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STATEMENT OF PURPOSE

The *Wisconsin Journal of Law, Gender & Society* grew out of two traditions: the University of Wisconsin Law School's "law in action" approach and the interdisciplinary design of gender studies. Through "law in action" we look beyond the statutes and cases to study the practical effects of the law on individuals, marginalized communities, and society at large. The interdisciplinary approach, with an emphasis on gender identity, offers different perspectives through which to expand and challenge our understanding of the law and its implications for society.

The Journal, originally the *Wisconsin Women's Law Journal,* one of the earliest in the nation devoted to the study of women and the law, has strived to contribute insightful scholarship to this evolving field of study. Recognizing that women are a diverse group with differing beliefs and interests, and moreover that gender stereotyping and gender identity discrimination of any kind inhibits each individual's full equality under the law, we encourage articles that examine the intersection of law and gender with issues of race, ethnicity, socioeconomic status, and sexual orientation.

We look forward to your contributions for it is through our discussions and debates that we fulfill the motto of the state of Wisconsin by moving "Forward."

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WISCONSIN JOURNAL OF LAW, GENDER & SOCIETY

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I THOUGHT I WOULD HAVE A VOICE

UNVEILING THE BARRIERS IMMIGRANT SURVIVORS OF DOMESTIC VIOLENCE FACE IN THE UNITED STATES COURTS

Hayat Bearat†

† Hayat Bearat, Associate Professor and Director of Domestic Violence Institute at Northeastern University School of Law; New England Law | Boston, J.D., 2014. I owe thanks to my mentors, Professors Rachel Rosenbloom and Russel Engler, for their feedback on this piece, as well to the thought-provoking insights garnered during the Faculty Colloquium at Northeastern University School of Law in October 2024. I thank my former colleague, Rachel Lieb, for her review and being a sounding board throughout the years we represented survivors of domestic violence in New York City. Tremendous thanks to the research assistance of Lea Halberstein. Lastly, I dedicate this article to my wonderful family, including my husband, Jack, two daughters Laila and Maya, and to the grandparents who lovingly took care of my daughters so I could finish this Article.

ABSTRACT

Many immigrants, especially survivors of domestic violence, arrive in America expecting to have more legal rights than in their home country. However, the reality of how our courts function tell a different story. From remaining voiceless due to lack of language services, to endangering their immigration status, to having their children removed from their home, to facing innumerable obstacles to obtain necessary services—seeking the court's intervention is often more harmful than not to immigrant survivors.

Academic legal research has failed to examine the anatomy of success and failure when it comes to survivors of domestic violence entering our courts. The research overlooks that even the most successful cases can take a wrong turn. The experience of one immigrant survivor is highlighted throughout this Article to showcase the struggles she faced when entering our family court system and where our courts and social services failed her. There has been incremental reform on a local, state, and federal level for various issues that are discussed, but too many gaps continue to exist.

This Article explores the language access issues survivors of domestic violence who are not primarily English-speaking encounter in the United States court system. It explains some of the fears and risks that immigrant survivors experience when going to court, including ICE's presence in and out of the courthouse, and the involvement of child protective services. It analyzes the cultural and religious implications of going to family court, focusing on Islamophobia. Lastly, it concludes with additional difficulties that survivors experience outside of court, including access to mental health services and support, and the impact that may have on their court cases.

INTRODUCTION

Noora was eighteen years old when she married Ahmed.[1] She was living in Palestine and their families arranged for their marriage. Ahmed and his life in New York City were described to Noora as the epitome of reaching the American dream: Ahmed was successfully employed as an engineer, owned an apartment in Manhattan, and wanted to get married to someone from Palestine who understood his culture and values and would want to join him in the United States. If Noora accepted, she would be able to join Ahmed in New York shortly after their marriage to study and work. They would eventually have their own children.

The reality of what followed was starkly different. Noora did join Ahmed, but it was several years after they had married. She was eager to join Ahmed, but he told her there were delays in the immigration process outside of his control, he had applied for her green card, and her work authorization was on the way.

1. The survivor of domestic violence's name and the abuser's have been changed for the survivor and her children's safety and protection. The author, Professor Hayat Bearat, represented this client during her time at the New York Legal Assistance Group (NYLAG) in New York City. NYLAG is a non-profit direct legal service provider that represents low-income New Yorkers in their various civil matters. Professor Bearat represented the client from 2017-2019 in a New York City County Family Court.

She boarded a flight to New York, hopeful for her future. To Noora's surprise, Ahmed did not apply for a green card, and she instead came to the United States on a spousal visa which eventually lapsed, leaving her with no lawful immigration status. She got pregnant quickly with their son, and a year later, her daughter. She was not permitted to work or take English courses. She was expected to stay home, cook all the meals, and be the primary caregiver. Ahmed did not have stable work and lived in public housing with his parents and siblings. As soon as Noora moved in with Ahmed and his family, his mother became abusive toward Noora. After their children were born, Ahmed's abuse started.

The police eventually got involved when a neighbor called 9-1-1 upon hearing Noora screaming and children crying. When the police arrived, no interpreter was present, and the children were taken from Noora by Child Protective Services (CPS). The children were held for 48 hours despite legal precedent allowing only very limited circumstances under which CPS can remove children from the home upon their witnessing domestic violence.[2] Noora, who was not a primary English-speaker and did not know the law, anxiously awaited her children's return.

Once reunited with her children, Noora moved into a domestic violence shelter with them. An abuse and neglect case began in family court against Ahmed, and Noora was expected to testify. The matter went to trial and concluded after two years, with a finding of neglect against Ahmed. Noora had to file her own petition for custody and for a final civil protective order, which took another year. Noora obtained sole custody and Ahmed had limited visitation. She also received a five-year civil protective order. She filed a VAWA application and received immigration status and work authorization after four long years.

However, the story does not end there. About a year after I had last seen Noora in court, I received a call from her explaining that she was back in family court, this time to seek visitation rights of her children. Noora explained that she struggled to provide for her children and take care of them on her own. She had left them with her in-laws one day as she went to work, and they refused to return them to her. Because she was so overwhelmed, she did not seek court intervention until months had passed since she had seen her children. She lost custody of her children, after years spent in family court. Noora never engaged in therapy throughout this process due to the stigma revolving around mental health in her community.

Noora's story is just one of many experiences that immigrant survivors of domestic violence encounter in family court. Immigrants have a vision of what their life will look like once they arrive in the United States. The American Dream has long been sought-after globally, desired by many like Noora. That vision does not include having children removed from the home, losing custody, being in family court for several years, and asking the court for protection and

2. Nicholson v. Scoppetta, 820 N.E.2d 840, 844 (N.Y. 2004) ("[M]ore is required for a showing of neglect under New York law than the fact that a child was exposed to domestic abuse against the caretaker.").

intervention. The obstacles and barriers that all survivors face in family court are extensive. However, with immigrant survivors, there are additional challenges.

This Article explores four primary areas in which immigrant survivors of domestic violence face barriers in family court: lack of language access, immigration risks and fears, discrimination and limitations with accessing services and support. The Article analyzes components of Noora's case which led to success and how she was also an outlier when it comes to many of the barriers she faced. And even though Noora's case looked like a success up to a certain point, her success proved to be so fragile that it eventually all fell apart. Although there have been some reform across local, state and federal governments, there are so many obstacles for a survivor to overcome to be successful both in their court case and in their own personal lives. In looking at these obstacles, the Article provides legal reform and frameworks for change to improve the lived experience of a survivor who enters our courts. This Article finds that in order to make the most effective change for immigrant survivors of domestic violence that enter our courts, there has to be an intersecting approach inclusive of academics, legal practitioners and of social service providers.

Section I discusses the language access issues survivors of domestic violence who are not primarily English-speaking encounter in the United States court system. Section II explains some of the fears and risks that survivors such as these experience when going to court. Section III analyzes the cultural and religious implications of going to family court, particularly with respect to Islamophobia. Finally, this Article concludes in Section IV with additional difficulties that survivors experience outside of court, including access to mental health services and support.

I. LANGUAGE ACCESS LIMITATIONS IN COURT

Like many non-primarily-English-speaking survivors, during the three years that Noora was in a New York City County Family Court, the lack of language services provided by the Court hindered her access to justice. She experienced long delays—sometimes spending an entire day waiting for her case to be called, even for a ten-minute appearance or, if no interpreter was available, an adjournment. She was expected to appear in court and arrange for childcare or bring her children to the court with her if she could not find childcare. She would be prepared to testify, only to be told that the Arabic interpreter could only interpret for thirty minutes before they had to appear before a different judge. She had interpreters incorrectly interpret critical testimony. All the signage and petitions at the court clerk's office were in English. Noora was fortunate to have an Arabic-speaking attorney who could involve her extensively in the negotiating process and communicate with her effectively throughout the three years. But according to the Arab American Family Support Center, an organization based out of New York City that helps Arabic-speaking individuals obtain services and legal representation, at the time of Noora's case, there were fewer than five

Arabic-speaking attorneys at non-profit organizations in New York City that could represent survivors of domestic violence in family court free-of-charge.[3]

Having attorneys speak the languages of their clients is an integral component that enhances the attorney-client relationship. "Attorney bilingualism can reshape the relationship between lawyers and their clients in ways that are at once subtle and deeply transformative."[4]

> When state courts fail to provide competent interpreters to . . . people in civil cases [who are of limited English proficiency], the costs are high. . . . [T]hey cannot protect their children, their homes, or their safety. Courts suffer because they cannot make accurate findings, and because communities lose faith in the justice system. And society suffers because its civil laws–guaranteeing the minimum wage, and barring domestic violence and illegal eviction–cannot be enforced.[5]

A. History of Language Access and Legal Precedent

On August 11, 2000, President Clinton signed Executive Order 13166, titled "Improving Access to Services for Persons with Limited English Proficiency," which required "[f]ederal agenc[ies] to examine the services [they] provide," identify the needs for services of people with limited English proficiency (LEP), and "develop and implement a system by which LEP persons can meaningfully access" them.[6]

The Supreme Court has affirmed that Title VI of the Civil Rights Act of 1964's prohibition against national origin discrimination includes discrimination against LEP individuals on the basis of language.[7] Several state courts have subsequently found that courts must take reasonable steps to ensure that limited English ability does not get in the way of a person's ability to appear and communicate effectively in court.

In 2010, the Georgia Supreme Court noted that, "as a recipient of federal funding, the court system in this State is obligated to provide persons who are 'limited English proficient' with meaningful access to the courts in order to comply with Title VI of the Civil Rights Act of 1964."[8] Further, "vigilance in

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3. Statement made by case worker and domestic violence advocate from Arab American Family Support Center in Brooklyn, New York to Professor Bearat in 2018.

4. Jayesh M. Rathod, *The Transformative Potential of Attorney Bilingualism*, 46 U. MICH. J.L. REFORM 863, 883 (2013).

5. C.J. Eric T. Washington, D.C. Court of Appeals, Remarks at the 2013 Council of Language Access Coordinators Conference (Apr. 23, 2013), *in* ACCESS TO JUSTICE FOR LIMITED ENGLISH PROFICIENT LITIGANTS, CALLED TO ACTION: 5 YEARS OF IMPROVING LANGUAGE ACCESS IN THE STATE COURTS 6 (Aug. 4, 2017), https://www.ncsc.org/__data/assets/pdf_file/0027/15858/language-access-called-to-action.pdf [perma.cc/F6US-SJ5W].

