator's apparent premeditated strategy in 'designing' a punishment or means of control specifically tailored to the child's fears and vulnerabilities would make inclusion as psychological abuse easier to determine."60 The risk and protective factors for abuse and neglect can shed light on a parent's actions and intentions, as well as a child's reactions to such behavior, which serve in many ways as the basis for the parent-child relationship. These factors include knowledge of parenting skills and child development, parental resilience, social

54 Moran et al., supra note 33, at 218 (citing James Garabarino, Not All Bad Outcomes Are the Result of Child Abuse, 3 DEV. AND PSYCHOPATHOLOGY 45, 45–50 (1991)).
56 Id.
57 Id.
58 Id.
59 Loue, supra note 32, at 315; BINGELI ET AL., supra note 12, at 77 (noting that psychological maltreatment can be defined as a relationship disorder between a child and his or her parent).
60 Moran et al., supra note 33, at 217.
61 Id. at 225.
connections, concrete support in times of need, and the social and emotional competence of the child.\textsuperscript{61}

The history of the conflict within the child protection system regarding the definition of emotional and psychological abuse is discussed in depth by J. Robert Shull in his article, \textit{Emotional and Psychological Child Abuse: Notes on Discourse, History, and Change}.\textsuperscript{62} Despite the fact that professional psychological conceptions of emotional child abuse focus on the action of the parents, the legal system focuses first on the existence of actual emotional harm exhibited by the child, and only afterward on whether the parents’ action caused the harm.\textsuperscript{63} By conducting a detailed survey of state statutory treatment of emotional child abuse, Shull identifies various classes of statutes: strict injury, loose injury, open, and affirmative definitions.\textsuperscript{64} States like Pennsylvania and Alaska set forth a strict definition of mental injury of a child, requiring an observable and substantial impairment in the child’s ability to function.\textsuperscript{65} Shull notes that such “emphasis is not on the actions of the parent . . . but instead on the results, the measurable and severe effects on the child’s development.”\textsuperscript{66} Kentucky is considered a loose injury state because in addition to the injury elements of strict injury states, its definition of child abuse also refers to threats and risk, which theoretically allows the state to intervene not only when there is actual harm, but also when parental behaviors threaten to harm the child by creating a risk of emotional injury. This is in sharp contrast to Georgia, Missouri, and Idaho, which use one sentence to encompass all types of abuse, sometimes to the exclusion of emotional abuse—which means these states may not recognize emotional abuse as a ground for intervening in the family to protect a child. New Jersey is an affirmative definition state since it defines child abuse and all its physical and nonphysical manifestations, including corrupting and exploiting a child, habitually using profane, indecent, or obscene language around a child, and habitually tormenting, vexing, or afflicting a child.\textsuperscript{67}

Interestingly, Shull notes that emotional abuse rose at a greater rate than physical or sexual abuse from 1986 to 1993.\textsuperscript{68} The NIS-3 indicated

\begin{itemize}
  \item[61] \textit{CTR. FOR STUDY OF SOC. POL’Y, A NEW, EFFECTIVE, AND AFFORDABLE STRATEGY FOR CHILD ABUSE AND NEGLECT PREVENTION 2}, available at http://www.strengtheningfamilies.net.
  \item[62] See generally Shull, supra note 20, at 1665.
  \item[64] Shull, supra note 20, at 1672–73.
  \item[65] \textit{Id.} at 1671–73.
  \item[66] \textit{Id.} at 1672.
  \item[67] \textit{Id.} at 1674.
  \item[68] \textit{Id.} at 1669.
\end{itemize}
that the total number of emotionally abused children increased by 183% and the incidence rate per 1000 children rose 163%. These increases are consistent with the large increases documented in the NIS-4. The lack of recognition of emotional abuse in the child welfare system may contribute to the greater increase of cases involving emotional abuse relative to other types of abuse. The choice of definition has a large impact on how emotional abuse is dealt with in the child welfare system. Until there is a consistent, thorough definition of this type of abuse, the numbers will likely continue to grow, and the harm being perpetrated against our children will remain unchecked and untreated.

B. THE PREVALENCE OF PSYCHOLOGICAL ABUSE

In its simplest form, psychological abuse is a repeated pattern of damaging interactions between parent(s) and child that becomes typical of their relationship. Psychological maltreatment is the most common form of child abuse. While often occurring alone, it is also present in physical or sexual abuse. The psychological abuse component of physical and sexual abuse is most damaging to children and leads to long-term harmful consequences.

The statistics belie the probable realities of the situation in our communities. In a CPS study, only four percent of the 794,000 children classified as child abuse and neglect victims in 2007 were victims of emotional abuse. The National Center on Child Abuse and Neglect

69 Id.
70 U.S. DEP’T OF HEALTH & HUMAN SERVS., supra note 2, at 7 (noting that although the incidence of emotionally abused children decreased by 48%, the estimated number of emotionally neglected children more than doubled in the interval between studies, rising from 584,100 in 1993 to 1,173,800 in 2005-2006, an 83% increase in the rate). While Shull does discuss emotional neglect in his article within the context of a historical overview of child abuse, he situates emotional neglect within other forms of neglect as well as part of the “medicalization” of neglect into abuse by Dr. C. Henry Kempe. Shull, supra note 20, at 1681–97.
72 BINGGELI ET AL., supra note 12, at xi, 40–50.
73 Hart et al., supra note 31, at 79.
74 Brassard & Hardy, supra note 18, at 398. See generally Valerie J. Edwards et al., The Wide-Ranging Health Outcomes of Adverse Childhood Experiences, in CHILD VICTIMIZATION (Kathleen A. Kendall-Tackett & Sarah M. Giacomoni eds. 2005).
found a total of over half a million cases of emotional abuse of children reported in 1993.76 A number of the studies regarding the incidence of psychological abuse are based on the extent to which it has been reported to human services professionals or official child protection agencies.77

The NIS-4, however, reveals startling statistics about the increase in the percentage of children experiencing emotional abuse or neglect.78 The increase in incidence of Endangerment Standard emotional neglect was particularly severe among younger children. Children ages 0 to 2 were at a 259% higher risk at the time of the NIS-4 than at the time of the NIS-3.79 The increase in incidence rate was nearly as large for children ages 3 to 5, at 214%.80 The rates of emotional abuse have decreased under the Harm Standard81 since the NIS-2 and NIS-3. The Third National Incidence Study also showed a decrease in the frequency of emotional abuse under the Endangerment Standard. However, the rate of emotional neglect has doubled under the Endangerment Standard since the NIS-3 and more than quadrupled since the NIS-2.82

A non-CPS study reveals that approximately 14% of children in the United States experience some form of maltreatment, and 75% of these were victims of emotional abuse.83 There are many factors for designating children who are at-risk. These include children who are unwanted, unplanned, socially isolated, or handicapped intellectually or emotionally, as well as children whose parents lack skill or experience in parenting or who engage in substance abuse or domestic violence.84 Ten to 20% of toddlers and 50% of teenagers experience some form of emotional aggression, including cursing, threats of being sent away, and being called dumb or other names.85 In homes where abuse has not been reported, 75% of those children are still emotionally abused.86

77 Brassard & Hardy, supra note 18, at 396.
78 U.S. DEP'T OF HEALTH & HUMAN SERVS., supra note 2, at 7.
79 Id. at 4-20.
80 Id.
81 See supra, note 2.
82 Id. at 3-4, 3-15.
83 CTRS. FOR DISEASE CONTROL & PREVENTION, supra note 75.
86 CTRS. FOR DISEASE CONTROL & PREVENTION, supra note 75 (noting that in a non-CPS study, 14% of U.S. children experienced some form of maltreatment: 8% were victims of sexual abuse, 22% were victims of child neglect, 48% were victims of physical abuse, and 75% were victims of emotional abuse).
Domestic violence increases the likelihood that children will experience psychological abuse. The children of fathers who are abusive to their partners are 30–60% more likely to be physically abused. Apart from possible physical abuse, studies show that children who witness abuse are at a higher risk for a wide range of behavioral, emotional, and intellectual problems.

Mainstream media abounds with stories of domestic violence. Many of these incidents involve professional athletes, politicians, and entertainers. Each account notes that children were present inside the home, witnesses to the incident, interveners attempting to stop the violence, or physically hit or endangered by the batterer’s actions. The most disturbing stories are those where children have witnessed a parent being killed. Although the children are third parties within a battering

88 Id. at 4–5.
relationship between intimate partners, they too are victims in that they are affected cognitively, emotionally, and physically by their parents' violence. A recent study found that more than 80% of battered mothers believed that their children overheard the abuse, and more than 75% reported that their children saw evidence of the abuse.

Both the NIS-3 and the NIS-4 include exposure to chronic or extreme spouse abuse in their definition of emotional neglect. Historically, witnessing violence between adults has not been treated as harmful to children, but increasing sociological and psychological research documents the detrimental effects on children, regardless of the child's own direct victimization. The recognition of exposure to domestic violence as a form of child abuse may explain the significant increase in the number of children who fall within the Endangerment Standard for emotional neglect. Estimates are that 3.3 to 10 million children are exposed to domestic violence in their homes annually. Between 10% and 20% of all children are at risk for exposure to domestic violence. Data collected from the Child Maltreatment 2008 annual report was examined to determine if children had a "caregiver risk factor" of domestic violence. The caregiver risk factor is determined by whether "the caregiver was either the perpetrator or victim of domestic violence in the child's home environment." The report concluded that 24.1% of victims and 6.0% of non-victims had a caregiver risk factor of domestic violence.

While all children exposed to domestic violence are subject to a greater risk of certain psychological problems, not all children are equally affected. Much of a child's ability to recover and develop into

92 Cahn, supra note 86, at 4.
93 Id. (citing J.L. Edleson et al, How Children Are Involved in Domestic Violence: Results from a Four-City Telephone Survey, 18 J. INTERPERSONAL VIOLENCE 18, 18-32 (2003)).
94 U.S. DEP’T OF HEALTH & HUMAN SERVS., THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT 3-9 (1996) [hereinafter NIS-3].
95 Cahn, supra note 85, at 3.
96 Id.
97 Id.
99 Id.
a competent adult after experiencing abuse is related to school environments, family intervention, involvement with a religious community and extracurricular activities, and most importantly, whether there is a secure care-giving relationship. As Hart et al. set forth in their book, Psychological Maltreatment, “empirical research [supports] the fact that the most significant and lasting effects of abuse and neglect are related to associated and embedded psychological experiences.” Psychological maltreatment causes the most damage to children who are unaware of what is happening and have no control over the array of relationships that comprise their environment. Pediatricians Steven Kairys and Charles Johnson state in their technical report, “[A] chronic pattern of psychological maltreatment destroys a child’s sense of self and personal safety.”

The harm caused by psychological abuse varies. Exposure to any type of abusive condition in childhood disrupts the normal course of development and leads to maladaptive behaviors. Proof of this is clear in studies of the family background of juvenile delinquents, which show that a very high percentage of young offenders were abused. Female juvenile offenders have an even higher correlation, with a startling 92% reporting some form of physical, sexual, or emotional abuse and 25% claiming to have been shot or stabbed at least once.

The adverse effects of psychological maltreatment include, but are not limited to, childhood depression, anxiety, low self-esteem, aggression, violence, suicide or suicidal thoughts, impulse control problems, emotional unresponsiveness, physical self-abuse, substance abuse, eating disorders, self-isolations, and low academic achievement. These mental health harms relate to both omissions and commissions of parents and caregivers. Emotional abuse often manifests

102 Hart et al., supra note 31, at 79.
104 Kairys et al., supra note 71, at 2.
105 Meltzer et al., supra note 99, at 5-2; Barbara Bennett Woodhouse, A World Fit for Children is a World Fit for Everyone: Ecogenerism, Feminism, and Vulnerability, 46 HOUS. L. REV. 817, 827 (2009) (citing James J. Heckman, Skill Formation and the Economics of Investing in Disadvantaged Children, 312 SCI. 1900, 1900 (2006)).
106 Meltzer et al., supra note 99, at 5-6 (noting that one study of 200 juvenile offenders found 72–84% of them had suffered from child abuse).
107 Id. at 5-6.
108 Kairys et al., supra note 71, at 2.
physical symptoms, including migraine headaches, psychogenic skin disorders, persistent pain, and ulcers. Dramatic negative physical health and brain development can result when young infants are emotionally neglected and deprived of emotional attachment to a primary caregiver. Many of the murderers on death row, as well as the rising number of children who commit terrible acts of violence, were emotionally abused and neglected as young children.

Psychological maltreatment is often difficult to substantiate in court. Children’s behavior can be indicative of abuse but is not evidence of it. Since there are multiple pathways to particular behaviors, assessors are cautioned about inferring causation from behavior. It is also true that some victims of psychological maltreatment show no discernible signs of distress. Dispositional evaluations can reveal the child’s perception of events in order to determine the precipitants for incidents of abuse and to assess the nature and strength of the child’s relationships with her parents.

Identifying psychological maltreatment requires viewing the family from an ecological perspective. Sociologist James Garbarino illustrates how an ecological view of the family helps to understand the interaction patterns within a family. He shows how family members’ perceptions of one another influence family behavior, how environmental conditions influence family life, and how changes that occur in the family impact

113 Id.
114 Id.
115 Id.
the environment, creating new family patterns. On an environmental level, Garbarino sets forth two major contributing factors to psychological maltreatment: lack of access to resources and alienation. A family atmosphere that is isolated, lacking an effective social support network, and lacking sufficient knowledge about child development to help cope with the demands of a child’s needs and behaviors creates a stressful, tense, and aggressive environment, which is conducive to maltreatment. Garbarino continues: “The psychologically maltreated child is often identified by personal characteristics, perceptions, and behaviors that convey low self-esteem, a negative view of the world, and internalized or externalized anxieties and aggressions.” The child typically is afraid of her parents and thus avoids them, or is rebellious against parental authority and provocative towards them. While this tends to describe most teenagers, the level of avoidance and aggression of the psychologically maltreated child is more extreme—including instances of truancy, running away, becoming involved with delinquent behaviors and drugs, being depressed, attempting suicide, developing eating disorders or other somatic disturbances, and emotional distress and instability.

While there is an argument that laws designed to deal with the emotional abuse of children after it has occurred are inadequate to

117 Garbarino et al., supra note 5, at 45–48.
118 Id. at 50. Garbarino states that families that are impoverished and overwhelmed by the demands of life without the proper support networks are more susceptible to ignoring or terrorizing their children. Middle-class and upper-class families that isolate themselves and engage in a destructive lifestyle are also at risk for psychologically maltreating children.
119 Id. at 52.
120 Id. at 63.
121 Id. at 63–64.
122 Id. at 64; see also Ian Urbina, Running in the Shadows: Recession Drives Surge in Youth Runaways, N.Y. Times, Oct. 25, 2009, available at www.nytimes.com/2009/10/26/us/26runaway.html (reporting about an increase in homeless youth since the recession began, and noting that many of such youth run away from abusive or neglectful home environments where a parent is on drugs and unable to provide stability); Ian Urbina, Running in the Shadows: For Runaways Sex Buys Survival, N.Y. Times, Oct. 27, 2009, available at http://www.nytimes.com/2009/10/27/us/27runaways.html (noting that “nearly a third of the children who flee or are kicked out of their homes each year engage in sex for food, drugs or a place to stay”); Nat’l Alliance to End Homelessness, Homeless Youth and Sexual Exploitation: Research Findings and Practice Implications 1 (2009), available at http://www.endhomelessness.org/content/article/detail/2559 (noting that the abuse, trauma, and neglect that runaways have already experienced in their homes make them more susceptible to sexual exploitation).
address this problem,123 this is not the focus of this piece. This Article provides a prescriptive process to carefully construct the law such that necessary interventions in a child’s life would be allowed to prevent further psychological damage and to start the road to recovery for emotional abuse victims.

II. THE NORMATIVE FRAMEWORK FOR EMERGENCY CHILD REMOVALS

A. GENERAL THREE-PRONG LEGAL STANDARD

Most states generally use a three-prong legal standard to determine whether a child should be removed from his or her parents’ home when there are allegations of child abuse and neglect.124 First, the state must show proof of imminent danger to the physical health or safety of the child. Second, the state must determine if the child remaining in the home is contrary to his or her welfare. Third, the state must make reasonable efforts to prevent the removal of the child from his or her home.125 This balancing test is grounded in constitutional law, which protects parents’ fundamental right to raise their children as they see fit, and the parens patriae doctrine, which establishes the state’s responsibility to protect those who cannot protect themselves.126 Three

123 See generally Judith G. McMullen, The Inherent Limitations of After-the-Fact Statutes Dealing with the Emotional and Sexual Maltreatment of Children, 41 DRAKE L. REV. 483 (1992). In this article, Professor McMullen argues that after-the-fact laws are inadequate to address the problem of emotional abuse of children. She suggests that ex-ante laws could mandate programs and institutions to provide help to at-risk families in the form of mandatory education for parents in the areas of child development, child psychology, and parenting; more school-based counseling staffs to support children; economic support for family therapy and counseling; mandatory psychological testing of parents and children to detect parenting problems; and more support groups and classes for parents suffering stress.

124 See Sue Badeau et al., A Child’s Journey Through the Child Welfare System, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 213, 220–26 (Marvin Ventrell & Donald N. Duquette eds., 2005). The first element of the prima facie case is evidence showing imminent danger to physical health or safety of child, which is typically a sworn affidavit of a state child abuse investigator and/or health expert. The prima facie showing that a child is at risk of imminent harm includes requirements set out in the Adoption and Safe Families Act (ASFA), including (1) a risk assessment to determine whether the child will be safe if left in his/her home and (2) an agency showing that it has made reasonable efforts to prevent or eliminate the need for removal of the child from the home. Together these three elements make up the three-prong legal standard.

125 45 C.F.R. § 1356.21(b).

United States Supreme Court cases form this legal standard's foundation: *Meyer v. Nebraska*,¹²⁷ *Pierce v. Society of Sisters*,¹²⁸ and *Prince v. Massachusetts*.¹²⁹ These three cases form the basis of the legal relationship between parents, children, and the state.

*Meyer* and *Pierce* both involved a parent's right, under the Fourth Amendment's Due Process Clause, to freely educate their children.¹³⁰ The Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law."¹³¹ The Court determined that the right of a parent to teach and educate children under his control is included within "liberty," setting forth that a parent's duties and rights were parallel with one another.¹³² Other cases broadened the notion of liberty to include individuals' right to marry, to establish a home, and to raise children.¹³³ Parents now have federal and state constitutional rights to direct a child's education, consent to medical treatment (with the exception of abortion and instances where parents' withholding of consent constitutes neglect or abuse), and direct a child's religious training.¹³⁴ This zone of family privacy is referred to as the

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¹²⁷ *Meyer v. Nebraska, 262 U.S. 390 (1923)* (holding that a state statute forbidding the teaching of subjects in foreign languages impermissibly interferes with the parents' right to control the education of their children), *abrogated on other grounds by Ferguson v. Skrupa, 372 U.S. 726 (1963).*

¹²⁸ *Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)* (holding that an Oregon statute requiring all children to attend public schools was invalid because it unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control).

¹²⁹ *Prince v. Massachusetts, 321 U.S. 158, 166–70 (1944)* (recognizing that parents have the right to provide a child with religious training but, when children may be harmed by their religious activities, the state has more authority over children).

¹³⁰ *Meyer,* 262 U.S. at 398–99; *Pierce,* 268 U.S. at 530–33.

¹³¹ U.S. Const. amend. XIV, § 1 (emphasis added).

¹³² *Meyer,* 262 U.S. at 400; *Pierce,* 268 U.S. at 534–35.

¹³³ *Loving v. Virginia, 388 U.S. 1, 12 (1967)* (describing the right to marry as fundamental); *Zablocki v. Redhail, 434 U.S. 374, 383–84 (1978)* (asserting the right to marry as fundamental); *Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)* ("Marriage and procreation are fundamental to the very existence and survival of the race."); *Santosky v. Kramer, 455 U.S. 745, 758–59 (1982)* (stating that a parent has a "fundamental liberty interest" in "the companionship, care, custody, and management of his or her children" (quoting Lassiter v. Dep't of Soc. Servs. 452 U.S. 18, 27 (1981)) (internal quotations omitted)); *Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)* ("Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.").

¹³⁴ *Wisconsin v. Yoder, 406 U.S. 205, 232 (1972)* ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the
parental rights doctrine, and it is supported by various cases that underscore the fundamental right of a legal parent over his or her child. A state may infringe on these rights only for a compelling reason and only insofar as that infringement is necessary to protect the state’s interest.

The Court confirmed the state’s authority to intervene in family relationships to protect children in *Prince v. Massachusetts*. In *Prince*, the First Amendment right to religious freedom was used to defend a guardian’s position that her niece should be allowed to help her sell Jehovah’s Witness magazines in the street. The Court weighed the private interest in freedom of religion against society’s interest in protecting the welfare of children. The Court held that each state had a wide range of power for limiting parental freedom, even in matters of conscience and religious conviction. The child labor law was intended to prevent the negative effects of child employment and the possible harms inherent in street activities. *Prince* established that parental authority is not absolute and can be permissibly restricted, if doing so is in the interests of a child’s welfare.

Beyond Supreme Court precedent, the balancing test is also predicated on several federal laws that govern the nation’s child welfare system. These laws include the Adoption and Assistance Child Welfare...
Act, the Adoption and Safe Families Act, and CAPTA. Further court cases solidified states’ rights to limit and even terminate parental rights. Typically, the facts that warrant removal of a child from his or her home become the grounds for termination if the parents are unable to rectify the abusive or neglectful home situation. Federal law gives parents one year and three months to rehabilitate their parenting skills and/or home environment before states must file for termination of parental rights. Since states must continue to make reasonable efforts to reunify a child with his or her parents beyond the removal timeframe, parents and children interact with many service providers in order to improve or eliminate the situation or circumstances that precipitated the removal in the first place. Though the burden of proof to terminate parental rights is clear and convincing evidence, at the time of the removal the state’s burden is much lower, typically preponderance of the evidence.

The relatively low burden of proof allows states more latitude to take custody of children in emergency situations when clear and convincing evidence is not yet available. “Imminent” danger is considered to be

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141 Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.) (conditioning state funding for adoption and foster care assistance programs on state requirement to make reasonable efforts to prevent placement of children in foster care and to reunify children with their families when placement was needed).


147 Santosky, 455 U.S. at 756–70; Badeau et al., supra note 123, at 225–26.
immediate danger to the child's physical health or safety. The exact level of danger is not consistent throughout all state statutes but typically includes the threat of or actual serious physical injury, sexual abuse, severe neglect, or death. Often the determining factors for imminent danger for emergency removals are visible physical injuries to the child or the child’s admission to an adult or an investigator of harm inflicted upon them by a parent. Other common instances of child removal involve children who are left for long periods of time or abandoned in environments where they cannot fend for themselves, and the environment is considered to endanger their physical health and safety.

Once a child is removed from a parent or legal guardian, the state conducts a risk and safety assessment to determine whether it is safe for the child to remain in the home. Risk assessment models are designed to structure decision-making, predict future harm, and help identify service needs for children and families. There are many factors that are considered to control risks to children, including alternative caretakers or a support network for parents, a protective parent and/or day care facility, and the removal of the abusive perpetrator from the home.

If the state can prevent the child from being removed from his or her home, it must make reasonable efforts to do so. Family preservation is the initial goal of the state. The definition of “reasonable efforts” is much debated, but it generally means attempting to work with the family without removing the child or placing the child with a protective parent,

149 See, e.g., CAL. WELF. & INST. CODE § 305 (West 2010) (peace officer has reasonable cause for believing minor is in immediate danger of physical or sexual abuse or physical environment poses an immediate threat to child’s health and safety); HAW. REV. STAT. §§ 587A-4, 587A-8 (2010) (imminent harm means there exists reasonable cause to believe that harm to the child will occur or reoccur within the next ninety days); N.Y. FAM. CT. ACT §1024 (McKinney 2010) (a peace officer, city/county social service worker, or any physician has reasonable cause to believe child’s home or care and custody presents an imminent life or health danger); TEX. FAM. CODE ANN. § 262.104 (West 2009) (a person of ordinary prudence and caution believes that there is an immediate danger to the physical health and safety of the child); Alyson Oswald, They Took My Child! An Examination of the Circuit Split over Emergency Removal of Children from Parental Custody, 53 CATH. U. L. REV. 1161, 1172 n.70 (2004); Paul Chill, Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings, 41 FAM. CT. REV. 457, 463 (2003).
150 Badeau et al., supra note 123, at 220–21.
151 Id.
Standard services may be offered to the parents, such as parenting classes, drug rehabilitation, psychological and/or psychiatric counseling, therapy, and education or job training. Usually a safety plan is implemented so that the children are supervised by an approved caretaker in addition to the parent, or the children remain in an approved caretaker’s home and the parent has only supervised visitation. If the current risks or harm to the children cannot be controlled, the state removes the children and places them in foster care.

As for the children, they do not have separate rights under constitutional law apart from those of their parents. Only when they are placed in the protective care of the state do children acquire certain rights under the law. The only right that children have throughout the process of the reporting and investigation of child abuse is the right to be represented by a guardian ad litem (“GAL”) in court if the state decides to intervene and remove them from the parents. The GAL can be an attorney or a lay advocate (or both), and is required to obtain a first-hand


154 See Wisconsin v. Yoder, 406 U.S. 205, 230–31 (1972) (rejecting Justice Douglas’ dissenting argument that the Yoder children themselves had a constitutional right to a hearing to determine whether they wished to attend school past the eighth grade, on the ground that the school choice belonged to the parents, not the children); Parham v. J.R., 442 U.S. 584, 603–04 (1979) (indicating that where a parent opposes the child’s wishes, the court should ordinarily give great weight to the parent’s preference). But see Morse v. Frederick, 551 U.S. 393, 396–97 (2007) (reaffirming that students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate, but their rights are not automatically coextensive with the rights of adults in other settings).

155 In re Gault, 387 U.S. 1, 29–31 (1967) (holding that children are persons under the Fourteenth Amendment and that a juvenile is entitled to due process rights during the adjudicatory phase of any delinquency proceeding that might result in secure detention); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (stating that “segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive[s] the children of the minority group of equal educational opportunities”); Marisol A. v. Guiliani, 929 F. Supp. 662, 674–75 (S.D.N.Y. 1996) (holding that children who suffered abuse in foster care had standing and due process rights to entitlement of services, and also had substantive due process rights to protection from harms while in state custody—including physical injury and unreasonable and unnecessary intrusions into their emotional well-being).

understanding of the situation and needs of the child in order to recommend what is in the child’s best interest. It is intended for the child’s voice to be heard through the GAL via direct representation or for the GAL to substitute his or her judgment regarding what circumstances would be in the best interests of the child when the child is too young or incompetent to direct the GAL’s representation.

Indeed, the state’s decision to remove a child is not governed by the state’s authority, parental rights, or children’s rights. The three-prong normative framework of emergency child removals is grounded in the best interest of the child, which is the primary consideration of the court in child abuse and neglect cases. The tension among parental rights, children’s wishes or best interests, and the state’s obligation to protect children continues to be the center of most emergency child removals and terminations alike.

B. INCLUSION OF EMOTIONAL ABUSE IN STATE CHILD REMOVAL STATUTES

States that accept federal funding through CAPTA are required to include psychological abuse (also known as emotional maltreatment or mental injury) in their state definition of child abuse. CAPTA defines child abuse and neglect as “any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm.” Forty-eight states and six U.S. territories include emotional maltreatment as part of their definition of abuse or neglect.

Typical language used in these definitions is “injury to the psychological capacity or emotional stability of the child as evidenced by an observable or substantial change in behavior, emotional response, or cognition,” or as evidenced by “anxiety, depression, withdrawal, or aggressive behavior.” In their definition of child abuse or neglect, Georgia and Washington are the two states which do not include emotional maltreatment in their definitions.