6. Exec. Order No. 13,166, 3 C.F.R. 13166 (2001), *cited in* 34 U.S.C. § 12491(d)(2)(D) (2022) (housing protections for victims of domestic violence, dating violence, sexual assault, and stalking).

7. Lau v. Nichols, 414 U.S. 563, 566—69 (1974).

8. Ling v. State, 702 S.E.2d 881, 884 (Ga. 2010).

protecting the rights of non-English speakers is required in all of our courts."[9] If no interpreter is provided, "[o]ne who is unable to communicate effectively in English . . . is no more competent to proceed than an individual who is incompetent due to mental incapacity."[10] Such a person thus "may be effectively incompetent to proceed in a criminal matter and rendered effectively absent at trial."[11] "The use of qualified interpreters is [thus] necessary to preserve meaningful access to the legal system for persons who speak and understand only languages other than English."[12]

In 2020, the Utah Supreme Court similarly concluded that "a failure to provide an interpreter in criminal proceedings may violate a defendant's right to due process [W]here a defendant cannot comprehend the proceeding, he or she may not be constitutionally present."[13]

In Hawai'i, the state judiciary is obligated under Hawai'i's Language Access Law to "take reasonable steps to ensure meaningful access to services, programs, and activities by [LEP] persons[.]"[14] It requires "each state agency . . . [to] provide competent, timely oral language services to limited English proficient persons who seek to access services, programs, or activities."[15] The judiciary accordingly set forth a Language Action Plan (LAP) pursuant to it's statutory obligations, which guides judges and judiciary personnel in ensuring access to the courts for people with limited English proficiency.[16]

The Department of Justice indicates that it "upholds the civil and constitutional rights of all members of our society."[17] It prohibits discrimination on the basis of race, color, sex, disability, religion, familial status, and national origin.[18] It created the Courts Language Access Initiative to secure "the rights of all people, regardless of their national origin [or] English language ability, to participate meaningfully in state court proceedings and programs," in compliance with the nondiscrimination provisions of Title VI and its regulations.[19] It recognizes that without effective language services in the court system, it creates a "judicial process that places unfair and unconstitutional burdens on [litigants'] ability to fully participate in proceedings."[20] Unfair and

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9. *Id.* at 884.

10. *Id.* at 883.

11. *Id.* at 882.

12. Ramos v. Terry, 622 S.E.2d 339, 343 (Ga. 2005) (quoting State v. Douangmala, 646 N.W.2d 1, 10 (Wis. 2002)).

13. Arriaga v. State, 469 P.3d 914, 927 n.71 (2020) (citing *Ling*, 702 S.E.2d at 883; Tennessee v. Lane, 541 U.S. 509, 523 (2004)).

14. HAW. REV. STAT. § 321C-3(a).

15. HAW. REV. STAT. § 321C-3(b).

16. *See* LANGUAGE ACCESS PLAN FOR PERSONS WITH LIMITED ENGLISH PROFICIENCY, Hawai'i State Judiciary (2017-2018), https://www.courts.state.hi.us/wp-content/uploads/2018/12/ADP876.pdf [perma.cc/UCJ4-VSMY]

17. U.S. DEP'T OF JUST. CIV. DIV, FEDERAL COORDINATION AND COMPLIANCE SECTION, LANGUAGE ACCESS IN STATE COURTS 1 (Sep. 15, 2016), https://www.courts.state.hi.us/wp-content/uploads/2018/12/ADP876.pdf [perma.cc/D63W-6ZPE].

18. *Id.*

19. *Id.*; *see* Title VI, Civil Rights Act of 1964, 42 U.S.C. § 2000(d).

20. U.S. DEP'T OF JUST. CIV. RTS. DIV, *supra* note 17.

unconstitutional proceedings such as these, however, continue to occur in state courts throughout the United States.

B. Current State of Language Access in the Courts

In 2016, Legal Services NYC (LSNYC) conducted a survey on the issues that LEP litigants encounter when they go to court.[21] LSNYC asked attorneys about their experiences utilizing the court's interpretation system.[22] Of the attorneys surveyed, 74% reported experiencing adjournments directly related to interpreters, 28% reported that more than half of their court appearances with LEP litigants are delayed by two or more hours as they wait for an available interpreter, 13% reported that court interpreters were "virtually never available" without a two-hour wait or an adjournment, 10% reported that more than half of court appearances for LEP litigants are adjourned, and 8% reported that adjournments happened three-quarters of the time.[23] In addition to the lack of interpreters and the unnecessary delays it causes, LEP litigants also frequently experience difficulty maneuvering the courthouses and procedures, an inability to engage in negotiations, a lack of explanation as to contents of settlement, limited attorney-client communication, and inaccurate interpretation.[24]

Due to a lack of understanding of court procedures, English-only signage, and the resulting inability to locate individuals in a crowded building to guide them, LEP litigants are "disempowered before they have even begun."[25] Courts need to provide clear, noticeable signs in multiple languages to address this issue.[26]

When LEP litigants finally enter a courtroom, they continue to face disadvantages. The LSNYC survey reveals that insufficient court interpreters and inaccurate interpretation are problematic throughout New York City courts.[27] The scarcity of interpreters both stretches interpreters too thin by forcing them to travel between different courts and boroughs on any given day, and also creates issues for courts and litigants.[28] When interpretation for specific languages can only be provided a few days each month, litigants are pressured by the court to adapt to this extremely limited schedule, which further delays their case, or

21. *New Report from Legal Services NYC Reveals Language Access Issues in New York City's Civil Courts*, LEGAL SERVS. NYC (Dec. 20, 2016), https://www.legalservicesnyc.org/news/new-report-from-legal-services-nyc-reveals-language-access-issues-in-new-york-citys-civil-courts/ [perma.cc/77CA-MGC5].

22. *Id.*

23. INTERPRETING JUSTICE: LANGUAGE ACCESS IN THE NEW YORK COURTS, LEGAL SERVS. NYC (Dec. 2016) [hereinafter INTERPRETING JUSTICE], https://www.legalservicesnyc.org/wp-content/uploads/2016/12/interpreting-justice-full-report-english.pdf [perma.cc/77CA-MGC5].

24. *Id.*

25. *Id.*

26. *Id.* This author observed that in New York City, at the start of the Covid-19 pandemic, family courts closed and posted signage and provided instructions for how to access virtual court only in English.

27. *Id.* at 2.

28. *Id.* at 9.

proceed without an interpreter, even in a language they do not speak well.[29] The issues caused by limited interpreter resources in New York courts should be anticipated and avoided, considering New York is comprised of almost 1.8 million people that are not proficient in English.[30]

Two LSNYC attorneys referenced trials where their clients were forced to proceed in a Chinese dialect that their clients did not understand.[31] One of these clients was a survivor of domestic violence and had been prepared to give "emotionally traumatizing testimony," and in efforts to proceed with the court's calendar, the court further traumatized the client by requiring that she prove herself via a test to determine if she does not understand Mandarin.[32] The client failed and had to repeat this test at the next trial date to demonstrate again to the court that she did not speak Mandarin.[33] In the other matter, a client lost a housing court trial and was evicted without his knowledge due to the court's use of a Mandarin interpreter when the client did not speak Mandarin.[34]

Delays and unnecessary adjournments, mainly due to language needs, are normalized as expectations for LEP litigants when they enter the judicial system. According to LSNYC, LEP litigants "face substantially more serious delays and adjournments than their English-speaking counterparts."[35] For survivors of domestic violence, repeated adjournments can re-traumatize them when they are expected to relive the incidents of domestic violence each time they prepare for trial, go to court, and are told to come back at a later date due to interpreter issues.[36]

Another issue identified by LSNYC is that LEP litigants may not understand the interpreters' roles and confuse them as lawyers or officers of the court.[37] As such, LSNYC suggests that courts should ensure that interpreters identify as interpreters when interacting with the public and indicate their role during such interactions (i.e., an interpreter "providing non-legal advice as an individual familiar with the courts" or answering questions).[38]

Inaccurate interpretation of LEP litigants' testimony could change their entire lives.[39] LSNYC discusses the importance of having highly-skilled interpreters, namely bilingual individuals that are proficient in legal vocabulary and procedures, and that do not act as *conduits* advocating for the litigant, but rather exclusively interpret the words the litigants state.[40] As to the qualifications

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29. *Id.* at 5.

30. *Language Access*, NYC DEP'T OF CITY PLAN., https://www.nyc.gov/site/planning/about/language-access.page [perma.cc/8ZH9-9UV9] (last visited Jul. 2024).

31. INTERPRETING JUSTICE, *supra* note 23.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 11.

36. *Id.*

37. *Id.* at 13.

38. *Id.*

39. *Id.* ("When an interpreter makes a mistake, serious consequences follow.").

40. *Id.*

of an interpreter, LSNYC recommends for courts to test language and interpretation proficiency before an interpreter becomes certified as a court interpreter.[41] And due to the complex nature of testing abilities, courts may use a third-party vendor to test interpreters on their qualifications.[42]

In 2013, the Center for Court Innovation and the National Center for State Courts assessed the need of LEP litigants for court language access services in domestic violence, sexual assault, dating violence, and stalking matters.[43] The "assessment examined the availability of interpreters and translated materials…; training for interpreters on domestic violence and sexual assault; protocols for monitoring the quality of interpretation and translation services; and engagement in . . . court language access planning."[44] The 927 respondents included judges, court administrators and staff, prosecutors, defense counsel, civil legal services attorneys, victim service providers, probation officers, batterer intervention treatment providers, and court and community interpreters, of which 84% reported providing direct services to LEP or deaf individuals.[45] Respondents resided in forty-eight states (New Hampshire and Rhode Island were excluded), the District of Columbia, and the U.S. territories (Guam, Northern Mariana Islands, and Puerto Rico).[46] The states with the largest number of respondents were Washington, California, Michigan, New York, Arizona, and Ohio.[47]

The assessment suggested that courts 1) "improve the provision of qualified court interpreters for all languages,"[48] 2) increase efforts to provide qualified interpreters and resources for such interpreters,[49] 3) "increase production and expand availability of translated materials,"[50] 4) provide "[a]ccess to interpreters and language services outside of the courtroom,"[51] 5) ensure that interpreters are trained on domestic violence and sexual assault,[52] 6) "publicize their language access plans" and reach out to the stakeholders of these plans,[53] and 7) develop protocols to assess the quality of language access services, to include feedback from litigants, attorneys, and service providers on any deficiencies.[54]

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41. *Id.*

42. *Id.* at 4.

43. NATIONAL CENTER FOR STATE COURTS, EFFECTIVE COURT COMMUNICATION: ASSESSING THE NEED FOR LANGUAGE ACCESS SERVICES FOR LIMITED ENGLISH PROFICIENT LITIGANTS IN DOMESTIC VIOLENCE, SEXUAL ASSAULT, DATING VIOLENCE, AND STALKING CASES 2 (Jul. 15, 2015) [hereinafter EFFECTIVE COURT COMMUNICATION], https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/373/rec/26 [perma.cc/D4UU-NVKE].

44. *Id.*

45. *Id.* at 3.

46. *Id.*

47. *Id.*

48. *Id.* at 4—5.