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157 Id.
161 See CHILD WELFARE INFO. GATEWAY, supra note 154, at 3, available at www.childwelfare.gov/systemwide/laws_policies/statutes/define.cfm. Georgia and Washington are the two states which do not include emotional maltreatment in their definitions.
162 Id. at 4.
163 DEFINITIONS OF CHILD ABUSE AND NEGLECT, supra note 8.
the statutes use different names to identify psychological abuse, including variations of the term mental injury, such as “severe emotional injury, or psychological trauma,”664 “emotional abuse,”665 “emotional maltreatment,”666 and “psychological harm.”667 Many states set forth that mental injuries must be evidenced by an “observable” and substantial impairment to the child’s ability to function “within the normal range of performance and behavior” or “in a developmentally appropriate manner.”668 Other states include in the definition of abuse examples of the effects caused by mental injury of children that should be presented by evidence, such as severe anxiety, depression, withdrawal, and social dysfunction.669 These state definitions of abuse and/or neglect are not consistent, and only twelve states and two U.S. territories include psychological maltreatment as a reason that a child could be removed from his or her home.670

The emergency removal statutes—that is, removals that do not require court interaction—in the fifty states and U.S. territories that define abuse and neglect can be separated into four categories. First, some states are all-inclusive, meaning that emotional abuse or mental injury is mentioned in both the abuse definition statute and the removal statute.671 Second, some states are exclusive of emotional abuse in that it

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664 ALA. CODE § 27-55-2(1)a (2010).
665 COLO. REV. STAT. ANN. § 19-1-103(1)(a)(IV) (West 2010).
666 CONN. GEN. STAT. § 46b-120(3) (West 2010).
668 See ALASKA STAT. ANN. § 47.17.290 (West 2010); ARK. CODE ANN. § 12-18-103 (West 2010); COLO. REV. STAT. ANN. § 19-1-103 (West 2010); FLA. STAT. ANN. § 39.01 (West 2010); HAW. REV. STAT. § 350-1 (West 2010); IOWA CODE ANN. § 232.68 (West 2010); MD. CODE ANN., CTS. & JUD. PROC. § 3-801 (West 2010); MINN. STAT. ANN. § 260C.007 (West 2010); NEV. REV. STAT. ANN. § 432B.020 (West 2010).
669 ARIZ. REV. STAT. ANN. § 8-201 (2010); CAL. WELF. & INST. CODE § 300 (West 2010); ME. REV. STAT. ANN. tit. 22, § 4002 (2010).
671 See ARIZ. REV. STAT. ANN. §§ 8-201, 8-821 (2010); DEL. CODE ANN. tit. 10 § 901, tit. 13 § 2512 (2010); IDAHO CODE ANN. §§ 16-1602, 16-1608 (2010); IND. CODE ANN. §§ 31-34-1-1, 31-34-2-3 (West 2010); KY. REV. STAT. ANN. §§ 600.020, 620.060 (West 2010); OHIO REV. CODE ANN. §§ 2151.031, 2151.31 (West 2010); P.R. LAWS ANN. tit. 8, §§ 444, 446b (2009).
is neither defined in the abuse definition nor the removal statute.\textsuperscript{172} Third, other states are specifically limited in their definition of abuse and neglect. These states define emotional abuse in their abuse definition statutes, but neither mention it in the removal statute nor provide a direct link between the removal statute and the abuse definition.\textsuperscript{173} Finally, some states are directly linked by their definition of abuse and/or neglect and their emergency removal statutes.\textsuperscript{174} These states include emotional injury as part of the definition of abuse or harm. They also either directly link the abuse definition statute to the removal statute, or provide broad terms for removal and require specific findings at the dispositional hearing of the emergency child removal, which include emotional damage. These directly-linked states that comprise the fourth category allow for children to be removed solely because of emotional abuse or mental injury. Thus, the only two categories that meaningfully account for the psychological abuse of children are the all-inclusive and directly-linked states.

\textsuperscript{172} See GA. CODE ANN. §§ 15-11-2, 15-11-14 (West 2010); WASH. REV. CODE ANN. §§ 26.44.020, 26.44.050 (West 2010).


Two caveats should be added to this categorization of emergency removal statutes based on psychological maltreatment. First, some specifically limited states allow for the removal of children based on a showing of domestic violence in the home. In most cases, a specific clause in the relevant statute provides for removal based on this reason, or the state considers exposure to domestic violence as neglect. Second, the Hague Convention on the Civil Aspects of International Child Abduction provides exceptions to the return of children wrongfully removed from the country where they habitually reside. Articles 13b and 20 set forth that if it is established by clear and convincing evidence that "there is a grave risk that [a child's] return would expose the child to physical or psychological harm . . . the return of the child may be refused . . .".

There are six states and one U.S. territory that are all-inclusive. Arizona is one of these states. Arizona defines emotional injury with a qualifier, such as severe or serious, and establishes that it must be diagnosed by a doctor or psychologist or supported by the opinion of a qualified expert witness. Arizona's child removal statute sets forth the particular situations that qualify as imminent harm and require CPS to intervene, including the determination by a doctor or psychologist that (a) the child's caregiver has emotionally damaged the child; (b) the child exhibits severe anxiety, depression, withdrawal, or aggressive behavior due to the emotional damage; and (c) the caregiver is unwilling or unable to seek treatment for the child. This statute requires a professional finding of emotional damage, negative reaction from the child, and negative behavior of the parent.

Arizona includes five alternatives to removal in its statute, including identifying a relative to temporarily care for the child, removing the alleged abuser from the home, or helping the protective caregiver and the child leave the home of the alleged abuser. These provisions may also

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175 See, e.g., CONN. GEN. STAT. § 46b-120(8) (B)-(C) (West 2010); N.Y. FAM. CT. ACT § 1012(f), 1022, 1024 (McKinney 2010); S.C. CODE ANN. § 63-7-620 (2009); see also Nicholson v. Scoppetta, 820 N.E.2d 840 (N.Y. 2004) (holding that emotional injury from witnessing domestic violence can rise to the level that justifies removal of a child, but witnessing does not, by itself, give rise to any presumption of injury).
177 ARIZ. REV. STAT. ANN. §§ 8-201, 8-821 (2010).
178 ARIZ. REV. STAT. ANN. § 8-201 (2010).
assist in reducing the amount of emotional harm the child may endure as a result of a finding of child abuse or neglect by the state.

Delaware also mentions emotional harm or danger directly in the removal statute. Delaware’s provision in the court rules states that the Department of Services for Children Youth and Their Families can seek emergency removal of a child when “probable cause exists to believe that a child continues to be in actual physical, mental or emotional danger or there is substantial imminent risk thereof or immediate or irreparable harm may result to the child if such an order is not issued.”

One of the consistencies among states that do include emotional or mental harm as part of their removal statute is that they also include it in various other statutes that pertain to protective orders, mandatory reporters, and termination of parental rights. This helps to establish consistency regarding how child abuse is dealt with in family and juvenile courts and allows the law to live out the true intention of its meaning.

The legislative history of these state statutes shows that many of the original versions date back several decades. Some of the most recent changes to the statutes stem from the history of child protection laws. The Commonwealth of Puerto Rico passed the “Comprehensive Child Well-being and Protection Act” in 2003, which provides a Statement of Motives. The statement sets forth that family violence is the “most serious social emergency in Puerto Rico.” It further discusses the devastating effects of domestic violence on the victims, specifically noting the effect of children’s exposure to violence and the repetitive patterns of dominance and violence that are reinforced as they establish relationships as young people. It reiterates the territory’s power of parens patriae, stating that when the wellbeing of children is at risk and violence becomes the mode of relating, the State must intervene in the private affairs of the family. It is interesting that this U.S. territory opted to address a specific cultural child abuse issue distinct to its state in a separate legislative act so as to underscore its importance.

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180 77 DEL. CODE ANN. tit. 13 § 2512 (2010).
181 See OHIO REV. CODE ANN. § 2151.031 (West 2010); KAN. STAT. ANN. § 38-2202 (2009) (though Kansas is a directly-linked state, the ability of the court to consider psychological injury is elaborated throughout the state family statutes).
182 P.R. LAWS ANN. tit. 8, § 444a (2009). For example, the child removal law in Puerto Rico, which was enacted in 2003, came from the Children’s Bill of Rights, 1998 P.R. Laws 338. This document first acknowledges the responsibility of the Government of Puerto Rico to foster the fullest social and emotional development of Puerto Rican children.
184 Id.
185 Id.
Some states, such as Minnesota and California, also include cultural or religious considerations when assessing mental injury. California is unique in that it excludes children who suffer serious emotional damage as a result of the conduct of a parent if the willful failure of the parent or guardian to provide adequate mental health treatment is based on a sincerely held religious belief and if a less intrusive judicial intervention is available. Minnesota adds the clause “with due regard to the child’s culture” at the end of the definition of mental injury in the Reporting of Maltreatment statute. The clause serves as a qualifier of the child’s ability to function within a normal range of performance and behavior. This inclusion of culture is different than how Puerto Rico specifically addressed domestic violence in that it allows some latitude with respect to the manifestations of harm demonstrated by a child if his culture would impact what is considered “normal” regarding performance and behavior. In other words, the child’s culture is taken into account when determining his or her “normal” performance or behavior so as not to misinterpret signals that might otherwise trigger a red flag of child abuse. It could also be argued that the child’s culture may embrace a practice that could cause mental injury to someone outside of that culture; but to this particular child, no harm has been noted.

In order to reform the normative framework of the emergency removal standard, the definition of emotional abuse should be revised. As the different categories illustrate, there are two ways to incorporate emotional abuse into state statutes. First, states could create a more inclusive overall definition of abuse and neglect and then refer back to the all-inclusive abuse and neglect definition in the emergency removal standard. Second, states could specifically define psychological abuse in the emergency removal statute. The latter choice could allow for a more instructive, culturally competent definition that also includes the means by which the emotional abuse should be substantiated. The best way to achieve conformity amongst state statutes is to amend CAPTA and tie the funding of critical family services offered by states to the modification of the definition of abuse and neglect.

C. CHILD REMOVALS BASED ON PSYCHOLOGICAL ABUSE

Removals in several states have been based on psychological abuse or risk of endangerment because of psychological abuse. Some state courts, such as California, Michigan, Montana, and North Dakota, have affirmed child removals because the child’s emotional safety or well-being was endangered. Some of these states are directly linked, but

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186 CAL. WELF. & INST. CODE § 300(c) (2010); MINN. STAT. ANN. § 626.556(f)(9) (2008).
others fall under the specifically limited category. The removal circumstances in the specifically limited states can be distinguished in that one child was both physically and mentally abused, and the other child’s specific circumstances satisfied the broad removal language. Most of these removals from the above-referenced states were based on the removal standard’s general inclusion of any type of abuse that fell under the statutory definition of “abuse” or “neglect.” For instance, in the state of California, the definition of abuse includes a child who is “suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as a result of the conduct of the parent or guardian . . . .” Psychological evaluations and the testimony of psychologists were utilized in some of the cases as a determining factor of the ultimate question of whether the child would be removed from the home.

A survey of cases over the last thirty-five years reveals that the recurring issue in cases involving psychological abuse is the court’s reticence to remove children when the harm to the child is difficult to attribute to the parents’ behavior. For instance, in 1976 the North Dakota Supreme Court affirmed a juvenile court ruling that a teenager was deprived and should be removed from her parents’ custody because she was without the proper parental care and control necessary for her emotional and mental health. The eighth grader made a suicide attempt and had threatened several other attempts. The court specifically ruled that the controlling factor in determining the child was deprived was the parents’ refusal to acknowledge anything was wrong with the child. While the court recognized the fundamental right of every parent to have custody of her child, it asserted that the stricter burden on the state to prove by clear and convincing evidence that the child fit the state

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189 Bjerke, 248 N.W.2d at 812 (child’s suicide attempt and other threatened attempts were grounds to believe that she was suffering from an illness or injury and was in immediate danger because her parents refused to acknowledge anything was wrong her).
191 In re Matthew S., 49 Cal. Rptr. 2d 139, 145 (Cal. Ct. App. 1996); In re J.G., C.G. & M.G.-E., 89 P.3d 11, 15 (Mont. 2004); In re J.B., No. 09-004, 2009 Vt. Unpub. LEXIS 61, at *2–3 (Vt. Apr. 16, 2009) (child had problems at school because his parent ignored physician’s orders for child’s bowel problems); Bjerke, 248 N.W.2d at 814 (teenager removed from home because parents would not provide her with mental health treatment).
192 Bjerke, 248 N.W.2d at 808, 811.
193 Id. at 809, 812.
definition of "deprived" helped to ensure that the family unit would not be disturbed for insufficient reason.\(^{194}\) The court further supported the fact that the necessity of state intervention may be just as strong where emotional, psychological, or learning problems are involved as when physical abuse or failure to provide for a child's physical well-being is the reason for removal.\(^{195}\) Because the child's mental health worsened due to the uncooperativeness of her parents in obtaining the recommended treatment, she was eventually placed in an institution.