49. *Id.* at 5.

50. *Id.* at 5—6.

51. *Id.* at 6, 9.

52. *Id.* at 6—7.

53. *Id.* at 7—8.

54. *Id.* at 8—9.

The first suggestion, that courts provide qualified interpreters for all languages, is crucial. A court interpreter's performance is successful only if they are able to meaningfully convey the speaker's words and presentation style in another language without making changes to their expressions or tone of speech.[55] Successful interpretation is made more difficult in domestic violence cases where specialized vocabulary, idioms, and slang are utilized regularly.[56] It is also imperative that court interpreters understand the impact of trauma on victims and witnesses.[57] Only half of the court-based respondents indicated that interpreters are always available for litigants filing civil protection orders.[58] Similarly, only half of these same court-based respondents reported that language services are always available in family law and other civil matters (including contested cases).[59] However, some states, like California, have prioritized the issue of funding court interpreters at the state level for civil cases.[60]

Regarding the second finding, while progress has been made in some jurisdictions, gaps in translating materials still exist in many courthouses especially as they relate to survivors of domestic violence and civil protection petitions and orders.[61] These gaps are problematic from both a legal and advocate perspective, in that Title VI mandates that written materials be provided in additional languages.[62] However, only 40% of court-based respondents had translated protective order forms and only one third of court-based respondents had translated general court services materials.[63]

Regarding the third need identified by the survey, court language services are scarce despite the increasing need throughout the country. Close to 50% of the respondents who were based in a prosecutor's office or were civil attorneys said they did not have access to language services for domestic violence cases unless it was court-related.[64] And two thirds of all respondents reported that they utilized family members, friends, advocates, or other non-formally trained persons as interpreters for out-of-court proceedings.[65]

The fifth need highlighted the importance of interpreter training on domestic violence and sexual assault issues. The needs assessment demonstrated that only 11% of respondents reported that court interpreters in their jurisdiction

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55. *Id.* at 4.
56. *Id.*
57. *Id.*
58. *Id.* at 5.
59. *Id.*
60. *Id.*
61. EFFECTIVE COURT COMMUNICATION, *supra* note 43 at 5—6 ("New York provides informational brochures for victims of domestic violence in Spanish, Bengali, Chinese, Haitian Creole, Korean, and Russian. California offers protection order forms in Spanish, Chinese, Korean, and Vietnamese, while Oregon posts online forms in Spanish, Korean, Russian, and Vietnamese. King County Superior Court (Washington) provides online family law forms and materials in several languages and includes a link to forms and information about family and domestic violence laws in several languages.").
62. Exec. Order No. 13,166, 3 C.F.R. § 2 (2000); *see also Lau*, 414 U.S. at 566—69.
63. EFFECTIVE COURT COMMUNICATION, *supra* note 43 at 5.
64. *Id.* at 6.
65. *Id.*

were trained on domestic violence and sexual violence, and close to 75% did not know if their interpreters were trained on these issues.[66] The need for this specialized training is important because of the challenging vocabulary and idioms utilized in such cases, and when testimony is modified into a "sterilized version of a [survivor's] more graphic account," it can negatively impact the outcome of a case.[67] Interpreters must also know their role in the courtroom and be able differentiate between an advocacy and interpretation role.[68] Additionally, there is confusion as to an interpreter's duty of confidentiality and how to handle situations where litigants disclose information indicating they may be in danger.[69] And due to the nature of working with survivors of domestic violence and sexual assault, interpreters need training on vicarious trauma.[70] Fortunately, there has been some development around the country of training curricula for interpreters in domestic violence and sexual assault proceedings.[71]

As to the seventh need addressed in the assessment, courts must develop protocols to monitor the quality of the language access services and educate litigants, justice system partners, and service providers on existing mechanisms for advising the court about service deficiencies.[72] This need is essential to provide effective interpreter services and a reliable system for gathering feedback from individuals that interact with the court and determining whether the systems in place are working or need to be modified for improvement.[73]

By monitoring the language services and various issues that arise with individual interpreters, courts can best determine the shifting needs of LEP litigants and whether there are gaps in their interactions.[74] Courts need to be transparent in their findings, respond quickly to various needs and issues, and publicize their courses of action.[75] More than three quarters of the respondents in the assessment reported that they did not know how to file a complaint regarding court language services.[76] Due to this lack of knowledge, only 15% of civil legal aid attorneys and less than 10% of prosecutors, victim witnesses, and community service providers indicated they had filed a complaint regarding their interactions with the court's language services.[77] "Less than a fifth of respondents reported having a feedback protocol and just over a third did not know if one exists."[78]

These findings are especially troubling when it comes to survivors of domestic violence and sexual assault, as having "a robust quality monitoring

66. *Id.* at 6—7.
67. *Id.* at 7.
68. *Id.*
69. *Id.* at 7.
70. *Id.*
71. *Id.*
72. *Id.* at 8.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 8.

system could address safety and access to justice issues that may arise from the lack of interpreter services for protection order . . . proceedings, as well as the lack of specialized training for interpreters on domestic violence and sexual assault."[79] Feedback mechanisms that various courts have utilized "include customer satisfaction surveys, court monitoring, oversight or interpreter committees that meet to discuss performance, and annual performance evaluations for interpreters."[80]

This assessment reflects the obstacles a survivor of domestic violence faces when interacting with state and federal court systems. In determining how to address the gaps between survivor needs and language access services, innovative strategies must be utilized. The assessment suggests that courts expand the use and build the capacity of bilingual staff, facilitate access to qualified interpreters through both a comprehensive database of such interpreters and remote interpretation, and provide court interpreters with specialized training on domestic violence and sexual assault.[81] Some states have taken steps at implementing these strategies.[82] The New Mexico judiciary, for example, through its Center for Language Access, has created the "Language Access Specialist Certification Program," an 8-week training program for bilingual staff that teaches modes of interpretation, ethical issues for interpreters, legal terminology and oral/written skills, cultural competency, and components of the justice system.[83]

Utilizing video or telephone remote interpretation can be beneficial in increasing access to qualified court interpreters available both in and out of court.[84] As of 2016, 13 states had implemented video remote interpretation and 14 states were exploring its use.[85] The COVID-19 pandemic dramatically changed courts' use of remote interpreters out of necessity, a change that was desperately needed.[86] "As technology costs have declined, the quality of high-

79. *Id.*

80. *Id.* at 9.

81. *Id.*at 10—11.

82. *Id.*at 7, 10.

83. *Language Access Specialist Certification: About the Program,* N.M. CTR. FOR LANGUAGE ACCESS, https://nmcenterforlanguageaccess.org/cms/en/las-certification/about-las [perma.cc/B3LP-SLWU] (last visited July 2024); *see Language Access Basic Training*, N.M. CTR. FOR LANGUAGE ACCESS, https://nmcenterforlanguageaccess.org/cms/en/services/about-language-access-basic-training [perma.cc/BQ52-2TG4] (last visited July 2024).

84. EFFECTIVE COURT COMMUNICATION, *supra* note 43 at 11.

85. *Id.* at 10.

86. Courts have been pressured "to provide broader interpreter services," including remote interpretation, for several years. Thomas M. Clarke, *Video Remote Interpretation as a Business Solution*, *in* TRENDS IN STATE CTS. 2014 at 49 (2015) (discussing the development of a national database of qualified interpreters). Until recently, however, the regular use of videoconference was "relatively rare and often not satisfactory because of quality issues." *Id.* In New Jersey, for example, "[p]rior to the C[ovid]-19 pandemic, court proceedings and services generally occurred and were available in-person within [j]udiciary facilities," while "the use of remote interpreting services was very limited." State v. Juracan-Juracan, 299 A.3d 805, 814 (N.J. 2023). "The unprecedented circumstances of the COVID-19 pandemic resulted in the widespread use of virtual court proceedings;" however, in 2020, the New Jersey

definition video, availability of broadband Internet connections, and compliance with [technological] standards . . . have increased," so remote interpretation is an increasingly feasible strategy going forward to ensure access to justice for all LEP litigants.[87] The Council of Language Access Coordinators has developed guidelines for the use of remote interpretation and has built a shared national database of interpreters that should be available for courts to use.[88] If used

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Supreme Court widely expanded the circumstances under which courts could permit remote interpreting services. *Id.* at 815. As the effects of the pandemic dwindled, in 2023, the New Jersey Supreme Court pronounced that remote interpretation could be used as follows:

> Judges shall have discretion to determine whether remote interpreting is to be used, in coordination with the . . . interpreters, to ensure the best remote interpreting option is provided when appropriate and to ensure efficient on-site, virtual, and hybrid court events; greater accessibility to [court-] approved . . . interpreters; and effective use of court interpreters and cost savings.

Id. (emphasis added by court) (quoting N.J. Cts., *Administrative Directive #10-22, in* New Jersey Judiciary Language Access Plan (2022)). It further advised that courts "should take into consideration the following nonexclusive list of factors:"

> (1) the nature, length, and complexity of the trial; (2) the number of parties and witnesses involved; (3) whether an interpreter is available to interpret in person at trial; (4) the impact any substantial delay in obtaining an in-person interpreter would have on the defendant and on third-parties such as co-defendants or victims; (5) whether the defendant tentatively plans to testify; (6) the financial costs associated with in-person interpreting as compared to remote interpreting; and (7) the interpreters' position as to whether they believe they can adequately fulfill their duties to interpret accurately and meet professional standards while interpreting virtually.

Id. at 814-15. *See also* Macias v. Monterrey Concrete LLC, No. 19-CV-830, 2020 WL 6386861, at *5 (E.D. Va. Oct. 30, 2020) (allowing remote testimony and interpretation for witnesses testifying from Mexico during Covid-19); Valdivia v. Menard Inc., No. 19-CV-50336, 2020 WL 4336060, at *1–2 (N.D. Ill. Jul. 28, 2020) (remotely interpreted deposition allowed due to Covid-19 public emergency, where counsel had "successfully used interpreters for remote depositions in the past") (citing Learning Res., Inc. v. Playgo Toys Enterprises Ltd., 335 F.R.D. 536, 539 (N.D. Ill. 2020) ("Remote depositions are a presumptively valid means of discovery even without the in-person interaction, and many courts have held that remote videoconference depositions offer the deposing party a sufficient opportunity to evaluate a deponent's nonverbal responses, demeanor, and overall credibility.").