The testimony of a psychologist is not the only factor courts consider regarding the ultimate question of whether a removal of the child was warranted. In California, contrary to the psychologist's recommendation, an appellate court supported the removal of a child from his mother because he was at risk of developing severe emotional problems.\(^{196}\) The facts of the case involved the mother's delusional behavior regarding injuries to her son's genitals. She thought that her thirteen-year-old son's penis had been mutilated and that he would die. Her son suffered the indignity and embarrassment of a medical examination stemming from his mother's delusion. Though the petition alleged that the son was suffering or was at substantial risk of suffering emotional damage (as evidenced by his severe anxiety, depression, or withdrawal), the psychologist who evaluated him and his mother testified that it would do more harm than good to remove the children from their mother. The children were confused about their mother's delusions, but they were able to recognize them and deal adequately with them. The doctor further stated that the family should be closely supervised to monitor the situation, recommending therapy, information sessions, and continuing involvement of child protection services. The court, however, agreed with the lower juvenile court, which held that there was clear and convincing evidence that the child was at risk of physical and emotional harm and declared him to be a dependent of the court.\(^{197}\)

In Minnesota, a specifically limited state, the Supreme Court confirmed the legislative intent to include mental injury in the definition of the term "physical abuse."\(^{198}\) This case involved the physical abuse of a twelve-year-old son by his father. The child was disciplined by paddling on the back of the upper thighs thirty-six times. In the midst of the paddling, the child wielded a knife and threatened to commit suicide. The court expounded on the meaning of physical abuse, mental injury, and emotional maltreatment. While the facts of this case did not involve

\(^{194}\) *Id.* at 811.
\(^{195}\) *Id.*
\(^{196}\) *In re Matthew S.*, 49 Cal. Rptr. 2d at 144–45.
\(^{197}\) *Id.*
\(^{198}\) *In re Welfare of the Children of N.F. and S.F.*, 749 N.W.2d 802, 810 (Minn. 2008).
mental injury, the court distinctly set forth the definition and action required if a finding of this type of abuse is substantiated. This case is illustrative of how a state legislature can establish the intent of law with specific definitions and a higher burden of proof for child abuse. Not only does physical injury include mental injury, but mental injury is also defined as "an injury to the psychological capacity or emotional stability of a child as evidenced by an observable or substantial impairment in the child's ability to function within a normal range of performance and behavior with due regard to the child's culture."  

Emotional maltreatment is regarded as different but not inconsistent with the definition of mental injury: it is the "consistent, deliberate infliction of mental harm on a child by a person responsible for the child’s care that has an observable, sustained, and adverse effect on the child’s physical, mental, or emotional development." All must be proven by clear and convincing evidence, which places the onus on the state agency to prove that the child suffered abuse. The court specifically mentions that "[i]t would be incongruous for the legislature to require the reporting of mental injuries inflicted upon a child, yet leave the courts without jurisdiction to provide protection to such an injured child or to require that services be provided to the child’s family."  

These removals based on psychological abuse illustrate the need for greater clarity regarding this type of injury for courts and everyone involved in the process of investigations and removals of allegedly abused and neglected children. They also show that psychological evaluations alone should not control the fate of a child in a dispositional court proceeding to determine if removal was warranted. More importantly, these cases confirm the fact that many family court judges and legislators understand the complexities of child abuse and realize that psychological abuse is the core component of abuse and neglect.  

III. REFORMULATING THE NORMATIVE FRAMEWORK THROUGH FOREIGN THEORY  

There is a need for an emergency child removal legal standard that allows all states to remove children if there is an immediate danger or risk to their mental health. This standard should also allow courts to consider mental injury to a child and the child’s voice as part of a more structured, reliable risk assessment in determining whether the child’s home is safe. While opening up another window to capture the psychological abuse of children by parents or caregivers, reliable parameters must be put in place such that the window does not become a floodgate that increases unnecessary investigations and child removals.

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199 Id. at 809.  
200 Id. at 810.  
201 Id. at 809–10.
In seeking a resolution to this problem in the child protection system, an interdisciplinary approach is required. A combination of federal law amendments, state statutory changes, recruitment of qualified clinical child and family psychologists, and education and training for social workers, lawyers, and judges is necessary to deal with the core issue of psychological abuse of children.

Furthermore, the community and environment with which children and families are most connected need to be included in the framework in order to most effectively treat and monitor psychological abuse. The places from which most referrals of abuse and neglect are reported are the same places that have the most frequent contact with children and parents: public schools and hospitals. The professionals that work in these institutions are specially trained to deal with children and parents in our communities, and are typically mandatory reporters of child abuse and neglect. They are the first line of defense in the fight against child abuse. It would be even more advantageous for them to be the first line of offense as well. Schools and hospitals are typically the safe places in our communities—the places that touch our families in the most consistent, meaningful ways over long periods of time. It would make more sense for these places to house the treatment and monitoring of child abuse and neglect. Moreover, they could also offer ongoing educational programs to families in order to serve in a preventative role so that parents could access treatment for their own issues and learn the skills necessary to avoid state intervention because of child abuse and neglect. This idea builds upon the concept of ecogenerism, a term coined by Professor Barbara Bennett Woodhouse, which places the child in an environmental context.202

The child protection system is currently set up as a negative process.203 First there is a referral of negative parental conduct, followed

202 Barbara Bennett Woodhouse, Ecogenerism: An Environmentalist Approach to Protecting Endangered Children, 12 VA. J. SOC. POL’Y & L. 409, 441–42 (2005) ("Ecogenerism would examine child welfare policies with reference to communities as well as individuals, and with reference to mesosystems, microsystems, and exosystems, rather than with reference to the familiar triangle of child/parent/state."). Using Woodhouse’s ecological approach, schools and hospitals would be part of the microsystems where children spend most of their time, and the exosystems, such as the financial markets and the health care systems, would be influenced to buttress families through the microsystems. The application of the principle of subsidiarity to the child welfare system would influence the cultural macrosystem.

203 ABCAN, supra note 21, at 9. "The most serious shortcoming of the nation’s system of intervention on behalf of children is that it depends upon a reporting and response process that has punitive connotations, and requires massive resources dedicated to the investigation of allegations. State and County child welfare programs have not been designed to get immediate help to families
by an investigation by a state agency specifically designed to investigate and remove children from their parents. If the abuse and neglect is confirmed through the investigation, the children are removed from their parents’ care, and a court proceeding ensues where parents’ positive rights to raise their children may be negatively affected by a decision of a judge. During this chaotic time families interact with two institutions, the CPS system and the civil court system, both of which are foreign environments to families, but similar to the police and to the criminal justice system in function and outcome. These institutions deal with families in a routine manner, offering “cookie-cutter” services with little individualized assistance for parents and children. If the child protection system could better utilize the community institutions that are built on the foundations of child and personal development, education, health and wellbeing, perhaps the system could be designed as a positive process for treatment and prevention.

In figuring out a path to capture psychological abuse within the spectrum of the child protection system, lawyers and policy makers should consider applying the European principle of subsidiarity. This legal principle concerns the allocation of power and certain functions between various levels of local and national government agencies or organizations. In choosing to implement a strategy that would utilize the support of the community and government institutions in the community that are designed to be safe havens for children and families, the child protection process could be more positive and more individualized for each family, and could provide continuity of care for the psychological issues that remain long after the legal case has ended.

A. THE EUROPEAN PRINCIPLE OF SUBSIDIARITY

The principle of subsidiarity is a social, religious, and political concept. It is a “theory about the relationship among social structures, the common good and human dignity . . . .” The term comes from the Latin word *subsidiun*, which means help, support, or protection. The principle is a common term of “Eurospeak” and is viewed as a means whereby distribution of authority between community institutions and

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member states in the European Union can be regulated. It has been fully integrated into the governing structure of Europe through the Treaty on European Union, commonly known as the Maastricht Treaty of 1992.

Scholars debate whether the theory is an element of social, religious, or political philosophy. The principle of subsidiarity was born out of the social movement in the nineteenth century called Social Catholicism. Bishop Kettler led this movement, which was founded on two main elements: the notions of “intermediate groups” and of “subsidiarity.” Kettler observed that the relationship between the State and society was paradoxical in that on the one hand, society needed State intervention because it was often unable to attain its own ends; but on the other hand, “State intervention should be limited to cases of real need since excessive State intervention would lead to a correlative weakening of society and individual potential in the long run.”

Development of strong intermediate groups, defined as associations of individuals whose function is to mediate between State authorities and individuals, was the only means of effectively limiting excessive State intervention. Subsidiarity is an organizing principle that supports the notion that matters ought to be handled by the smallest, lowest, or least centralized competent authority.

As a fundamental principle of European Union ("EU") law, subsidiarity provides that the EU may act or make laws only where action of any individual country would be insufficient. Subsidiarity was

209 Joseph A. Komonchak, Subsidiarity in the Church: The State of the Question, 48 JURIST 298, 298 n.1 (1988). Komonchak cites to various scholars that associate the development of subsidiarity as a political response in Germany to claims made for the modern liberal state, a Catholic response to liberalism, and a western social theory.
210 ESTELLA, supra note 22, at 78.
211 Id.
212 Id. at 79.
213 Id. at 80. Pope Pius XI sets forth the principle of subsidiarity in the Encyclical Letter, Quadragesimo Anno, stating, "Just as it is wrong to withdraw from the individual and commit to a group what private enterprise and industry can accomplish, so too it is an injustice, a grave evil and a disturbance of the right order, for a larger and a higher association to arrogate to itself functions which can be performed efficiently by smaller and lower societies. This is a fundamental principle of social philosophy, unshaken and unchangeable. Of its very nature the true aim of all social activity should be to help members of the social body, but never to destroy them or absorb them."
established in EU law by the Treaty of Maastricht and is contained in Article 3(b) of the Treaty on European Union. It reads as follows:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.214

Since the EU was created to harness the social and economic power of various European countries, there was a common concern among the Member States regarding excessive centralization of the new political entity.215 “In effect, subsidiarity is a guideline for contemporary power-sharing between . . . the institutions of the [European Union] and the constituent Member States that formed the Union.”216

There are two fundamental ideas contained within the contemporary general theory of subsidiarity: the principle of noninterference and the principle of assistance.217 The principle of noninterference proposes that “the state should not interfere with either the rights of the individual or the activities of lesser social groupings when the individual or the lesser groupings can cope with their own specific problems or assigned tasks.”218 The principle of assistance “acknowledges a need for the state to render assistance whenever the individual or lesser groupings are incapable of coping on their own.”219 These two principles undergird the agreement that only the responsibilities that cannot be effectively exercised by Member States should be transferred to the European Union.

Though subsidiarity is politically known for supporting the autonomy of Member States of the EU, the true Catholic social theory stands for individual empowerment alongside a government that “play[s] a significant role in fostering the conditions necessary for its implementation.”220 The emphasis on active government that works for the good of the community, not just the rights of individuals, contrasts

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214 Maastricht Treaty, supra note 201, at art. 5 (formerly art. 3b).
216 Vause, supra note 22, at 62.
217 Bridge, supra note 197, at 50.
218 Id.
219 Id.
220 Vischer, supra note 23, at 110.
with the liberalism of John Locke, which espoused that society was a “collection of individuals who have come together to promote and protect their private rights and interests.” The common good has three essential elements: (1) ‘respect for the person’; (2) ‘the social well-being and the development of the group itself’; and (3) ‘the security and permanence of a just order.’ The principle of subsidiarity propounds a partnership between families and the government whereby small and intermediate-sized communities or institutions link the individual to society in a way that gives people greater freedom and power to act.

Four criteria explain the concept of the subsidiarity principle: the sufficiency criterion, the benefit criterion, the close-to-the-citizen criterion, and the autonomy criterion. These tenets are important in the analysis of how individuals and the state should coexist and support one another in a democratic society that values the common good. The sufficiency criterion requires that actions of individuals or member-state governments alone will not achieve the objectives of the action. The benefit criterion states that the action must bring added value over and above what could be achieved by individual or member-state government action alone. The close-to-the-citizen criterion involves the idea that decisions should be made as closely as possible to the citizen. The autonomy criterion sets forth that the action taken should secure greater freedoms for the individual. The common good in child protection cases is typically the common goal of both the state and the parents—maintaining the integrity of the family unit through reunification. Applying the subsidiarity principle along with its four criteria to the child protection system allows for a fresh perspective on how the common good is achieved and what can be done to improve it.

B. TRANSFORMING THE CHILD PROTECTION SYSTEM WITH THE PRINCIPLE OF SUBSIDIARITY

In a very natural way, the principle of subsidiarity is aligned with the meaning of the fundamental rights extended to the family, as developed under the U.S. Constitution and through case law involving parents’ and

221 Id. at 113–14 (citing Oliver F. Williams, Catholic Social Teaching: A Communitarian Democratic Capitalism for the New World Order, in NEW WORLD ORDER 5–6 (Oliver F. Williams & John W. Houck eds., 1993)).
222 Id. at 114 (citing E. De Jonghe, Participation in Historical Perspective, in CATHOLIC SOCIAL TEACHING 126-27 (David A. Boileau ed., 1998)).
224 Treaty of Amsterdam, supra note 26, at Protocol on the application of the principles of subsidiarity and proportionality.
children’s rights to family integrity. The underlying philosophy of subsidiarity is the protection of the autonomy of smaller entities against intervention by larger entities. The smallest entity is the individual, which is just below the family to which the individual belongs. Subsidiarity as applied should work to protect the child from harm within the family and protect the family from harm outside its community by the state. Many scholars recognize the paradox of subsidiarity—it “both empowers and limits the state” in that it is allowed to provide remedies for social group weaknesses, but it is then limited in its intervention because of its duty to respect the integrity of the social group. The principle has been used to support the argument that the government should not interfere with the decisions of competent, non-abusive parents concerning the upbringing and welfare of their children. On the other hand, it has been used to emphasize the

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225 See Prince v. Massachusetts, 321 U.S. 158, 166–67 (1994) (recognizing that the state cannot interfere with parents’ right to care and nurture their child, but outlining limitations on this right); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (finding that parents have a fundamental interest in guiding the “religious future and education of their children”); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (“The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment.”); Santosky v. Kramer, 455 U.S. 745, 753–54 (1982) (holding that the State must provide parents with due process when seeking termination of parental rights).

226 Duncan, supra note 23, at 67; see also, Tara Melish, From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies, 34 YALE J. INT’L L. 389, 392 (2009) (asserting that the U.S. human rights policy, which is grounded in the principle of subsidiarity, presents a paradox in that it outwardly embraces human rights principles as a founding national ideology while simultaneously rejecting direct domestic application of human rights treaty norms); Armand H. Matheny Antommaria, Jehovah’s Witnesses, Roman Catholicism, and Neo-Calvinism: Religion and State Intervention in Parental, Medical Decision Making, 8 J.L. & FAM. STUD. 293, 310 (2006) (quoting John Paul II as saying, “While significant theoretical and practical arguments would need to be made to analyze these issues fully, it can fairly be claimed that the current approach to child abuse and neglect, with its assumption in favor of parental authority, is consistent with the Roman Catholic tradition and its principle of subsidiarity”).