87. EFFECTIVE COURT COMMUNICATION, *supra* note 43 at 10–11.

88. NAT'L CTR. FOR STATE CTS., REMOTE INTERPRETING GUIDE FOR COURTS, COURT STAFF, AND JUSTICE PARTNERS (2018) [hereinafter REMOTE INTERPRETING GUIDE], https://www.ncsc.org/__data/assets/pdf_file/0021/18705/remote_interpreting_-guide.pdf [perma.cc/44GP-UC7G]. *See* CONF. CHIEF JUST. & CONF. STATE CT. ADMIN'R, RESOLUTION 7 IN SUPPORT OF ESTABLISHING BEST PRACTICES/RECOMMENDATIONS FOR THE USE OF VIDEO REMOTE INTERPRETATION (2013) (adopting a resolution supporting the use of video remote interpretation), https://ccj.ncsc.org/__data/assets/pdf_file/0020/23744/07312013-support-best-practices-recommendations-use-video-remote-interpretation-ccj-cosca.pdf [perma.cc/FTT2-P2LY]; CONF. CHIEF JUST. & CONF. STATE CT. ADMIN'R, RESOLUTION 8 IN SUPPORT OF SHARING INTERPRETER RESOURCES THROUGH ESTABLISHING A SHARED NATIONAL COURT VIDEO REMOTE INTERPRETING NETWORK AND NATIONAL PROFICIENCY DESIGNATION FOR INTERPRETERS (2013) (adopting a resolution supporting the creation of a national database of interpreters), https://ccj.ncsc.org/__data/assets/pdf_file/0020/23645/07312013-support-sharing-interpreter-resources-national-court-vir-ccj-cosca.pdf [perma.cc/NVL2-WWU4].

effectively, a court interpreter should be available for any court proceeding for a majority of languages.[89]

As discussed above, interpreters have demanding responsibilities when interpreting in domestic violence and sexual violence cases. That is why training needs to be provided for interpreters on domestic violence and sexual violence issues to "enhance interpreter skills, clarify [their] roles and responsibilities, and improve the [LEP] litigant experience [while in] the courtroom."[90] Washington and Ohio, for example, committed to working with the Asian Pacific Institute on Gender-Based Violence to train interpreters on domestic violence and sexual assault.[91] In addition, in 2015, the National Center for State Courts launched an online training program for interpreters on these issues.[92]

Courts should take advantage of these opportunities and require court interpreters to complete trainings on domestic violence and sexual assault. Every state needs to make commitments to combat gender-based violence to several organizations. The trainings should be held both remotely and in person to ensure that access is available to all interpreters. If interpreters do not complete the trainings, they should not be permitted to interpret in domestic violence proceedings. And courts need to provide clear information to both litigants and attorneys on the process for reporting interpreting issues.

Noora came to family court after years of abuse suffered at the hands of Ahmed. She relied on her attorney and the interpreters appointed by the court to effectively tell her story, having never expressed the abuse herself. She had interpreters that spoke a different dialect of Arabic, and so misinterpreted her testimony. She had interpreters who were not trained on domestic violence and were not able to decipher the difference between being slapped in the face and punched in the face. She was prepared for trial in January of 2017 and testified on two dates at that time, before the trial was adjourned repeatedly thereafter for continued testimony or cut short. She was expected to testify when the court had the resources to accommodate her, which blatantly disregarded her status as the primary caretaker of her children, for whom she had to find childcare.

For survivors of domestic violence, they come to family court after being silenced by their abusive partners for so long. They look to the judicial system to express themselves and share their traumatic stories in hopes of seeking justice. With immigrant survivors who do not primarily speak English, their stories are told through interpreters. That is a serious responsibility that both the interpreters and courts need to meet. The momentum survivors have in hopes of seeking justice is lost when the courts repeatedly adjourn their cases or only allot fifteen to thirty minutes to be heard. They are re-traumatized repeatedly by having to recount the incidents of domestic violence over an extended amount of time, as opposed to a few days. Courts must prioritize their language access services to

89. REMOTE INTERPRETING GUIDE, *supra* note 88.

90. EFFECTIVE COURT COMMUNICATION, *supra* note 43 at 11.

91. *Id.*

92. *Id.*; *Interpreting for Domestic Violence and Sexual Assault Cases*, NAT'L CTR. FOR STATE CTS., HTTPS://WWW.NCSC.ORG/EDUCATION-AND-CAREERS/ICM-CREATIVE-LEARNING-SERVICES/CLS-PORTFOLIO/DOMESTIC-VIOLENCE-AND-SEXUAL-ASSAULT-CASES [perma.cc/D4BX-TSHL] (last visited July 2024).

meet the needs of all LEP litigants, and specifically those of survivors of domestic violence.

II. IMMIGRATION STATUS FEARS & RISKS OF SEEKING COURT INTERVENTION

Immigrant survivors often do not know the extent of the rights to which they are entitled. If they come from a Muslim country, oftentimes, Shari'a law rules and determines family law and divorce proceedings.[93] These survivors often fear going to the police and to court due to a lack of immigration status, which the abusers can use as a weapon to keep them trapped in the relationship. Noora did not have immigration status and was worried she would be deported, leaving her children behind. Noora's fears reflect the horrors and risks that immigrant survivors of domestic violence face in the United States.

A. Keeping ICE Out of the Courts

U.S. Immigration and Customs Enforcement (ICE), formerly called the Bureau of Immigration and Customs Enforcement, was created in 2003 as the domestic immigration policing arm of the Department of Homeland Security (DHS).[94] This was done in response to 9/11 in efforts "to protect national security and strengthen public safety."[95] While there have been serious issues with the U.S. immigration system for many years, notably the rights of immigrants were stripped upon the inauguration of Donald Trump in 2017, where he vowed to place "America First" and block immigration.[96] And with his so-called "Muslim Ban," federal immigration agents, in their already-discriminatory practices, increased their targeting of Muslim immigrants.[97]

When Noora's case started in family court in 2016 to 2017, New York State had a 1200% increase in arrests or attempted arrest by ICE agents in and around

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93. *See, e.g.*, Abbas Hadjian, *The Children of Shari'a*, L.A. LAWYER 32, 36 (2013) (discussing various Islamic legal traditions in the context of child custody) ("Modern shari'a law reflects the social, economic, and political values and goals of millions of Muslims. In particular, the family law of various countries reflects not only 14 centuries of Shari'a law but also its more contemporary manifestations."), https://www.iafl.com/media/1173/children_of_sharia.pdf [perma.cc/2LMU-WD64]; Mervate Mohammad, *The Evolution of Sharia Divorce Law: Its Interpretation and Effect on a Woman's Right to Divorce*, 7 ALB. GOV'T L. REV. 420, 424, 440 (2014) ("Divorce in Islam is looked upon as abominable…[m]any Muslim American Women will not speak out about their divorce because it is not a topic that is usually discussed and is looked down upon within the community. In the United States, many Muslims who obtain a civil divorce also obtain a divorce pursuant to Shari'a law in order to fulfill their Islamic obligations.").

94. DHS, *Honoring the History of ICE*, DEP'T OF HOMELAND SEC. U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/features/history [perma.cc/QPL7-YJ6G] (last visited July 2024).

95. *Id.*

96. Dan De Luce, *Trump Promises 'America First' in Defiant and Divisive Inaugural Speech*, FOREIGN POL'Y (Jan. 20, 2017), https://foreignpolicy.com/2017/01/20/trump-promises-america-first-in-defiant-and-divisive-inaugural-speech/ [perma.cc/HC6Z-BUYW].

97. *A License to Discriminate: Trump's Muslim & Refugee Ban*, AMNESTY INT'L UK (Oct 6, 2020), https://www.amnesty.org.uk/licence-discriminate-trumps-muslim-refugee-ban [perma.cc/9U2P-2LFY].

courthouses.[98] Her case was pending in court during an especially volatile period for immigrants in the United States, "[a]s the White House steamroll[ed] over immigrants' rights and crank[ed] up its deportation machine."[99] ICE's presence in courthouses is a barrier for survivors of domestic violence who began to fear that if they went to court they could be arrested by ICE.[100]

There is a chilling effect to ICE's presence and arrests in courts as it deters immigrants from attending child welfare, domestic violence, adult criminal, and youth court hearings.[101] A nation-wide survey was conducted by Ceres Policy Research and the Immigrant Defense Project to record the impact of ICE raids.[102] They partnered with twenty organizations throughout the United States to acquire 1,000 participants from families with mixed immigration statuses.[103] The participants came from 123 cities in 11 states.[104]

The findings showed that the respondents, fearful of ICE, avoided attending a broad range of hearings.[105] 48% of court-based respondents thought that judges were helping ICE arrest people.[106] 49% believed that prosecutors were helping ICE arrest people.[107] 50% of the Respondents avoided calling the police (as victims of crimes) because they were afraid that ICE would come.[108] 60% of respondents avoided attending court as witnesses when they were victims of crimes.[109] As it relates to family law proceedings, 41% of the respondents avoided domestic violence-related hearings, 37% avoided appearing in child welfare hearings when involved in dependency court, and 35% avoided attending youth court when their children were appearing.[110] 33% avoided all types of hearings because they were afraid that ICE would take their children away.[111]

"These findings suggest that large proportions of immigrants—particularly those who are undocumented, have DACA status or a current deportation

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98. *Courts are Places for Justice, Not Places for Intimidation by ICE*, SAFE HORIZON, https://www.safehorizon.org/advocacy/ice-courts/ [perma.cc/A4K7-XH9P] (last visited July 2024).

99. Michelle Chen,*KickingICE Outof the Courthouses*, THE NATION (Sep. 5, 2018), https://www.thenation.com/article/archive/kicking-ice-out-of-the-courthouses/ [perma.cc/ZD5W-YHQW].

100. SAFE HORIZON, *supra* note 98.

101. ANGELA IRVINE, MITZIA MARTINEZ, CRYSTAL FARMER, & AISHA CANFIELD, CERES POLICY RESEARCH & IMMIGRANT DEFENSE PROJECT, THE CHILLING EFFECT OF ICE COURTHOUSE ARRESTS: HOW IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE) RAIDS DETER IMMIGRANTS FROM ATTENDING CHILD WELFARE, DOMESTIC VIOLENCE, ADULT CRIMINAL, AND YOUTH COURT HEARINGS 2 (2019), https://www.immigrantdefenseproject.org/wp-content/uploads/ice.report.exec_summ.5nov2019.pdf [perma.cc/RH8X-KUMX].

102. *Id*. at 1.

103. *Id*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id*

108. *Id.* at 2.

109. *Id.*

110. *Id.*

111. *Id.*

order—are avoiding court."[112] This causes a disruption to a variety of court proceedings, including parents failing to appear in child welfare and youth court, which further risks severe consequences to their family and their constitutional rights as parents.[113] Survivors are not calling the police when they need to obtain safety and or legal protections.[114] Victims of domestic violence do not appear in domestic violence proceedings and criminal court.[115]

The importance of reporting domestic violence to the police and obtaining a civil protective order is highlighted in a study comprised of 2,700 women, which found an 80% decrease in subsequent police-reported physical violence when women reported domestic violence to the police and obtained civil protective orders.[116] These women experienced a significantly reduced risk of physical and non-physical intimate partner violence, including contact by the abuser, weapons threats, injuries, and medical treatment related to domestic violence.[117] Another study found a 70% decrease in physical abuse among women who maintained their protective orders.[118] And in another study, 86% of women who received a protective order indicated that the abuse stopped or was tremendously reduced.[119]

In Noora's case, she never called the police herself to intervene because she was fearful that they would discover her immigration status, a threat which her husband reminded her of daily. Any time they would argue, he would threaten to call the police himself and have her deported. With her children's well-being as her priority, she feared what would happen to her if she ever involved the police. When she ended up in court–albeit not by her own volition–her husband's counsel argued during trial that she was seeking the court's protection to obtain immigration status. They disclosed her lack of immigration status in open court, during a time that ICE was present in and around courthouses. But for Noora's counsel's objection to this line of questioning, the judge and members of the public could have heard much more of this harmful testimony.

Immigrants were not protected in United States civil courthouses until April 2021, when DHS issued a memorandum on guidance for ICE and U.S. Customers and Border Protection (CBP) regarding civil immigration enforcement actions in or near courthouses.[120] However, ICE can still be found in or around the

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Jane K. Stoever, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 VAND. L. REV. 1015, 1065 (2014).

117. *Id.*

118. *Id.*

119. *Id.*

120. TAE JOHNSON & TROY MILLER, U.S. DEP'T HOMELAND SEC., CIVIL IMMIGRATION ENFORCEMENT ACTIONS IN OR NEAR COURTHOUSES (2021), https://www.cbp.gov/sites/default/files/assets/documents/2021-Apr/Enforcement-Actions-in-Courthouses-04-26-21.pdf [perma.cc/NEA5-NRLN] ("A civil immigration enforcement action may be taken in or near a courthouse if (1) it involves a national security threat, or (2) there is an imminent risk of death, violence, or physical harm to any person, or (3) it involves

courthouses regardless of this memorandum.[121] From the east coast to the west coast, immigrant advocates have been attempting to create protective policies to prevent or minimize ICE's interference in the courts.[122]

New York City has been working on a proposed amendment to Intro 184, Intro 185, and Intro 158 to strengthen and simplify their local detainer laws.[123] Other cities like Chicago, Los Angeles, Kings County (Seattle), Santa Clara County (San Jose), Montgomery County (Maryland) and Washington County (Oregon) are clear on their laws as it relates to ICE and their communication with the Department of Corrections about anyone as long as they meet the judicial warrant requirement.[124] The proposed amendment to Intro 185 would prevent the Department of Corrections from communicating with ICE about a person unless

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hot pursuit of an individual who poses a threat to public safety, or (4) there is an imminent risk of destruction of evidence material to a criminal case. In the absence of hot pursuit, a civil immigration enforcement action also may be taken in or near a courthouse against an individual who poses a threat to public safety if: (1) it is necessary to take the action in or near the courthouse because a safe alternative location for such action does not exist or would be too difficult to achieve the enforcement action at such a location, and (2) the action has been approved in advance by a Field Office Director, Special Agent in Charge, Chief Patrol Agent, or Port Director.").

121. *See, e.g.*, IMMIGRANT DEF. PROJECT, FAQ FOR DEFENSE ATTORNEYS: HOW TO ADVISE IMMIGRANT CLIENTS ABOUT ICE IN THE COURTS (2021), https://www.immigrantdefenseproject.org/wp-content/uploads/FAQ-FOR-DEFENSE-ATTORNEYS_-How-to-advise-immigrant-clients-about-ICE-in-the-courts-.pdf [perma.cc/VJ66-7FE8] ("ICE officers have to identify themselves [and their purpose] to court personnel if they enter a courthouse…However, ICE may still surveil people outside of the courthouse building without notifying court personnel").

122. Chen, *supra* note 99; Petition for Writ of Protection Pursuant to M.G.L. c. 211, § 3 (Mar. 15, 2018), https://www.immigrantdefenseproject.org/wp-content/uploads/Massachusetts-petition.pdf [perma.cc/JAP4-6DJ8] (requesting protection "against arrest on civil process while within the confines of a courthouse and its environs, and for all those having business before the court while coming to and leaving court proceedings."); Christopher Ho & Marisa Díaz, *Application for a Proposed Rule of Court Prohibiting Civil Arrests at California Courthouses* (Aug. 1, 2018), https://www.immigrantdefenseproject.org/wp-content/uploads/Application-to-California-Judicial-Council-for-Proposed-Rule-of-Court-8.1.2018.pdf [perma.cc/V9FL-HPYT] (requesting the prohibition of civil arrests of people going to, inside, or coming from courthouses "in connection with any judicial proceeding or other business with the court"); ICE OUT OF CTS. COALITION, SAFEGUARDING THE INTEGRITY OF OUR COURTS: THE IMPACT OF ICE COURTHOUSE OPERATIONS IN NEW YORK STATE (2019), https://www.immigrantdefenseproject.org/wp-content/uploads/Safeguarding-the-Integrity-of-Our-Courts-Final-Report.pdf [perma.cc/Z6Z8-5EBQ]; U.S. COMM'N ON C.R., U.S. COMMISSION ON CIVIL RIGHTS EXPRESSES CONCERN WITH IMMIGRANTS' ACCESS TO JUSTICE (2017), http://www.usccr.gov/press/2017/Statement_04-24-2017-Immigrant-Access-Justice.pdf [perma.cc/6YJP-JAAJ]; ICE OUT OF CTS. COALITION, *Section 4: Statements from Chief Judges, Governors, Prosecutors, Attorneys General, and Bar Associations*, *in* ICE OUT OF COURTS CAMPAIGN TOOLKIT (2018), https://www.immigrantdefenseproject.org/wp-content/uploads/CourthouseToolkitSection4.pdf [perma.cc/ST2D-U3HW].

123. *N.Y.C. Counsel Int. 0184-2022*; *N.Y.C. Counsel Int. 0185-2022*. (A detainer, or "immigration hold", is a tactic used by ICE to ask a City agency to help them arrest someone. They are not signed by a judge and there is no requirement to comply with them.).

124. *Id.*

there is a warrant signed by a federal judge.[125] The proposed amendment to Intro 184 would prohibit the New York Police Department from holding a person for ICE without a warrant signed by a federal judge (aligning the local New York City law with state law).[126] The proposed amendment to Intro 158 would create a "'private right of action'–which allows a private person to take legal action to enforce their rights–so that people wronged by [New York] City's violation of these laws can seek justice in court, including [monetary] payment."[127]

B. Procedural Barriers to Immigration Relief

Many immigrant survivors "suffer in silence for fear that the security of their entire families will be jeopardized" if they seek help.[128] Immigrant survivors of domestic violence may be eligible for various immigration relief under the Violence Against Women Act of 1994 (VAWA) and its subsequent reauthorizations by submitting a VAWA self-petition or a Battered Spouse Waiver (BSW).[129] If a survivor of domestic violence is not eligible for either a VAWA self-petition or BSW, they may be eligible as Victims of Criminal Activity for U Nonimmigrant Status, also known as a U Visa.[130] However, immigrant survivors, particularly survivors of color, often face difficulties meeting the conditions required by our immigration laws.[131]

Noora was able to apply for a VAWA self-petition while her case was pending in family court. She was eligible to do so because she was married to a U.S. citizen, entered her marriage in good faith, lived with her husband for several years, and suffered extensive domestic violence by her husband and his family. However, as Noora's case was pending, she "jumped a subway turnstile" and was given a Desk Appearance Ticket by the New York City Transit Authority Police. While this seems like an insignificant ticket, it actually was a criminal ticket, and impacted her admissibility due to this being a crime involving moral turpitude.[132] This caused a delay in her immigration application and posed serious

125. ICE OUT! NYC, *Ice Out NYC Fact Sheet* (2022), https://www.documentcloud.org/documents/23599600-ice-out-nyc-fact-sheet-english-july-2022/ [perma.cc/4RMA-27HN].

126. *Id.*

127. *Id.*

128. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1249 (1991).

129. U.S. CITIZENSHIP & IMMIGR. SERVS., *Abused Spouses, Children and Parents*, https://www.uscis.gov/humanitarian/abused-spouses-children-and-parents [perma.cc/7UHU-55B5] (last updated Apr. 2, 2024); Cecilia Olavarria & Moira Fisher Preda, *Additional Remedies Under VAWA: Battered Spouse Waiver, in* BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS (2013).

130. U.S. CITIZENSHIP & IMMIGR. SERVS., *Victims of Criminal Activity: U Nonimmigrant Status*, https://www.uscis.gov/humanitarian/victims-of-criminal-activity-u-nonimmigrant-status [perma.cc/T8FY-MST5] (last updated Apr. 2, 2024).

131. Crenshaw, *supra* note 127 at 1247-48.

132. N.Y. PENAL LAW § 165.15 (2018); Emma Whitford, *NYPD Claims New Yorkers Won't be Deported for Turnstile Jumping*, GOTHAMIST (Feb. 25, 2017), https://gothamist.com/news/nypd-claims-new-yorkers-wont-be-deported-for-turnstile-

risks for her, as the likelihood of deportation increased if her application was denied due to this criminal ticket.[133] Ultimately, she was able to obtain work authorization and public benefits and move into government subsidized housing, but this took several years of legal advocacy, efforts, and much patience on her behalf.

For a VAWA/BSW application to be granted, survivors must prove they suffered domestic violence at the hands of their U.S. citizen or Legal Permanent Resident spouse or family member.[134] One way to prove they suffered domestic violence is by obtaining a civil protective order against their abuser.[135] With ICE present in or around the courthouses, however, survivors may be less likely to go to court to obtain a civil protective order.[136] They also could be a witness in a criminal case against the abuser, but similarly, ICE's presence can be a deterrent to their appearance in criminal court.[137] They may also submit evidence to support their application including "reports and affidavits from police, medical personnel, psychologists, schools officials, and social service agencies," but often they are not able to access these resources.[138]

To be granted a U Visa, an applicant must be a victim of a qualifying criminal activity, have suffered substantial physical or mental abuse as a result of being a victim of criminal activity, have information about the criminal activity, and prove that they are, were, or are likely to be helpful to law enforcement in the investigation or prosecution of the crime.[139] Some of the qualifying criminal activities include: domestic violence, abusive sexual contact, blackmail, extortion, kidnapping, rape, sexual assault, and unlawful criminal restraint.[140] Cooperating in abuse and neglect proceedings and testifying in a family offense case in family court, can qualify as assisting and cooperating with law enforcement.[141] To obtain a criminal protective order, victims must cooperate

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jumping [perma.cc/MY2T-H9TY] ("A turnstile jumping conviction is also a deportable offense. Any two convictions 'involving moral turpitude'–turnstile jumping, petty theft–qualify a green card holder for deportation."). *See* Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i); 8 U.S.C. § 1182(a)(2)(A)(i).

133. If an immigrant is "unlawfully present" in the U.S., applying for immigration will alert USCIS to their presence, and if the application is denied, removal proceedings may be triggered. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., *Unlawful Presence and Inadmissibility*, https://www.uscis.gov/laws-and-policy/other-resources/unlawful-presence-and-inadmissibility [perma.cc/865J-HAEP].

134. *Abused Spouses, Children and Parents*, *supra* note 128.

135. U.S. CITIZENSHIP & IMMIGR. SERVS., *Chapter 2 – Eligibility Requirements and Evidence*, https://www.uscis.gov/policy-manual/volume-3-part-d-chapter-2 [perma.cc/H58A-4EEW] (last visited July 2024).

136. Irvine, *supra* note 101.

137. Irvine, *supra* note 101.

138. Crenshaw, *supra* note 127, at 1248.

139. *Victims of Criminal Activity: U Nonimmigrant Status*, *supra* note 129.

140. *See* 8 U.S.C. § 1101(a)(15)(U)(iii).