227 Brief for Society of Catholic Social Scientists as Amicus Curiae Supporting Respondents, Troxel v. Granville, 530 U.S. 57 (2000) (No. 99-138). In this brief, Professor Richard Garnett and Stephen M. Krason, President of the Society of Catholic Social Scientists, argue that “the state violates a fundamental moral principle, upsets the proper order of civil society, and undermines the natural end of the family when it substitutes its judgment for parents’, except when absolutely necessary in special and difficult circumstances.” Id. at 8. The brief sets forth that the heart of the principle of subsidiarity is the concept that, if families cannot fulfill their responsibilities, other social bodies have the duty of helping them and of supporting the institution of the family. It further states that the subsidiarity principle applies to family-state relations as well as to relations between different levels of government.
provision of help through coercive intervention when the child’s family was unable or unwilling to provide proper care or development. In considering the intersection of the state and the family, Professor Jennifer Reich notes, “[o]ne of the most striking features of the child welfare system is that its power to dismantle families exists alongside its efforts to preserve them.” Rather than continue within a framework of partial subsidiarity, the principle can be stretched further to empower communities, with support from the state, to help the family who cannot fulfill its responsibility to protect the health and wellbeing of its children.

As stated earlier, the common good or goal of CPS is reunification of children with their parents. Maintaining children within their family group incorporates the three essential elements of the common good as it relates to the Catholic social theory of subsidiarity. First, this goal respects the individuals within the family, including the child, the sibling group, the parents, and extended family members. Second, the social wellbeing and development of the family is best met by its performance as a cohesive unit. The support family members can provide for one another is typically greater than the support that could be provided by the state. The state is better off providing a buttress to families who require assistance with caring for children than taking on the role of caregiver itself. Finally, the security and permanence of a just order within the state depends on the stability of families to produce constructive citizens. In keeping with the spirit of the concept of the common good, the underlying primary consideration of courts dealing with abuse and neglect allegations should be strengthening the family unit to better serve the child, rather than the best interest of the child.

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228 See Timothy J. Pillari, *Rethinking Juvenile Justice: Catholic Social Thought as a Vehicle for Reform*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 167, 186 (2008) (arguing that the principle of subsidiarity was used in the formation of the original juvenile justice system and that the idea of *parens patriae* supports and complements familial or community units); William A. Galston, *Public Morality and Public Policy: The Case of Children and Family Policy*, 36 SANTA CLARA L. REV. 313, 313 (1996) (suggesting that the Catholic theory of subsidiarity assists in conceptualizing a family public policy for how responsibility should be allocated amongst individuals, families, communities and “society as a whole, exercised through formal institutions”).

229 Reich, *supra* note 21, at 10. Reich further states, “[t]his paradox exposes the way that the family is both the subject of public policy and of sentimental and material privacy.”

230 Melish, *supra* note 219, at 392 (arguing that the U.S. human rights paradox might not be so paradoxical if there were a shift from partial subsidiarity, how the theory is utilized currently within the U.S. international human rights framework, to genuine subsidiarity, where internationally recognized human rights would be protected at the local level).
Analysis of the four criteria of the subsidiarity principle can help identify ways in which the framework of CPS can be reformed. With respect to the sufficiency criterion, the objectives of CPS to maintain the family unit can be achieved only when parents are offered useful services by the state that they can access. The current framework provides a cookie-cutter approach that requires most parents to complete the same services, regardless of whether those services actually deal with the relevant issues regarding their home environment and behaviors. The services are often spread out over a wide geographical area for parents who generally do not have private transportation or jobs with adequate leave policies. In contrast, medical centers and local public schools are more competent to diagnose and treat the family, and they are closer to the family in that they are readily accessible within the neighborhood. The benefit and close-to-the-citizen criteria are met because parents would have more frequent and continuous contact with service providers at schools and medical centers due to their proximity and flexible hours. This adds value to the family's upward trajectory above what could be achieved in the current framework. In addition, families would likely be more receptive to receiving assistance from places that are purposed to secure family and individual autonomy. This satisfies the autonomy criterion as well as the close-to-the-citizen criterion because the service providers who actually develop a relationship with the parents would be the persons to make recommendations regarding the ultimate objective of the state.

Observing how the principle of subsidiarity has been applied to the international human rights system can inform the transformation of the child protection system with the same theory. Professor William Carter explains: “Subsidiarity has been one of the foundational organizing elements of the international human rights system since its inception. In its simplest form, the principle of subsidiarity holds that international human rights standards are best implemented at the lowest level of government that can effectuate those standards.”231 The inherent conflict that arises in dealing with international human rights is reconciling the goal of recognizing the universality of human rights with the goal of respecting national sovereignty.232 As Professor Tara Melish argues, “the role of the subsidiarity principle . . . is to act as a flexible mediator, policing the boundary between ‘noninterference’ and ‘assistance’ to maximize the space in which effective protection for human dignity can be ensured at levels closest to affected individuals.”233 In the instance of the child protection system, applying the subsidiarity principle would enable licensed professionals within the public school and health systems

232 Id. at 323.
233 Melish, supra note 219, at 440.
to serve as the flexible mediators who police the boundary between noninterference in the private sphere of the family and assistance to families in the community, so that they can learn how to effectively care for and protect their own children.

Though the principle of subsidiarity generally applies a hierarchal view of groups and organizations, it is not so simple to place the state institutions that are required to deal with children and families in a vertical template. These organizations include the Department of Health and Human Services ("DHHS") as it operates on both the federal and state levels, public independent school districts, federally-funded preschool agencies, state and local police departments, and public institutions of health. The way that the current framework is set up, many of the organizations that regularly deal with children and parents on a daily basis are referral networks for DHHS, which houses the CPS unit of the state. In order for a reconfiguration of the child protection system to take place, major efforts would have to be made to identify and transfer qualified personnel from CPS units to schools and health centers. In addition, respective supervisory structures within each agency would have to be established and coordinate with one another. The type of restructuring will require finances beyond what is currently allocated to CPS—which leads to the need for a change in federal law.

1. Amending the Child Abuse Prevention and Treatment Act

The federal law should require not only that psychological abuse be part of the definition of abuse, but it should also require that states include this form of abuse as part of the emergency legal removal standard for children. It is such a vital part of child abuse and neglect that it can no longer be left out of the war against harms perpetrated against children. CAPTA is the law that created a federal definition of child abuse and child neglect that states were expected to follow generally in their own statutes in order to receive grant funds.234 Although CAPTA did include the definition of "mental injury" along with physical injury, sexual abuse, and negligent maltreatment, its definition of mental injury should conform to the general standard definition in the field of psychology. Since psychology will supply testing, evaluation, and testimony to the courts regarding the mental state of children and parents, it is essential that the legal standard comply with these parameters. Once the definition is standardized, the funding language of CAPTA should also be amended to require states to include mental injury and/or psychological abuse in their legal removal statutes.

The extent to which mandatory reporters, child protection agencies, and courts should consider this particular type of abuse needs to be quantified in order to avoid frivolous or minor referrals and petitions against parents. The term “substantial” should be used to quantify the level of psychological abuse considered under the new removal standard. “Substantial” means the psychological abuse must be extensive, sizeable, or significant. The determination of the abuse’s significance could be associated with the magnitude or frequency of the parent’s action or inaction, or the affect that the parent’s action or inaction has had on the child. Since research shows that different children react differently to abuse, the court should consider both the alleged abuse or neglect and its effect on the child.

One question that arises is how child protection agencies should determine the threshold of emotional abuse. Some psychologists argue that “[t]he abuse threshold is reached when the continuing viability of the parent-child relationship is regarded as unacceptable without some attempted intervention.” This dilemma is similar to that of the “dirty house” question in child neglect cases: how dirty can a house be such that it is unacceptable or unsafe for a child? Though there are instances of neglect that are clearly unsafe for children, such as homes that violate county or city housing codes, many cases are gray, especially those where other factors must be considered in order to determine risk. These factors—the age of the child, the mental health or capacity of the parent, the developmental stage of the child, the ability and willingness of the parent to seek help, and the presence of protective relatives—are the same factors that should be used in determining whether a child is at risk of substantial emotional abuse.

CAPTA should also be amended to provide for grants for qualified clinical child psychologists, to be hired by the courts, or guardians ad litem to conduct assessments or evaluations. Since child protection agencies are already stretched financially, federal law should provide incentives to states and counties to match federal funding for a neutral entity to select a doctor to evaluate a child who has allegedly been subjected to psychological abuse. CAPTA should provide guidance to agencies and courts regarding the minimum qualifications of psychologists utilized in child welfare cases. The selection of a child

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235 Loue, supra note 32, at 316 (quoting Danya Glaser & Vivian Prior, Is the Term Child Protection Applicable to Emotional Abuse?, 6 CHILD ABUSE REV. 315, 315 (1997)).

psychologist should be from a pool of doctors that have shown commitment to following the Guidelines for Psychological Evaluations in Child Protection Matters (the "CPM Guidelines"), which are founded upon the American Psychological Association's Ethical Principles of Psychologists and Code of Conduct. These guidelines intend to promote proficiency in using psychological expertise and assure a high level of professional practice by psychologists. The CPM Guidelines set forth the specialized competence necessary for psychologists desiring to provide evaluations in child protection matters. A variety of other issues are addressed, including informed consent, the limits of confidentiality, time constraints in child protection cases, over-interpretation of data, personal and societal bias, scope of the evaluation, and ethical considerations. Adherence to the CPM Guidelines will serve to combat criticism of the use of mental health evaluations in custody and child protection matters and, more importantly, will make it less likely that a child is removed from a parent unnecessarily.

CAPTA has been reauthorized nine times since 1974, and was most recently reauthorized by President Obama in December 2010 through

238 Id.
at 587–91. There are seventeen tenets of the CPM Guidelines and a glossary of terms that includes a definition of emotional abuse/psychological maltreatment. Emotional abuse/psychological maltreatment is defined in the CPM Guidelines as "a repeated pattern of behavior that conveys to children that they are worthless, unwanted, or only of value in meeting other’s needs; may include serious threats of physical or psychological violence.”
fiscal year 2015. Implementation of the bill will cost about two billion dollars over the 2011–2015 period, and the child welfare appropriations remain the same with small increments each year. One of the continuing problems of CAPTA is that the basic state grants used to strengthen child protection agencies have been funded at the same level—$27 million annually—for ten years, and this amount is not sufficient. A need for a change in policy in the economics of child custody evaluation practice has been noted. If CAPTA is to be amended to fully include psychological abuse in the legal emergency removal framework, the federal government must renew its commitment and increase or redistribute the funding to cover what will certainly be added costs for states. If this seems an unlikely goal due to the dire financial debt of the federal government, individual states can amend their statutes to capture the substantial emotional abuse of children.

2. Expanding the Risk Assessment: Compulsory Review of Children's Mental Health

After determining that there is actual harm that imminently endangers a child's psychological or physical health and wellbeing, a court must consider the risk of returning a child to her home or continuing her stay in an out-of-home placement (usually foster care, placement with relatives, or institutional placement). Typically the factors that weigh in the decision are: (1) a review of the various competing environments available to the child; (2) the parent's preference of placement; (3) the child's preference (if competent to express preference) of placement; and (4) a recommendation (by CPS and/or the child's appointed guardian ad litem) of which placement serves the child's best interest. It is quite rare for a psychological assessment of a child to be available at the initial evidentiary hearing when the judge makes this risk assessment.

245 See Badeau et al., supra note 123, at 224.
246 See generally, CECILIA FIERMONTE & JENNIFER L. RENNE, MAKING IT PERMANENT—REASONABLE EFFORTS TO FINALIZE PERMANENCY PLANS FOR FOSTER CHILDREN 3–8 (2002).
On the other hand, when a child is formally referred to a probation department for alleged criminal activity, mental health or clinical assessments by a mental health professional are conducted as part of an initial screening. It has been suggested that “[a]ssessment of children’s developmental and health status would seem to be crucial to a determination of whether the risks inherent in the agency’s actions were worth the potential gain.” When children are taken into state custody, either by the juvenile department or the child welfare system, it should be a best practices standard to conduct a compulsory psychological assessment prior to making an initial decision regarding the child’s temporary placement. The decision of the judge should consider the evaluation of professionals whose core competence is in the field of mental health.

The interdisciplinary nature of the child welfare field necessitates consideration of various professional opinions as they pertain to the physical and emotional damage to children caused by caregivers. In custody cases between divorcing spouses or sparring relatives, there is often a professional psychologist and/or therapist who testifies about what type of custody arrangement would be in the children’s best interest. In many cases, the finding that a court must make, based on the wording of the statute, is heavily dependent on expert testimony. Some courts appoint psychologists to evaluate an entire family to determine custody and visitation. However, there is much criticism of

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247 See, e.g., TEX. FAM. CODE § 51.21; TEX. HUM. RES. CODE § 141.042(e) (West 2010) (mandating that juvenile probation departments to use the mental health screening instrument selected by the commission for the initial screening of children under the jurisdiction of probation departments who have been formally referred to the department).


249 Daniel A. Krauss & Bruce D. Sales, Legal Standards, Expertise, and Experts in the Resolution of Contested Child Custody Cases, 6 PSYCHOL. PUB. POL’Y & L. 843, 862–63 (2000). But see Tippins & Wittmann, supra note 232, at 193 (challenging the recommendations provided by psychologists as to the ultimate issue in custody matters as ethically inappropriate based upon the limited empirical foundation for such conclusions).


251 See In re Ricky Derzapf, 219 S.W.3d 327, 333–34 (Tex. 2007) (basing its ruling on court-appointed psychologist testimony in order to determine whether grandparents should have access to their grandchildren where statute requires that grandparent seeking court-ordered access prove by preponderance of the evidence that denial of access to the child would significantly impair the child’s physical health or emotional well-being); Newcomer v. King, 447 A.2d 630,
child custody evaluations by psychologists for various reasons. In his
discussion of the validity and reliability of psychological tests, Professor
Robert Levy states that "[m]ost psychological tests used in custody cases
have only moderate reliability values," and judges should be aware of the
risk of over-reliance upon test scores when making assessments and
judgments about people. In addition to their moderate reliability, most
psychological tests purport to measure named specific attributes, such as
aggressiveness or parenting skill, but turn out to have little ability to
actually assess these psychological attributes.