141. N.Y. STATE JUDICIAL COMM'N. ON WOMEN IN THE CTS., IMMIGRATION AND DOMESTIC VIOLENCE: A SHORT GUIDE FOR NEW YORK STATE JUDGES 3 (2009), https://ww2.nycourts.gov/sites/default/files/document/files/2018-07/ImmigrationandDomesticViolence.pdf [perma.cc/SY8K-TLN9].

with prosecutors, who many immigrants are reluctant to trust.[142] They also are unlikely to trust that judges will not alert ICE of their presence in court for domestic-violence related hearings.[143] They fear that, if they call the police to report a crime, ICE will come to their home to deport them, separate them from their children, or both.[144] Many also worry, like Noora, that their children will be removed from their home in abuse and neglect proceedings.[145] Despite this, often survivors who have children do not want the abuser-parent to be deported.[146]

VAWA allows many survivors of domestic violence to have a pathway to immigration status.[147] With proper immigration status, a survivor can have authorization to work in the United States, access education after high school, obtain public benefits, and so much more.[148] ICE's chilling presence in and around the courts can completely block a survivor from safely seeking legal recourse and protections they are afforded by the law.[149] Foreign nationals are entitled to equal protection of the laws and to due process requirements—but whether those protections are a reality for survivors of domestic violence is questionable.[150]

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142. Irvine, *supra* note 101.

143. Irvine, *supra* note 101.

144. Irvine, *supra* note 101, at 2.

145. *See* IMMIGRATION DETENTION, FAMILIES, AND CHILD WELFARE: A SUMMARY OF ICE'S DIRECTIVE ON DETENTION AND REMOVAL OF PARENTS OR GUARDIANS, MIGRATION POL'Y INST., (May 2018), https://cimmcw.org/wp-content/uploads/Summary-of-ICE-Directive-FINAL.pdf [perma.cc/FJ3R-NREM].

146. 8 U.S.C. § 1227(a)(2)(E) (deportable aliens include those convicted of domestic violence, stalking, violation of protection order, crimes against children, and trafficking); *Why People Stay*, NAT'L DOMESTIC VIOLENCE HOTLINE, https://www.thehotline.org/support-others/why-people-stay-in-an-abusive-relationship/ [perma.cc/QAD9-R5AC] (last visited Apr. 2025) ("Children: Many survivors may feel guilty or responsible for disrupting their familial unit. Keeping the family together may not only be something that a survivor may value, but may also be used as a tactic by their partner used to guilt a survivor into staying.").

147. *See History of VAWA*, LEGAL MOMENTUM, https://www.legalmomentum.org/history-vawa [perma.cc/MNS7-5DHK] (last visited Apr. 2025); IMMIGRANT DEFENSE PROJ. & PADILLA SUPPORT CTR., Immigration Status Guide for Assigned Counsel (2016), https://www.immigrantdefenseproject.org/wp-content/uploads/IDP-Immigration-Status-101-Guide-FINAL1.pdf [perma.cc/8VSK-KT7W].

148. Tanya Broder & Gabrielle Lessard, *Overview of Immigrant Eligibility for Federal Programs*, NAT'L IMMIGR. L. CTR. (May 1, 2024), https://www.nilc.org/wp-content/uploads/2024/05/overview-immeligfedprograms-2024-05-08-1.pdf [perma.cc/2MMP-JJXW]. *See*, *e.g.*, *Know Your Rights: New U Visa Bona Fide Determination Procedure*, NAT'L IMMIGRANT JUST. CTR., https://immigrantjustice.org/know-your-rights/know-your-rights-new-u-visa-bona-fide-determination-procedure [perma.cc/68JL-GB69]; *Humanitarian Protections for Noncitizen Survivors of Domestic Violence and Other Crimes: An Overview*, AM. IMMIGR. COUNCIL (Feb. 11, 2025), https://www.americanimmigrationcouncil.org/research/humanitarian-protections-noncitizen-survivors [perma.cc/6RDJ-AU3L].

149. Irvine, supra note 101.

150. David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, 25 T. JEFFERSON L. REV. 367, 381 (2003).

In coming to court, survivors also risk retaliation by the abuser.[151] Abusers can file frivolous or falsified petitions against survivors in family court, and obtain temporary or final protective orders.[152] Whether temporary or final, if a survivor violates an active court order, they can be deported—even if they have lawful immigration status, like a green card.[153] Even if the order has expired, and even if the survivor does not violate the order, USCIS can still request additional evidence, question the survivor about the order, and use that information to deny applications for immigration relief.[154] In addition, during international travel, a survivor can be questioned about the alleged conduct, and during removal proceedings the government and judge can question the individual about the protective order.[155] Retaliatory protective orders filed by abusers can still result in deportation or denial of various immigration benefits, despite a survivor's avoidance of court and lawful immigration status.

The courts should be a place where one can seek sanctuary, with full protections afforded to them by the United States Constitution. However, until ICE is fully prevented by state and city legislation nationwide from entering without a judicial warrant, risks to the immigration status of survivors of domestic violence will continue to prevent them from accessing the protections they are entitled to under the law. Immigration status should not be denied because of protective orders, regardless of whether active or expired, as this has harmful consequences to both the survivor and potentially a survivor's children if the abuser is deported due to a protective order being in place.

III. CHILD PROTECTIVE SERVICES

Sometimes, Child Protective Services (CPS) removes children from the home due to domestic violence, and immigrant survivors do not know why it happened or if they will be reunited with their children. These fears kept Noora trapped in her abusive marriage and home. She escaped because a neighbor called the police. Her fears were realized when CPS removed her children from the home while they investigated, even though they were returned to her 48 hours later. Throughout her case, she was haunted by this removal of her children and worried it would happen again. Noora agonized that, because she lived in a domestic violence shelter, her abuser would get custody of their children.

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151. Laura Dugan et al., *Exposure Reduction or Retaliation? The Effects of Domestic Violence Resources on Intimate- Partner Homicide*, 37 LAW & SOC'Y REV. 169, 174 (2003) ("Such retaliation effects could occur if the intervention (e.g., restraining order, arrest, shelter protection) angers or threatens the abusive partner without effectively reducing contact with the victim.").

152. *Abusive Litigation: When Your Abuser Exploits the Legal System*, LEGAL VOICE (Jan. 2021), https://legalvoice.org/abusive-litigation/ [perma.cc/L6FA-8ZYG/].

153. 8 U.S.C. § 1227(a)(2)(E); *See* UNDERSTANDING IMMIGRATION & ORDERS OF PROTECTION, IMMIGRANT DEFENSE PROJ. (2019), https://www.immigrantdefenseproject.org/wp-content/uploads/Understanding-Immigration-and-Orders-of-Protection.pdf [perma.cc/CDF6-2U36].

154. Understanding Immigration, *supra* note 153.

155. Understanding Immigration, *supra* note 153.

For Noora, once the police were called by her neighbor, CPS was alerted, and they removed her children for a 48-hour investigation hold period. She was not told where her children would go or when she would get them back. She only spoke Arabic, and no interpreter was provided to her by CPS—or by the police, for that matter. Noora moved into a domestic violence shelter and her children were returned to her eventually. A neglect petition was filed by CPS in her county's Family Court, and she obtained legal representation through a non-profit organization that provided direct legal services free of charge. Throughout Noora's case, she worried that her children would be taken away from her without an explanation—very much like what happened when the police arrived. Her attorney explained the risks of reconciling with the abusive husband, both as the case was pending in court and after the case ended. As Noora struggled to provide for her children as the primary caretaker with limited resources, the neglect case continued in court for several years. Her every move was observed by CPS under a magnifying glass. However, Noora was lucky, and she did not have a neglect petition filed against her. Perhaps it was due to the *Nicholson* case, which is discussed below. Perhaps it was because that was the first time the police were called. Perhaps because of various cultural biases that exist against her husband, he was the focus of CPS's attention. However, the same cannot be said for other survivors of domestic violence who are immigrants and are non-primarily English speaking.

A. Charging Domestic Violence Survivors with Neglect

Certain risk factors, like domestic violence, make parents more susceptible to charges of maltreatment, and specifically failure to protect, which is construed as a type of neglect in many states.[156] The majority of states in the United States will charge a survivor of domestic violence with neglect of a child for failing to protect such child from witnessing domestic violence.[157] It is a grave injustice to survivors of domestic violence to be charged with abuse or neglect on the assumption that a parent is failing to protect their child when they witness domestic violence against that parent. Such charges are imprudent for several reasons, "some common sense, others less obvious or more controversial:"[158]

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156. *See* Colleen Henry, *Expanding the Legal Framework for Child Protection: Recognition of and Response to Child Exposure to Domestic Violence in California Law*, 91 SOC. SERV. REV. 203, 220 (2017); Colleen Henry & Vicki Lens, *Marginalizing Mothers: Child Maltreatment Registries, Statutory Schemes, and Reduced Opportunities for Employment*, 24 CUNY L. REV. 1, 11 (2021).

157. ISABELLA SCOTT & NANCY MCKENNA, DOMESTIC VIOLENCE PRACTICE & PROCEDURE § 7:10 (2023) ("[M]ost jurisdictions have codified a failure-to-protect standard in their child protective statutes and bring charges against abused mothers for failing to stop the abuse themselves. The courts find battered mothers neglectful under a theory of derivative abuse because witnessing such abuse is deemed harmful to the child. Mothers have an affirmative duty to intervene.").

158. Justine A. Dunlap, *Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 LOY. L. REV. 565, 573 (2004).

> First, a failure-to-protect charge presumes that the mother has not taken concrete effective steps to protect her children. Second, although witnessing domestic violence can harm children, not all are harmed to a degree that warrants the coercive intervention of the child protection system. Removal from the home, care, and custody of the non-violent, nurturing parent only exacerbates the harm to the children. Third, failure-to-protect charges may actually enhance the likelihood of harm in several ways. [They] ignore[] the phenomenon of separation assault, which holds that a woman and her children are at greater risk of violence during and after attempts to leave the abusive home.[159]

At least 50% of women survivors are followed and harassed or further attacked upon leaving the abuser.[160] In a study on interspousal homicide, more than 50% of men who killed their spouses did so when they separated.[161] Failure-to-protect charges necessarily ignore the risk assessments survivors have made when determining if they and their child would be safe if they left the abusive partner.[162] "The paradox of society's treatment of domestic violence survivors "is that the word is 'out': if you report domestic violence in your home, your children might be removed."[163] In reality, when survivors "decline to seek help for fear of losing their children, more [violence] may occur."[164] Thus, when our judicial systems deter survivors "from getting help," they "deprive[] children of protection."[165]

In sum, failure-to-protect charges can be both ineffective[166] and emotionally abusive to survivors by mimicking the coercive, controlling behavior of the abuser.[167] Such charges combine two institutional players (CPS and the anti-domestic violence advocacy community) that have competing interests in helping combat domestic violence.[168] Therefore, failure-to-protect charges fail to protect the children on whose behalf such charges are brought.[169]

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159. *Id. See* Jeffrey L. Edleson, Lyungai F. Mbilinyi, & Sudha Shetty, *Parenting in the Context of Domestic Violence* 16, (JUD. COUNCIL OF CAL., Admin. Off. Courts, Ctr. for Fams., Child., & Courts 2003), https://www.baylor.edu/content/services/document.php/28835.pdf [perma.cc/5VRR-4PMX].

160. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 64—66 (1991).

161. *Id.* at 64—65.

162. *Id.* at 64—66.; *See* Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1492 (2008).