Mental health professionals in CPS cases can shield their testing
methods from attack through reliance on a set of accepted procedures
that depend mostly on forensic interviews of the parents, children, and
significant others, as well as observations of the child with the parent and
review of the child's school records. In order to meet the standard for
admissibility of expert testimony, the psychologist's conclusions and
opinions must pass the Frye and Daubert tests, which provide a roadmap

of the child was completed); In re Alpha J., 2000 Conn. Super. LEXIS 301, at *
evaluations of the entire family); Berta v. Michener, 72 Pa. D. & C.4th 487,
494–97 (2005) (agreeing with a psychologist who evaluated a family and stated
it was in the child's best interest to continue visitation with the grandparents);
In re Mark V., 540 N.Y.S.2d 966, 968 (N.Y. Fam. Ct. 1989) (allowing joint
custody between biological father and step-father because of a psychological
evaluation of the child).

252 Robert E. Emery et al., A Critical Assessment of Child Custody Evaluations:
Limited Science and a Flawed System, 6 PSYCHOL. SCI. PUB. INT. 1, 7–12
(2005) (arguing that the array of tests that psychologists administer to parents
and children for child custody evaluations are inadequate on scientific grounds
and are significantly limited. The authors also assert that certain constructs, like
parental alienation syndrome or the children's wishes regarding custody, do not
withstand scientific scrutiny or have insufficient empirical data to support their
use, and that well-established psychological measures, i.e., measures of
intelligence, personality, psychopathology, and academic achievement, should
not be used because of their often limited relevance to questions of custody
before the court); JOHN A. ZERVOPOULOS, CONFRONTING MENTAL HEALTH
EVIDENCE—A PRACTICAL GUIDE TO RELIABILITY AND EXPERTS IN FAMILY LAW
115–116 (2008) (identifying issues with experts' qualifications to testify on
certain matters and analytical gaps between the experts' data and conclusions
and between conclusions and opinions).

253 MENTAL HEALTH ASPECTS OF CUSTODY LAW 311 (Robert J. Levy ed., 2005)
(stating that "a test's reliability indexed as a number between 1.00 and 0.00,
with 1.00 meaning perfect reliability and 0.00 meaning no reliability," and
noting that psychological tests used in child custody cases have reliability values
between 0.5 and 0.8).

254 Id. at 312.

255 ZERVOPOULOS, supra note 244, at 55–60.
for judges to assess the reliability and relevancy of experts.\textsuperscript{256} Besides the qualifications of the psychologist, the methods used to gather the data upon which they base their expert opinions are important to establish their validity and reliability. Psychological testing is limited in what it can provide because there is no test that has been sufficiently composed to concentrate on the best interest standard in child custody proceedings.\textsuperscript{257} Psychological tests that address questions related to clinical diagnosis and treatment planning are the most widely accepted tests.\textsuperscript{258} If testing is utilized in CPS cases, the tests “must be integrated into comprehensive evaluations designed to address those matters and to provide a reliable basis for the offered opinions.”\textsuperscript{259} As stated earlier, the CPM Guidelines provide a benchmark for the quality of psychological evaluations needed in CPS cases.

An empirical analysis was done in Cook County, Illinois in 2001 to determine how mental health evaluations were utilized in child protection legal proceedings.\textsuperscript{260} Researchers reviewed 512 clerk files with 171 randomly selected mental health evaluations completed on parents and 44 evaluations completed on children.\textsuperscript{261} This analysis revealed that the court relied on the evaluations as a basis for its legal decisions in 36.2\% of cases involving parent evaluations and 2.3\% of cases involving child evaluations, revealing a modest impact of parent evaluations on legal decisions and a notably low impact of child evaluations.\textsuperscript{262} Part of this analysis included interviews with parties in child protection cases. All parties, including attorneys, child welfare workers, and mental health professionals, agreed that the practice of requesting and using clinical evaluations needed to change.\textsuperscript{263}

There is obviously more time for evaluation in a case where an emergency temporary restraining order is not being sought. However, the child welfare field has adapted over the last thirty years in order to provide better ways to address the investigation of child abuse and neglect such that less trauma is inflicted upon the child, and both law enforcement and social service agencies work together to collect the

\textsuperscript{256} Id. at 21 (noting “the two seminal cases giving rise to the standards for evaluating expert testimony” are Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), and Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)).

\textsuperscript{257} ZERVOPOULOS, supra note 244, at 61.

\textsuperscript{258} Id.

\textsuperscript{259} Id.


\textsuperscript{261} Id. at 632.

\textsuperscript{262} Id. at 638.

\textsuperscript{263} Id. at 631.
necessary information and evidence within a short window of time. The concept of child advocacy centers began in the 1980s and revolutionized the criminal prosecution of child abuse and the assessment by professionals of recommended treatment for child and family. The ability to house police detectives, social workers, forensic interviewers, therapists, attorneys, and sometimes nurses and doctors in the same child-friendly environment has made a huge impact in how cases move forward in civil and criminal court. The main reason for the creation of these centers was to improve the investigative experience for children and provide them with a safe place to go for treatment of the abuse. Child and family clinical psychologists should be added to the professional roster of child advocacy centers so that psychological assessments and/or evaluations of children can be done quickly before the due process hearing that determines temporary custody. Provision of staff psychologists would enable states to hire or contract with qualified, dedicated experts who could assist the court as fact finders to assess best interest as well as what should be an additional factor to the emergency legal standard—the child's mental health.

Moreover, in-depth psychological testing of children should be made available in cases where substantial psychological abuse is at issue. The judge, child’s attorney, or guardian ad litem should request a psychological evaluation for the child. This evaluation could be provided through the local Child Advocacy Center, where a qualified child psychologist is on staff, or through a selected pool of qualified child psychologists contracted with the county or state to provide these services for the family and juvenile courts. The funding for these services can be derived through a combination of federal, state, and county funds. A collaborative agreement between the American Bar Association and the American Psychological Association should address lower or pro bono fees such that the children in major cities and smaller rural towns can have access to qualified child psychologists.

States could look to the American Psychological Association ("APA") to locate qualified and appropriate doctors to conduct these evaluations according to the CPM Guidelines. The APA issued a resolution, Psychological Issues Related to Child Abuse and Neglect, which promotes the organization’s efforts to enact public policies consistent with applying the science and profession of psychology to the development and implementation of a national strategy for the


prevention and treatment of child abuse and neglect.\textsuperscript{266} In addition to this resolution, special divisions devoted to child and adolescent psychology within the APA could assist lawmakers in developing suitable measures for states to ensure that the knowledge, expertise, and experience of the psychologists meet Daubert legal admissibility requirements.\textsuperscript{267} The Society of Clinical Child Adolescent Psychology is a division of the APA that promotes scientific inquiry, training, professional practice, and public policy in clinical child and adolescent psychology in order to improve the welfare and mental health of children, youth, and families.\textsuperscript{268} Because part of the clinical child psychologists' practice includes testifying in child welfare courts, it makes sense for this division to compose certain parameters to ensure that their testimony is admissible, and therefore useful to the court in making a decision that is best for the child.

Once the psychologist has been notified and conducted the evaluation, the evaluation would be filed with the court and sent to all parties for review. The CPM Guidelines provide ample direction for how the evaluation should be used by the court:

The primary purpose of the evaluation is to provide relevant, professionally sound results or opinions, in matters where a child’s health and welfare may have been and/or may in the future be harmed. The specific purposes of the evaluation will be determined by the nature of the child protection matter. In investigative proceedings, a primary purpose of the evaluation is to assist in determining whether the child’s health and welfare may have been harmed. When the child is already identified as being at risk for harm, the evaluation often focuses on rehabilitation recommendations, designed to protect the child and help the family. An additional purpose of such an evaluation may be to make recommendations for interventions that promote the psychological and physical well-being of the child and, if appropriate, facilitate the reunification of the family . . . .\textsuperscript{269}

\textsuperscript{268} Id.
\textsuperscript{269} APA Board of Professional Affairs, supra note 227, at 587.
The Guidelines also set forth the specialized competence necessary for psychologists desiring to provide evaluations in child protection matters. Courts should be able to compose a list of qualified psychologists who can serve as evaluators and expert witnesses. Most large cities and the towns surrounding them should be able to accommodate this legal change, but smaller rural communities may not have access to doctors who can serve in this capacity. If the APA stands behind the aforementioned resolution, psychologists could be encouraged to provide a specific number of rural community service hours, similar to the inferred pro bono legal obligation of attorneys to provide representation to indigent persons in their communities. Engaging the APA in establishing wider networks of psychologists to serve in the community will be vital to filling this hole in our child protection system.


In the normative framework of the child welfare system, the state’s reasonable efforts to maintain a child at risk of harm in the home are couched in its ability to maintain some level of control over the home environment and the actions of the parents or caregivers. Borrowing from the European theory of subsidiarity, a new paradigm for evaluating and monitoring child abuse and neglect within families would include utilization of public institutions that are better suited to deal with health and education issues that have come to the attention of the legal system because of the state’s responsibility to children. In light of the fact that health care institutions and schools are the major reporters of child abuse and neglect, it is sensible that an extended function of these institutions would be to provide professional assessment and assistance to families in which abuse is found to exist. The principle of subsidiarity is based on the assertion that matters ought to be handled by the smallest, lowest, or least centralized competent authority. Public medical and educational systems are smaller authorities with respect to their local presence in communities. While they are not subservient to state departments of health and human services, health care centers and schools are arguably more competent with respect to training, evaluation, and treatment of human lives than the current CPS system.

As stated earlier, the theory of subsidiarity has been used to support the idea of state intervention into the private realm of families when

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270 Id. at 588.
271 Garrison, supra note 238, at 595 (arguing that child maltreatment is an urgent public health problem, and a public health model that relies upon evidence-based treatment and standardized diagnostic procedures is necessary to treat this chronic condition).
caregivers are unable to protect or care for children. The theory has not been applied, however, to the issue of ongoing monitoring and treatment for confirmed cases of child abuse and neglect. Nor has it been applied to the idea of providing standard child abuse and neglect preventative education to families and children. Thus, our current normative framework embraces a partial subsidiarity principle, without utilizing the theory to chip away at the generational cycle of abuse that plagues our communities. Many scholars have pointed out the cracks in the foundation of the child welfare system, which prevent it from being anything more than a temporary solution to a societal ill. By expanding the subsidiarity principle to guide how government institutions assign the duty to protect children and educate the public about child abuse and neglect, the term “reasonable efforts” takes on new meaning.

The supportive state structure, as explained by Professor Maxine Eichner, would be a start towards application of a genuine subsidiarity theory to the child welfare system. In the supportive state model, “the state’s responsibility to children is conceived as both ongoing and concurrent with parents’ responsibilities . . . . [The model] recognizes, though, that the way in which institutions are structured makes a huge difference in both parents’ ability to parent children, and in children’s wellbeing generally.” The government “would seek to develop institutional structures that enable parents to care for their children physically, emotionally, and financially.” This would include providing public day care or regulated, subsidized private day care for low-income families, adequate substance abuse programs for parents, access to mental health services for parents and children, adequate low-income housing, an increase in the minimum wage, and a transformation of blighted neighborhoods and schools. The supportive state model builds upon the foundation laid by Professor Martha Fineman, who argues that the state owes a societal debt to caretakers as part of its collective responsibility for dependency.

The principle of subsidiarity would take the supportive state a step further in moving the prescription for reasonable efforts towards standardized child maltreatment prevention. Public schools could require a child development class for parents to complete prior to enrollment of

273 Eichner, supra note 267, at 463.
274 Id. at 466.
275 Id. at 467–72.
their children in daycare and elementary, middle, and high schools. This parenting class could focus on child development for specific ages, methods of communication and discipline, ways in which parents can assist in their child’s learning, and specific education on emotional abuse and neglect, physical and sexual abuse, and medical neglect. Similar to the way that required immunizations prevent public health epidemics and safeguard children from illness, child development classes would be one way to prevent child maltreatment and safeguard the wellbeing of children. School systems could also introduce a new version of home economics back into the required curriculum so that children can learn the basics of cleaning, managing money, life planning, child development, and parenting. This type of class could be taught in culturally sensitive and developmentally appropriate ways as early as fifth grade, and should gradually increase in scope as children age and grow closer to adulthood.

In order to achieve what might be considered a massive overhaul of the current child protection system, resource allocation and an increase in the number of professionals able to diagnose and treat child victims of abuse and neglect are key components of ensuring the efficient implementation of this new framework. Due to the low number of professionals presently serving our communities in the area of mental health, there would need to be an increase in psychologists, psychiatrists, nurses, and school counselors in order for the principle of subsidiarity to be applied on a large scale basis. There are certain ways that the government could incentivize students to enter the social and human services fields. Much in the same way colleges and universities develop programs for science and math, colleges could develop full scholarships and specialized joint-degree programs with graduate schools of social work, psychology, medicine, and education.

One example is the Tulane Institute of Infant and Early Childhood Mental Health, which encourages the development of professionals in the area of mental health, specifically graduates of masters or doctoral programs in counseling, marital and family therapy, nursing, medicine (including pediatricians and family practitioners), psychiatry, psychology, social work, and public health. Two goals of the Institute are (1) to enhance the responsiveness of systems of care to the mental health needs of young children and their families, and (2) to increase the number of trained infant and early childhood mental health providers. The Institute recognizes that “the probability of social, behavioral, and

emotional problems in infancy and early childhood are increased by intrinsic vulnerabilities, as well as by poverty, community and family violence, psychiatric symptomatology in parents, early parenthood, social isolation, and maltreatment." The approach of the Institute is proactive and includes research and service delivery to families with a variety of problems and concerns.

Charter schools like the J. Erik Jonsson Community School in Dallas, Texas could become the public model for schools in areas where there are at-risk children. This school offers bi-lingual education beginning for children three years of age until fifth grade, along with parent education focus groups and after-school therapeutic care. The Jonsson School is housed within the Salemanship Club of Dallas, which offers child and family therapy for children and parents who have experienced child abuse. There is an infant/child comprehensive assessment program that includes the parent in a multidisciplinary team to assess the child and family when there is a concern about emotional, behavioral, or developmental challenges. The team also includes an education specialist, nurse, psychologist, psychiatrist, and social worker, and families are followed for up for one year after the assessment to assist with accessing needed services. The results of this model are proven: since the school’s inception ten years ago, there has been only one confirmed high school dropout. Most of the school’s students graduate high school, and two-thirds go on to post-secondary education. This school exemplifies how educational and health services professionals can work collaboratively to prevent and treat child abuse and neglect in communities.

Another proven method where health and education meet to prevent child abuse is the Nurse-Family Partnership Program. It is a free,
voluntary maternal and childhood health program that focuses on low-income, first-time mothers who often lack good parenting role models. A relationship is built between pregnant mothers and nurses, who visit them in their homes up to the child’s second birthday. The nurses focus on teaching preventative health practices during the pregnancy, parent coaching aimed at increasing child development awareness and nonviolent child-rearing techniques, and encouraging the development of a plan for the future of their family. This program is intended to reduce the high number of children who are abused and neglected between the ages of zero and three, who are also most likely to suffer serious injury or death as a result of abuse or neglect. Because of its success in various places across the country, it has become a model for local communities offering positive assistance to families.

Given the new role of schools and public health facilities in the child protection system under the principle of subsidiarity, the primary function of child protective services would be to serve in the role of third-party government reporting authority and investigator of child abuse and neglect. School personnel and medical professionals would be given the task of educating and treating the family and children if abuse or neglect is found. Rather than transfer this duty to CPS caseworkers, who may not have backgrounds or experience in the social/human sciences, this job of treatment and case monitoring can be handled by institutions that satisfy various criteria of the subsidiarity principle. Children’s medical centers and local public schools are sufficient to diagnose and treat the family, closer to the family with regard to frequency and continuity of contact, more acceptable to the family with regard to receiving assistance, and more purposed to secure family and individual autonomy. The state’s legal case against the parents could be dismissed upon a final assessment of the family’s progression in treatment. The court system would continue to have jurisdiction over the family only if the state decided to seek termination of parental rights, after which time the remedial efforts of the state through the medical and school systems would focus on supporting the children and family through an alternative custodial arrangement or a permanent separation.

IV. LEGAL AND POLICY CONSIDERATIONS OF MASSIVE REFORM

Several considerations should be evaluated prior to applying the principle of subsidiarity, such as how this new system would impact families that do not operate within the public sphere, how it would affect

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minority families, and how the system could disadvantage relationships between families and their schools and doctors. As with any system, there will be weaknesses in its ability to reach every family in our communities. While not covering the entire scope of evaluation of the new framework, this article will begin the dialogue of changing the focus and, hopefully, the effectiveness of the child protection system in America.

A. PARENTS’ RIGHTS, STATE POWER, AND THE CHILD’S BEST INTEREST

In DeShaney v. Winnebago, the Court determined that state child protection agencies owe no constitutional duty of protection to children against their parents, who are private actors.286 Essentially, even if the state knows of a child’s dangerous predicament in their home and expresses intent to help the child, it cannot be held liable under the Due Process Clause of the Fourteenth Amendment unless it takes physical custody of the child, thereby depriving the child of her liberty.287 Moreover, if the emergency removal standard were to seize all of the children who experience emotional abuse, the foster care system would likely collapse. As stated earlier, the severity of psychological abuse varies, and the role of the state is clearly not to monitor the parenting skills of all parents but to intervene under the parens patriae doctrine only when a child is being substantially psychologically abused.288

In order to increase the balance between parental rights as defined by constitutional law, state authority, and the best interest of the child consideration, states should add a standard requirement to the family code that each child who has allegedly suffered substantial emotional or psychological abuse or neglect have a psychological evaluation. A qualified child psychologist would add another dimension to the risk assessment considered by the court at the initial hearing in order to

286 DeShaney v. Winnebago, 489 U.S. 189, 192–93, 195 (1989). After a report of child abuse when Joshua DeShaney was hospitalized at age four, the county Department of Social Services (“DSS”) determined that the child could be returned to his father under an agreement. DSS supervised Joshua for a year, during which time abuse was suspected and reported by a hospital, but ultimately DSS took no action. Subsequently, Joshua was beaten so badly that he suffered severe brain damage and would remain institutionalized for the rest of his life. His mother filed suit under 42 U.S.C. § 1983, claiming that DSS violated Joshua’s right to liberty under the Due Process Clause of the Fourteenth Amendment by failing to intervene and protect him from the violence about which it knew or should have known.
287 Id. at 196–97.
288 Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) (noting that the state as parens patriae may act to guard the general interest in youth’s well-being and has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare).
determine whether the child’s home is contrary to her welfare. The psychologist could help to identify any significant issues that the state social worker or forensic interviewer could not capture in an interview with the child. In order to give proper weight to the child’s emotional wellbeing within her home environment, it is critical to have an expert examine her mental state. How else can the risk and safety assessment determine whether a child would suffer more harm if she remains in the home than if she were removed? Currently, the second prong of the normative three-part standard can be fairly subjective and dependent on the parents’ interview and the child’s ability to express herself to the caseworker (unless physical injuries speak for her).

Of course, the usefulness of the evaluation would depend on the quality of the psychologists and the cooperation of the child. In addition, the psychological evaluation would be most helpful if completed before the initial adversarial hearing. It could be used to determine the child’s emotional needs and which temporary option—return to the parent, foster care, or temporary placement with a relative—would best meet the child’s current needs. This, of course, would be the optimal time to complete the evaluation; however, the reality of the child welfare system is that it is unlikely the state will be able to contract with enough qualified child psychologists who could churn out evaluations before the first evidentiary proceeding. Adding a competent child psychologist to the list of professionals available to families through child advocacy centers was mentioned earlier. However, the child welfare field historically has low funding for additional services and a high load of children in state care. A change in CPS policy would require an increase in or redistribution of funding on the state level, and even then there would be the issue of finding enough qualified psychologists in certain areas to meet the needs of the system.

The state does, however, promote public policies in education and health, which would support the earlier suggestions of required child development classes for parents and revised home economics courses for students. It has been argued that a developmental perspective in constitutional law is necessary in order for public support for family childrearing to be recognized as fundamentally important to democratic

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government. Schools are the institutions used by the state to socialize, educate, and produce responsible citizens. Constitutionally protected, preventative services offered through schools to families can assist young or uneducated parents in raising children in a psychologically healthy environment. A revised home economics course could also prevent children from becoming parents too early. Statistics show that there is a strong correlation between the age of parents and the risk of being reported and substantiated for child abuse and neglect. There is also empirical data from various states who have adopted neighborhood-based, child-centered child protection systems that focus on prevention and treatment, strengthen family and community supports and connections, and enhance parents’ capacities to foster the optimal development of their children and themselves.

B. CHILDREN’S RIGHTS AND VOICES—GIVING CHILDREN AN OPPORTUNITY TO SPEAK

Courts should allow the child to have a more tangible voice in the initial court proceedings that determine their removal from parents. The child should be given the opportunity to write an affidavit to be filed with the court or have an in-chambers or web-based interview with the judge presiding over the case. The child’s attorney or the judge, on their own motions, could have the child’s communication sealed such that it is confidential and not made available to the public or other parties to the suit. A child’s feelings and opinions should be taken into consideration when making a decision that so critically affects his or her life.

The emotional toll abuse and neglect take on children is tremendous. Without some specialized interpretation of how the child is faring mentally, the court is shooting in the dark with regard to determining the “best interests of the child.” The fact that psychological evaluations are court-ordered for parents at the first adversarial hearing (if the state meets its burden of proof) is a clear indicator that the mental health of the parent is a top priority to the judge in determining where children should be permanently placed. What is it that makes children’s mental health any less important? In fact, their mental health is equally


important to this decision-making process. The status of children’s rights remains at issue when evaluating this problem.

Family law scholars differ on their positions regarding whether children’s rights should be recognized and more clearly defined. James Dwyer, a professor of law at William and Mary, advocates for dismantling parental rights in favor of a parental privilege and focusing on children’s rights.294 Barbara Bennett Woodhouse supports articulation of children’s rights as “an indispensable building block for constructing a basic scheme of justice that extends to children.”295 In her most recent book, Hidden in Plain Sight, she highlights the stories of U.S. children and traces their childhood experiences across an historical timeline to illustrate how the state systematically denies their basic human rights.296 She supports passage of the United Nations Convention on the Rights of the Child (“CRC”) because it proposes norms of justice to guide and assess the behavior of adults who act on children’s behalf.297 The CRC’s provisions recognize both the essential dependency of children and their capacity for autonomy, treating children as interdependent members of families and communities, and also as individuals with unique personalities.298 Entitlement to support and guidance from both parents, who will make a child’s interest “their basic concern,” is articulated as a child’s right, not the parents’ right.299

The United States and Somalia are the only two nations that have not ratified the CRC.300 As stated earlier, children’s rights in the United States are largely a subset of their parents’ rights. Parents’ rights to raise their children as they see fit were primarily established within the realm of education. The Supreme Court has supported parents’ challenges to compulsory education laws in the name of religious freedom, but did not support a guardian’s challenge to child labor laws in the name of religious liberty.301 The most obvious difference between these two cases is that the Court seems to give more deference to the observation of a religious lifestyle than to a religious act. A subtle difference is the

296 BARBARA BENNETT WOODHOUSE, HIDDEN IN PLAIN SIGHT 8 (2008).
297 Id. at 109.
298 Id.
Court's subjective acceptance of the Amish religion in Wisconsin and rejection of the Jehovah's Witnesses in Prince.

The problem that follows in complex cases like the Texas Fundamentalist Latter-Day Saints case is two-fold: (1) the child does not have any independent rights afforded by state or federal law that are not in some way connected to the parent; and (2) the best interest of the child is not part of the legal standard for removal but is rather an overarching “primary consideration” of the court in determining issues of conservatorship, possession, and access to a child. Children are not afforded the same constitutional rights as adults, and they suffer from several disadvantages in securing constitution-based protection. Robert Fellmeth articulates three such disadvantages in his book Child Rights & Remedies: “state action” asymmetry, lack of access to court redress, and child immaturity as a permitted distinction.

Recognition of the child's psychological state includes taking into consideration the child's needs and desires. In addition to the court's consideration of the psychological evaluation of the child, the child's voice should be incorporated to a fuller extent than it is now in the initial hearing. Both federal and state laws govern the manner in which children are incorporated in the legal suits that pertain to their care. Only thirty-six states require that a lawyer be appointed to a child in dependency and foster care proceedings, and only seventeen states require that the child

302 See, e.g., TEX. FAM. CODE ANN. § 153.002 (West 2010).
303 See Michael H. v. Gerald D., 491 U.S. 110, 130–32 (1989) (failing to recognize whether a child has a liberty interest, symmetrical with that of her parent, in maintaining a filial relationship with her natural father); Bellotti v. Baird, 443 U.S. 622, 634 (1979) (recognizing three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 682 (1986) (noting that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings”); New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (holding that the validity of a school official's search of a student depends upon the search's reasonableness under all the circumstances, not on probable cause); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 644–65 (1995) (upholding the school district’s policy authorizing random urinalysis drug testing of its interscholastic athletes, including athletes the district had no reason to suspect of drug use); ELISSA WALL, STOLEN INNOCENCE 431 (2008). Though Elissa Wall, the fourteen-year-old child bride who testified against polygamist leader Warren Jeffs, says that she hopes her book will reach many young girls and women and help them use their strength to reclaim the power of choice, WALL, supra, it is not so clear what choice they really do have in how they are raised.
304 FELLMETH, supra note 298, at 614–16.
be heard through “client directed” or “expressed interest” representation.\textsuperscript{305}

Because of the wide variation in development in children from infancy to teenage years, a child’s capacity to assist with his or her own representation is an issue for lawyers representing a child in a client-directed role. The issue of child competency and its determination can be hotly contested. Some states have established a bright-line age; others allow the lawyer to establish an attorney-client relationship with a child client through which competency is examined; and still others appoint an expert in forensic child psychology or psychiatry to assess the child’s competence to testify.\textsuperscript{306} Training of GALs is not uniform throughout each state, much less the entire country. Without learning how to interview children in their language, how abuse and neglect might affect their cognitive development, and how to relate to them as an attorney, GALs cannot communicate a child’s expressed interest to the court.

For all that CAPTA intended regarding the child’s inclusion in the court process, in most instances the child’s wishes are not heard or considered at the initial hearing or throughout the rest of the litigation.\textsuperscript{307} For children who are not competent to assist with their own representation, this may not be a tangible loss. But for those children who do have distinct opinions about what is going on in their lives, it can be a huge injustice to assume the adults charged with fulfilling their roles actually do so. Just like any other client, children should be able to participate in the court process in a meaningful way that allows the GAL to be more of a guide than a mouthpiece. Children should be able to submit an affidavit in their own handwriting of their wishes to the court so that they can tell in their own words what they feel and believe about the circumstances surrounding their removal. In lieu of writing an


\textsuperscript{306} See, e.g., \textit{Cal. Evid. Code} § 700 (West 2010) (no age restriction on competency to testify); 42 Pa. Cons. Stat. Ann. § 5911 (West 2010) (same); Mo. Rev. Stat. § 491.060(2) (West 2010) (allowing children under the age of ten who are alleged to be victims of abuse to testify “in any judicial proceeding involving such alleged offense”); \textit{Colo. Rev. Stat.} § 13-90-106(b) (West 2010) (allowing children under the age of ten to testify in any proceeding for abuse “when the child is able to describe or relate in language appropriate for a child of that age the events or facts respecting which the child is examined.”); \textit{Sherrie Bourg Carter, Children in the Courtroom: Challenges for Lawyers and Judges} 3–4, 10–11 (2d ed. 2009).

\textsuperscript{307} See Mark Henaghan, \textit{What Does a Child’s Right to Be Heard in Legal Proceedings Really Mean? ABA Custody Standards Do Not Go Far Enough}, 42 \textit{Fam. L.Q.} 117, 119–20, 126 (2008) (arguing that the ABA Custody Standards allow attorneys to subvert their child-client’s wishes, which endangers the child’s “strong voice,” from being heard and that the onus should be on the child’s attorney to be competent enough to listen to, communicate in, and understand the child’s language).
affidavit, children could also have the option to answer a few standard questions, such as:

- If given the choice, who do you want to live with right now? Why?
- If you could not live with this person, is there someone else (grandmother, grandfather, aunt, uncle, cousin) you would like to stay with for right now?
- How do you feel about visiting with your mother / your father if you do not go back home?
- Is there anything that makes you feel scared? Explain what makes you feel this way.
- Is there anything that makes you feel worried? Explain what makes you feel this way.
- Is there anything that makes you feel nervous? Explain what makes you feel this way.
- Is there anything else you want to tell the judge about what is going on in your life right now?

These questions and answers can be put in affidavit form and filed with the court. The affidavit allows the court to read the child’s own words and gives the child an actual voice during the initial court proceedings. If the child is uncomfortable with writing an affidavit, or is unable to write for any reason, an in-chambers interview can be scheduled with the judge. In courts where the equipment is already provided, closed circuit television or webcams can allow the child to speak with a judge about the same issues that would be covered in the affidavit. In this age of digital technology, with cell phones and computers, there should be an economical solution to getting the child before the court in a tangible way for the child. Information from the child is necessary in order to make a best interest determination as well as to assess the risk of harm to the child if he or she is returned to the parents.

**C. Exercising Proper Discretion—Alternatives to Child Removals**

A consequence of increasing what some would argue is the long arm of the state would be a spike in child abuse and neglect referrals by mandatory reporters, which would result in a heavier investigative burden on CPS. However, applying the subsidiarity principle to the child protection system would serve to help families who need intervention
before their situation worsens, which could ultimately protect more at-risk children and save lives. Including psychological abuse in the legal standard for emergency child removals does not mean that states could bypass the normal steps they are required to take in order to determine if a child is safe in his or her home. Though the application of the term “reasonable efforts” varies from state to state and circuit to circuit, the theory of subsidiarity would create an incentive for both state institutions and community organizations to provide avenues for parents and children to learn how to have healthy relationships with one another.

Reasonable efforts must be made to retain the child in the home, and if possible, remove the risks to the child. Rather than filing a lawsuit, state child protection agencies can adopt a kinder, gentler approach to changing the lives of children and parents. At the initiation of an investigation, social workers could use a screening form to obtain basic information about the parents, such as demographic data, educational status, number and age of parents’ children, major medical conditions, prior placements outside the home, and so forth. This screening form could also collect data about other background variables, such as mental health conditions, history of sexual abuse, young age at first pregnancy, and current areas of functioning (i.e., substance abuse, depressed mood, and parenting knowledge). This background information indicates risks that could be used to determine if the parent may be eligible for assistance while maintaining the child in the home. A similar screening tool called the Psychosocial Assessment was utilized on teenage mothers in the foster care system in Illinois.

Psychosocial Assessments differ from traditional psychological or other mental health evaluations in that they (1) focus on functional competencies of parents and adaptive behaviors; (2) screen both strengths and weaknesses in functioning to provide useful guidelines for

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308 Kaiser, supra note 150, at 101 (noting that appellate courts, which determine the degree of effort a state agency must exert before termination of parental rights occurs, differ in their standards: some appellate courts rubber-stamp state agency efforts without much review while others do a more thorough examination of whether reasonable efforts were made).

309 42 U.S.C. § 671(a)(15) (requiring that in each case, “reasonable efforts shall be made to preserve and reunify families (i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child’s home; and (ii) to make it possible for the child to safely return to the child’s home”); Robin Fretwell Wilson, Sexually Predatory Parents and the Children in Their Care—Remove the Threat, Not the Child, in HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 39, 51 (Nancy E. Dowd et al. eds., 2006).

treatment planning; (3) emphasize current functioning as most relevant to behavioral competence; (4) occur in familiar surroundings—i.e., the home—in order to take into account the natural childcare environment; (5) occur with the child present, in order to allow for observation of parent-child interactions; (6) employ methodologically sound procedures to obtain comprehensive information; and (7) follow a systematic assessment protocol tailored to adolescent parents to allow for comparison of findings across adolescents. They are designed to be conducted by professionals with advanced training, not just ordinary caseworkers. The assessments require evaluators to have advanced training in test construction and interpretation, psychometrics, and clinical assessment procedures. Use of this type of assessment would require a special cadre of caseworkers with either a master’s degree in social work or additional training. If the theory of subsidiarity were applied, schools and hospitals may already have counselors in place with the proper education who could conduct the psychosocial assessments. Also, licensed caseworkers currently working for the state could be transferred to the educational or health institutions. Proper screening of children for substantial psychological abuse would prevent over-inclusion of children in the CPS system, which would allay many fears that families would unnecessarily be swept into the arms of the state.

D. THE IMPACT OF REFORM ON MINORITIES AND UNCONVENTIONAL COMMUNITIES

A few states recognize that different cultures have various ways of raising children that do not conform to mainstream expectations of appropriate treatment of children. These states include language that the child protective agency as well as the judiciary must consider culture when making determinations of abuse and neglect, and they make clear that culture may have a lot to do with the perception of abuse or neglect. Cultural norms shape how abuse and risk are evaluated. There are many instances when false positives in child welfare cases result from ethnocentrism, where the professional sees his or her own beliefs and practices as superior, and misidentifies differing cultural practices as maltreatment. When the beliefs and behaviors of the

311 Id. at 299–300.
312 Budd, supra note 302, at 301.
313 E.g., COLO. REV. STAT. ANN. § 19-1-103(1)(b) (West 2010) (“In all cases, those investigating reports of child abuse shall take into account accepted child-rearing practices of the culture in which the child participates . . . .”); MINN. STAT. ANN. § 626.556(o) (West 2010) (“Persons who conduct assessments or investigations under this section shall take into account accepted child-rearing practices of the culture in which a child participates . . . .”).
314 LISA ARONSON FONTES, CHILD ABUSE AND CULTURE: WORKING WITH DIVERSE FAMILIES 63 (2005).
315 Id. at 64.
dominant culture are imposed on other populations, nonmainstream childcare practices are mistakenly viewed as pathological even when there is no harm to children. Alternatively, there can be false negatives when culture is used as a justification for harmful behavior. Frequently, questionable behaviors that are explained away as cultural are behaviors that oppress or restrict women and children.

Cultural differences exist in communities of different races, ethnicities, national origins, and religions. The principle of subsidiarity may or may not work in communities that have customs and practices that lie outside the norms of U.S. society. Since the principle allocates power to local organizations in the community, such as schools and public hospitals, those families who don’t send their children to public school or go to public health centers would not be fully integrated into the systems designed to recognize abuse and neglect. Because psychological abuse is often a repeated pattern of behavior, only those persons in places frequented by unconventional families and children would have the opportunity to observe any patterns of behavior that would serve as warning signs or symptoms of a greater problem. Also, the isolating nature of most caregivers who mentally maltreat their children would make it difficult for them to take advantage of educational measures put in place by local agencies to prevent abuse. Dr. James Garbarino maintains that child maltreatment exists within a cultural framework. Using an ecological perspective of human development, he argues that how a culture defines children and violence impacts its capacity to prevent most maltreatment:

A culture that defines children as private property and that writes violence into its most basic normative scripts is weak when it comes to preventing child maltreatment.
A culture that endows children with self-evident human rights, and does so in the context of an ethic of

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316 Id. For example, some families from traditional peasant cultures in Asia, Africa, and South America are incorrectly substantiated for neglect because their children sleep on the floor. Id. Many traditional medical practices can be mistaken for abuse, including coining, cupping, and moxibustion. Id. at 71. Swaddling an infant, or wrapping a child snugly in a long blanket or cloth so that the child cannot move his or her limbs, is a common practice at naptime for practicing Sikhs that can be considered an abusive form of restraint. Id. at 72–73.
317 Id. at 77–78.
318 Id. at 78; Leti Volp, Blaming Culture for Bad Behavior, 12 YALE J.L. & HUMAN. 89, 90 (2000) (noting that voluntary adolescent marriages by whites and non-whites are viewed differently).
nonviolence and collective responsibility for children has the value resources needed to prevent child maltreatment. Americans who are discouraged about preventing child maltreatment should acknowledge that their frustration is a function of American culture, not something basic in universal “human nature.”

When dealing with issues of disproportionality among African-American children and families within the child welfare system, American culture must also be taken into consideration. The fact that some children are already overrepresented in the foster care system must force a critical eye on the question of what will happen if the state’s ability to remove children is expanded to include psychological abuse. One of the unintended consequences of this change in the child protection system may be an increase in the emergency removals of minority children, specifically African-American children. Racial disproportionality is a serious problem that exists in almost every state in the United States, and many states are addressing it through the development of disproportionality specialists within CPS to concentrate on ways to remedy this issue in order to reduce the number of African-American children entering the foster care system. The subsidiarity principle offers some guidance in that it requires the federal government to address issues of national scope or effects. When a problem reaches a level of national concern because state governments are unable to resolve it individually, then the national government should have the

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320 Id. at 51.
321 See ROBERTS, supra note 21, at 14–16 (explaining that the association of the War on Poverty in the late 1960s with black women changed the image of the welfare mother from the “worthy white widow to the immoral Black welfare queen,” and that this equating of welfare with Black social degeneracy caused a demand by the American public to dismantle the federal safety net for poor children and put welfare recipients to work); Jessica Dixon, The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases, 10 BERKELEY J. AFR-AM. L. & POL’Y 109, 112–21 (2008) (setting forth empirical research that illustrates the various decision points within the child welfare system where disparate treatment of African-American families and racial bias appear).
323 Bayer, supra note 23, at 1425.
authority to provide an alternative policy solution.\textsuperscript{324} Thus, if state solutions do not reduce the high number of African-American children already in the foster care system, the principle of subsidiarity would allow the federal government to step in and propose legislative action to address the problem.

It may also be important to consider a control that would support “real” referrals versus biased ones. Adding the “due cultural considerations” clause to the definition of substantial psychological abuse would allow for various cultural practices to be acknowledged and perhaps validated if the risk or harm to the child is not serious or imminent. Furthermore, states could expand on what precisely cultural considerations means for their particular population. It would be useful to hire specifically trained CPS social workers (who could also have the ability to conduct psychosocial assessments) to ensure that the cultural integrity of families is respected. It would also be ideal if CPS had specialized units that dealt with specific forms of abuse where social workers could develop some expertise in investigating and dealing with psychological abuse.

Another consideration would be to change the burden of proof at removal for substantial psychological abuse. Many states that already incorporate serious emotional harm in their removal statutes have the higher burden of proof at removal of clear and convincing evidence, the same as the burden of proof at termination. For those jurisdictions where termination of parental rights is filed along with petition for emergency removal, perhaps the burden of proof should increase at the outset. This change would dramatically offset the increase in substantiated investigations of all child abuse and neglect, and it would force states to work harder and smarter on prevention and voluntary services for at-risk families and children. This ultimately would be cost-saving for states in the long run.

CONCLUSION

Incidents of psychological abuse of children are growing at a rapid rate. Because psychological abuse is the core injury of all child abuse and neglect, finding a way to deal with this type of maltreatment is critical to improving the child welfare system and offering a meaningful preventative process in our communities. Emotional abuse and neglect must be defined in a way that it can be identified across multiple disciplines, and it should be a part of every state’s legal emergency removal standard. The methodology that the government should utilize to handle child abuse and neglect as a whole, including psychological abuse, is the European principle of subsidiarity. A partial application of

\textsuperscript{324} Id. at 1444–45.
this theory aligns with the *parens patriae* doctrine, and the fundamental rights of parents to raise their children as they see fit. The United States should go a step further and apply the principle in full. Once the state has intervened to protect a child from substantial psychological abuse, the treatment and monitoring of the family and children should go back to schools, hospitals, and medical centers.

These are the institutions in the community that are best equipped to handle the education and health issues of families. They are the institutions that meet the four criteria of the principle of subsidiarity, and they are the entities that best serve the state in achieving the common good of maintaining the integrity of families.

Logistically, it is more efficient to change the law from the top, such that every state must comply with the law set forth by the federal government. The National Incidence Studies of Child Abuse and Neglect illustrates that the issue of emotional abuse and neglect affects one-third to one-half of the nearly three million children who experience abuse and/or neglect. CAPTA should be amended to clarify the definition of "serious emotional abuse," and each state should be required to consider whether a child has experienced substantial psychological abuse when a referral of child abuse or neglect is made to CPS. Psychological assessments conducted by competent child psychologists should be routine examinations made prior to the decision to continue out-of-home placement for children after their initial removal from their home. The risk assessment made by a court of law should be more structured to include a review of this psychological assessment, as well as the child's voice regarding the temporary placement. Restructuring the child protection system and the manner by which social workers are hired and assigned to cases would allow professionals in the area to specialize in certain types of abuse and work within other state institutions to facilitate individualized treatment plans and provide continuity of care. In this way, reasonable efforts to prevent removal of children from their homes would start with standard child abuse prevention in our schools and hospitals, with only the worst cases of abuse and neglect remaining within the court system.

Application of the principle of subsidiarity would essentially initiate massive legal and public government reform. In depth consideration should be made regarding how this reform would affect children and families of different races, cultures, and religions. Ultimately the reform calls for states and communities to work together to provide healthier environments in which children, our most vulnerable citizens, can grow to be healthy adults. The subsidiarity model combines treatment and prevention at the lowest levels of state institutions to produce a new, positive child protection system.