163. Bonnie E. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 ALB. L. REV. 1109, 1111 (1995).

164. Dunlap, *supra* note 156158, at 573–74.

165. Dunlap, *supra* note 158, at 574.

166. Dunlap, *supra* note 158, at 574—75.

167. *See* Dunlap, *supra* note 158158, at 587—89; *See* Nina W. Tarr, *Civil Orders for Protection: Freedom or Entrapment?*, 11 WASH. U. J.L. & POL'Y 157, 170—76 (2003).

168. Dunlap, *supra* note 158, at 574.

169. *Id.* at 590 ("[B]y bringing charges in less serious cases, the system diverts its attention and resources from other, more serious cases," which "heightens the risk to children in more acute circumstances, thus putting or keeping more children in harm's way.").

It has been nearly twenty years since New York State issued the landmark decision for survivors of domestic violence, *Nicholson v. Scoppetta*.[170] In *Nicholson*, a class action lawsuit was brought forth by mothers on behalf of their children (hereinafter referred to as "Plaintiffs") against the city, officers, and employees of the Administration for Children's Services (ACS).[171] The Plaintiffs alleged that ACS's removal of children from a parent's custody under New York law, solely on the grounds that they were survivors of domestic violence, violated their substantive and procedural due process.[172] The case made its way up to the highest court in the state of New York, the Court of Appeals, which held that "more is required for a showing of neglect [justifying removal of a child] under New York law than the fact that [the] child was exposed to domestic abuse against the caretaker."[173] The Court stated "that a blanket presumption favoring removal was never intended."[174] It concluded that, to determine which course is in the child's best interest, "a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal" and "balance that risk against the harm removal may bring."[175] When conducting this assessment, courts may consider the risks to the survivor of leaving the abuser, staying with the abuser, seeking government assistance, seeking criminal prosecution against the abuser, and relocating, the severity and frequency of the violence, and the resources and options available to the survivor.[176] The survivor's conduct "must be judged in the context of circumstances then and there existing."[177] *Nicholson*, although complex, can be summarized as follows: survivors who experience domestic violence "in front of their children are not guilty of neglecting them—on the sole ground that the children have witnessed the violence—under New York's child abuse and neglect laws."[178] The New York high court clearly "rejected any notion that witnessing domestic violence is a presumptive ground for neglect or removal."[179]

There was much legal scholarship on *Nicholson* following the decision.[180] There has been support and criticism of the decision and skepticism as to

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170. *Nicholson*, *supra* note 2, at 843—44.

171. *Id.* The term "Mother" is utilized here as the Court used gendered language in describing survivors of domestic violence and their Plaintiffs. ACS is the New York City based government agency that is named Child Protective Services in other jurisdictions.

172. *Id.*

173. *Id.* at 844.

174. *Id.* at 852.

175. *Nicholson*, *supra* note 2, at 852.

176. *Id.* at 846.

177. Jill M. Zuccardy, *Nicholson v. Williams: The Case*, 82 DENV. U.L. REV. 655, 669 (2005).

178. Justine A. Dunlap, *Judging Nicholson: An Assessment of Nicholson v. Scoppetta*, 82 DENV. U.L. REV. 671, 672 (2005).

179. *Id.*

180. *See, e.g.*, Zuccardy, *supra* note 177; Dunlap, *supra* note 178; Kathleen A. Copps, *The Good, the Bad, and the Future of Nicholson v. Scoppetta: An Analysis of the Effects and Suggestions for Further Improvements*, 72 ALB. L. REV. 497 (2009); Amanda J. Jackson, *Nicholson v. Scoppetta: Providing a Conceptual Framework for Non-Criminalization of*

whether CPS in New York has followed the *Nicholson* ruling.[181] There are arguments made that CPS has filed neglect petitions "alleging pretextual reasons to hide the primary purpose of removing children from homes where they are exposed to domestic violence."[182] This argument is supported by cases subsequent to *Nicholson* that indicate that courts may still be acquiescing to this practice by CPS.[183] Other issues that have arisen include the courts' failure to understand the lack of services, financial hurdles, limited English language comprehension, lack of education, access to childcare and so forth that may lead a survivor to return to an abusive partner.[184] And these issues should be considered when determining whether a parent has failed to exercise a minimum degree of care as is outlined by *Nicholson* as the standard necessary to file a neglect petition.[185]

No matter *Nicholson*'s legal deficiencies from an advocate's perspective, having a decision lay out that survivors of domestic violence will not be vilified and have their children routinely removed from their home is a decision that should be in place in other states throughout the country. And while not all states have done so, some have amended their custody laws to consider domestic violence as a factor when determining custody decisions—a step in the right direction.[186] Because the Second Circuit in *Nicholson* certified the questions on state law, it is up to states to enact legal and public policy to absolve survivors of responsibility for the violent acts they suffer by removing their children from their homes.[187]

B. Bias, Racism, and Discrimination by CPS

The Family Regulation System (also known as Child Welfare System), "like other mechanisms of state control and surveillance, is more likely to catch

Battered Mothers and Alternatives to Removal of Their Children from the Home, 33 CAP. U.L. REV. 821 (2005); Heidi A. White, *Refusing to Blame the Victim for the Aftermath of Domestic Violence: Nicholson v. Williams is a Step in the Right Direction*, 41 FAM. CT. REV. 527 (2003).

181. *See, e.g.*, Zuccardy, *supra* note 177; Dunlap, *supra* note 178; Copps, *supra* note 180, at 498-99; Jackson, *supra* note 180, at 821; White, *supra* note 180, at 527.

182. Copps, *supra* note 178, at 514.

183. *Id.* at 514—15. *See, e.g.*, *In re* Alan FF., 811 N.Y.S.2d 158 (N.Y. App. Div. 2006); *In re* Krista L., 798 N.Y.S.2d 592 (N.Y. App. Div. 2005); Velez v. Reynolds, 325 F. Supp. 2d 293 (S.D.N.Y. 2004); *In re* Aiden L., 850 N.Y.S.2d 671 (N.Y. App. Div. 2008); Doe ex rel. Doe v. Mattingly, No. 06-CV-5761, 2006 WL 3498564, at 1 (E.D.N.Y. 2006).

184. Dunlap, *supra* note 158, at 579—80. *See, e.g.*, Alan FF., *supra* note 183; Krista L., *supra* note 183; Velez, *supra* note 183; Aiden L., *supra* note 183; Mattingly, *supra* note 183.

185. Nicholson, *supra* note 2, at 846.

186. *See, e.g.*, D.C. CODE § 16-914(a)(3)(F), (a-1) (2021); *see also*, Nancy K. D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?*, 28 WM. MITCHELL L. REV. 601, 605 (2001) (noting that some states' laws permit consideration of domestic violence for purposes of custody decisions); Kim Susser, *Weighing the Domestic Violence Factor in Custody Cases: Tipping the Scales in Favor of Protecting Victims and Their Children*, 27 FORDHAM URB. L.J. 875 (2000) (analyzing New York statute requiring judicial consideration of domestic violence in custody and visitation matters).

187. Jackson, *supra* note 180, at 822, 856—57.

disadvantaged populations in its net."[188] Research shows that allegations of maltreatment by the Family Regulation System are disproportionality made against poor women, many of whom are Black.[189] Black children are more likely to be removed from their homes and Black families are overrepresented in foster care, where they face further disparate treatment and outcomes.[190] With our current family regulation system, Black families are placed under intense surveillance by the state and their every move is regulated.[191] Professor Dorothy Roberts, an expert in the child welfare system and its inherently racist foundation, argues that to protect Black communities we must abolish the child welfare system.[192]

The majority of maltreatment cases are neglect proceedings.[193] And while each state has their own definition of neglect in their statutes, it is generally defined as the failure to provide adequate food, shelter, medical care, or supervision, or a failure to protect a child from harm or risk of harm.[194] These vague neglect statutes are problematic because they "equate poverty with neglect," target women (especially women of color), and dissuade survivors of domestic violence from seeking help for fear of being accused of maltreating their children.[195]

Both survivors and perpetrators of domestic violence are regularly referred to family regulation agencies for exposing their children to domestic violence, with the survivor "substantiated for maltreatment."[196] A study focusing on a large Midwestern family regulation system found that over 20% of verified reports involved exposure to domestic violence and that both the survivor and abuser were charged with neglect.[197] Another study found that in cases with allegations of failure to protect, women were more likely to be substantiated for failure to protect than men (at 65% vs. 24%), and were significantly more likely to be charged with failure to protect in cases involving domestic violence where the relationship was ongoing (84%), and only a small

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188. Colleen Henry & Vicki Lens, *Marginalizing Mothers: Child Maltreatment Registries, Statutory Schemes, and Reduced Opportunities for Employment*, 24 CUNY L. REV. 1, 2 (2021).

189. *Id.*

190. Kele M. Stewart, *Re-Envisioning Child Well-Being: Dismantling the Inequitable Intersections Among Child Welfare, Juvenile Justice, and Education*, 12 COLUM. J. RACE & L. 1, 2 (2022).

191. DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022).

192. *Id.*

193. Henry, *supra* note 188; U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2021 (2021), https://www.acf.hhs.gov/cb/report/child-maltreatment-2021 [perma.cc/BYH4-U2ZZ] (stating 60% of child welfare cases involve neglect); Roberts, *supra* note 191.

194. Henry, *supra* note 188, at 24 n.138.

195. Stewart, *supra* note 188, at 635, 638—42, 661.

196. Bryan G. Victor et al., *Child Protective Service Referrals Involving Exposure to Domestic Violence: Prevalence, Associated Maltreatment Types, and Likelihood of Formal Case Openings*, 24 CHILD MALTREATMENT 299, 306 (2019).

197. *Id.*

percentage of cases gave no justification to substantiate the failure-to-protect charge (5%).[198]

Racial disparities in the family regulation system "can occur at every decision-making point…beginning with the point of initial report, acceptance of reports for investigation, substantiation of maltreatment, entries into foster care, and exits from care. These decisions are made not only by child welfare caseworkers, but also by supervisors, administrators, judges, and other legal professionals, as well as professionals external to the child welfare system and the general public. At each of these decision-making points, racial disparities occur that disproportionately impact Black children."[199] Studies have identified "that children in low-socioeconomic-status households experienced some form of maltreatment at a rate more than five times the rate of other children, and Black children were significantly more likely to live in families with low socioeconomic status."[200] Researchers have provided four explanations for this racial disproportionality: "(1) disproportionate need resulting from poverty and related risks associated with maltreatment; (2) racial bias and discrimination among child welfare staff and mandated reporters, as well as institutional racism in policies and practices of child welfare agencies; (3) child welfare system factors, including a lack of resources to address the needs of families of color; and (4) geographic context, including neighborhood conditions of concentrated poverty and other factors that may contribute to differential rates of maltreatment."[201] In order to minimize these disparities, advocates must work constantly to dismantle systemic racism at every level.

Survivors of domestic violence are thus, first victimized by their partners and continue to be victimized by the family regulation system.[202] "Gendered and racialized expectations of care can affect how parental acts and omissions are judged by child welfare agencies and may make low-income women—and particularly Black women—to be more vulnerable . . . than other groups" to child maltreatment proceedings, findings, and registry listings.[203] The decision to substantiate child maltreatment reports against a parent is one made administratively and not judicially, and so maltreatment findings are made by workers, not members of the judiciary.[204] The standards of proof vary state by state and Professors Colleen Henry and Vicki Lens have researched whether states have a high or low standard of proof for substantiation.[205] The harm this can

198. Colleen Henry et al., *Substantiated Allegations of Failure to Protect in the Child Welfare System: Against Whom, in What Context, and with What Justification?*, 116 CHILD. & YOUTH SERVS. REV. 1, 3, 6 (2020).

199. Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?*, 692 ANNALS AM. ACAD. POL. & SOC. SCI. 253, 256 (2020).

200. *Id*.

201. *Id.* at 256—57.

202. Henry, *supra* note 156 at 12.

203. . *Id*.

204. *Id.* at 20.

205. *Id.* at 21—25.

cause a survivor who is trying to get on their own two feet is tremendous.[206] Being placed on a registry impacts their ability to obtain certain type of jobs.[207] Some states have a parent listed on a child maltreatment registry for life.[208] There needs to be statutory reform in these states regarding their child maltreatment registries. Originally child maltreatment registries were utilized as an investigative tool to protect families but have since become a way to prevent parents from seeking employment and therefore undermining a survivor's economic security. These "registries cast too wide a net, catching poor women, many of whom are Black, who are trying to preserve and provide for their families while presenting no harm to other children."[209] At a time in our nation where racism is being uncovered in an uncountable number of state institutions and practices, the time for reform is now.

III. CULTURAL ISSUES (ISLAMOPHOBIA)

Islamophobia has been defined as "a fear, prejudice and hatred of Muslims or non-Muslim individuals that leads to provocation, hostility and intolerance by means of threatening, harassment, abuse, incitement and intimidation of Muslims and non-Muslims, both in the online and offline world. Motivated by institutional, ideological, political and religious hostility that transcends into structural and cultural racism which targets the symbols and markers of a being a Muslim."[210]

The notion of defining Islamophobia, however, has seen criticism from scholars for various reasons. An argument is made that defining the term is driven by the desire of practicality and expediency when it comes to analyzing a "complex phenomenon."[211] Another argument is that in an effort to combat anti-Muslim racism, defining Islamophobia can create unexpected harms to the Muslim community that the government intends to protect.[212] Yet another scholar proposes that "Islamophobia is a wildly potent and powerful lie . . . which envisions . . . Islam as a monolithic, unchanging, and war-mongering creed," "drove the state's sweeping counterterror reforms that targeted Muslim-Americans after 9/11, and helped deliver the presidency to Trump" in 2016.[213]

Regardless of the definition, Islamophobia is undoubtedly an epidemic: in 2021, the United Nations General Assembly even adopted a resolution that designated March 15th as the International Day to Combat Islamophobia,

206. *Id.* at 24—25.

207. *Id.*

208. *Id.* at 21—23.

209. *Id.* at 34.

210. Imran Awan & Irene Zempi, *A Working Definition of Islamophobia, A Briefing Paper Prepared for the Special Rapporteur on Freedom of Religion or Belief*, UNITED NATIONS HUM. RTS. OFF. HIGH COMM'R (Nov. 2020).

211. Khaled A. Beydoun, *Islamophobia: Toward A Legal Definition and Framework*, 116 COLUM. L. REV. SIDEBAR 108, 109 (2016).

212. Rebecca Ruth Gould, *The Limits of Liberal Inclusivity: How Defining Islamophobia Normalizes Anti-Muslim Racism*, 35 J.L. & RELIGION 250, 255 (2020).

213. Khaled A. Beydoun, *9/11 and 11/9: The Law, Lives and Lies That Bind*, 20 CUNY L. REV. 455, 463 (2017).

following in the stead of many governments combatting Islamophobia through anti-hate crime legislation and awareness campaigns debunking myths and misconceptions that the public had about Muslims and Islam.[214] The widespread issues stemming from Islamophobia are evident both inside and outside of the court system.

When Noora was in family court, she was questioned by her attorney, the CPS attorney, her husband's attorney, the attorney for the child, and the judge. There was room for a lot of Islamophobic practices and questioning. Fortunately for Noora, she was in a venue and before a jurist that did not allow Islamophobic questions to continue, but that is not the norm for all survivors. She was permitted to keep her headscarf on, something that has historically and even this year been a discriminatory practice by our courts and law enforcement.[215]

A. Islamic Marriage Laws and Misinterpretation by the Courts

As the U.S. Supreme Court has stated repeatedly, "the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'"[216] A culmination of cases led to the Supreme Court decision that states "the principles of law can be applied to resolve religious issues so long as there is no issue of religious practice or doctrinal controversy."[217] The New York Courts' neutral approach to enforcing religious marriage contracts began in the context of a Jewish marriage contract, or *ketubah*.[218] New York has a statute that requires the removal of barriers to remarry, which was done specifically to prevent husbands from refusing to grant

214. *International Day to Combat Islamophobia– 15 March*, U.N., https://www.un.org/en/observances/anti- islamophobia-day [perma.cc/XRQ2-G6FU] (last visited July 2024).

215. Jonathan Stempel, *New York City to pay $17.5 million for forcing women to remove hijabs for mug shots*, REUTERS (April 5, 2024), https://www.reuters.com/legal/new-york-city-pay-175-million-forcing-women-remove-hijabs-mug-shots-2024-04-05/ [perma.cc/97JD-PVTP]; Jakkar Aimery, *Muslim woman sues Kent County over forced hijab removal for arrest booking photo,* THE DET. NEWS (Jan. 3, 2024), https://eu.detroitnews.com/story/news/local/michigan/2024/01/03/muslim-woman-forced-hijab-removal-for-arrest- booking-photo-grand-rapids-kent-county-michigan/72099047007/. [perma.cc/E44L-3Q7S]; Katelyn Newberg*, Las Vegas police denied woman access to hijab, lawsuit claims*, LAS VEGAS REV.-J. (May 24, 2024), https://www.reviewjournal.com/crime/courts/las-vegas-police-denied-woman-access-to-hijab-lawsuit-claims-3056971/ [perma.cc/8P9K-GVC9].

216. McCreary Cnty, Ky. v. Am. C.L. Union of Ky., 545 U.S. 844, 860 (2005) (citing Epperson v. Arkansas, 393 U.S. 97, 104 (1968)); Everson v. Bd. of Educ of Ewing, 330 U.S. 1, 15—16 (1947); Wallace v. Jaffree, 472 U.S. 38, 53 (1985); Heather C. Keith, *Custody and Religion: Are Church and State Separate in New Jersey Family Court?*, KEITH FAM. L. (Sept. 2018), https://keithfamilylaw.com/wp-content/uploads/2018/09/Custody_and_Religion_Paper_Final_Website.pdf [perma.cc/GLZ5-9DGE].

217. Lindsey E. Blenkhorn, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenupitals and their Effect on Muslim Women*, 189 S. CAL. L. REV 215 (2002) (citing Jones v. Wolf, 443 U.S. 595 (1979)).

218. Avitzur v. Avitzur, 446 N.E.2d 136, 138 (N.Y. 1983) (concluded that the husband must abide by his contractual promise to grant a get, or Jewish divorce, to his wife).

their wives a Jewish divorce, or *get*.[219] In a case regarding a religious divorce in New Jersey, the Court stated that the free exercise clause of the Constitution "prohibits government from interfering or becoming entangled in the practice of religion by its citizens."[220] The Connecticut Supreme Court recently came to the same conclusion that a court may decide whether to enforce a religious marital agreement, as long as it does not violate a party's rights under the free exercise clause of the first amendment.[221] The Michigan Court of Appeals reached a similar conclusion, "that religious marital agreements may be examined when a court applies neutral principles of law . . . that d[o] not require consideration of religious doctrine."[222] When it comes to Islamic marriage contracts, attempts of neutral interpretation of the agreements are unfeasible, when they are defined and designed inherently as religious.[223] And the dynamics and legal roles between women and men who come from predominantly Muslim countries is very different to that found in the United States.[224]

A Muslim marriage, or *nikah*, is negotiated and agreed upon by the groom and the bride's guardian who is a male relative.[225] The marriage contract includes: the names and lineage of the bride and groom, names of two witnesses, and details of the dower, or *mahr* and the bride is not involved in the negotiation of the *mahr*.[226] Unfortunately, American courts do not know what to do with Muslim marriage contracts whether that be out of ignorance of Islamic law and custom, or minimization of the legal significance of the document.[227]

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219. N.Y. DOMESTIC REL. L. § 253 (McKinney 1984).

220. Aflalo v. Aflalo, 685 A.2d 523, 537 (N.J. Super. Ct. Ch. Div. 1996).

221. Tilsen v. Benson, 299 A. 3d 1096, 1111 (Conn. 2023) (citing *Jones*, 433 U.S. at 602—03 (1979); *Avitzur*, 466 N.E.2d at 155).

222. Seifeddine v. Jaber, 934 N.W.2d 64, 67—69 (Mich. Ct. App. 2019) (citing *Jones*, 443 U.S. at 602-04; *Avitzur*, 446 N.E.2d at 136).

223. Lindsey E. Blenkhorn, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. CAL. L. REV. 189, 217 (2002).

224. *See, e.g.*, James Bell, *Women In Society*, *in* THE WORLD'S MUSLIMS: RELIGION, POLITICS AND SOCIETY (2013), https://www.pewresearch.org/ religion/2013/04/30/the-worlds-muslims-religion-politics-society-women-in-society/ [perma.cc/EKF6-8YDM] ("In nearly all countries surveyed, a majority of Muslims say that a wife should always obey her husband . . . [but] that a woman should have the right to decide for herself whether to wear a veil in public. Muslims are less unified when it comes to questions of divorce and inheritance. The percentage of Muslims who say that a wife should have the right to divorce her husband varies widely among the countries surveyed. In some, but not all, countries surveyed, Muslim women are more supportive of women's rights than are Muslim men. Differences on these questions also are apparent between Muslims who want sharia to be the official law of the land in their country and those who do not."). *See also The Gender Gap in Religion Around the World*, PEW RESEARCH CTR. (Mar. 22, 2016), https://www.pewresearch.org/ religion/2016/03/22/the-gender-gap-in-religion-around-the-world/ [perma.cc/43JB-C8H5]; Claire Gecewicz, *In many ways, Muslim men and women see life in America differently*, PEW RESEARCH CTR. (Aug. 7, 2017), https://www.pewresearch.org/short-reads/2017/08/07/in-many-ways-muslim-men-and-women-see-life-in-america-differently/ [perma.cc/YR9M-22SA].

225. Blenkhorn, *supra* note 223, at 198.

226. *Id.* at 197—98.

227. *Id.* at 205.

In some jurisdictions, judges have indicated that Islamic law is contrary to public policy.[228] This is alarming because Muslims' marital relations are based on Islamic marriage contracts.[229] The terms utilized in the marital contracts are not in English and so judges may rely on expert witnesses to provide information, which sometimes can be incorrect.[230] In cases of domestic violence, Islamic law allows a woman to file for a divorce and still be entitled to the monetary agreed upon sum in the marital contract, but without the proper guidance, expert or legal team, that survivor may walk away with nothing.[231] In some instances they treat the marriage contract as a prenuptial agreement which deprives the non-monied spouse of financial support they are entitled to under the law.[232] And this leaves Muslim women indigent.[233] With survivors often being the less-monied spouse as a result of financial abuse, isolation, and control of the abuser, this is very problematic.[234] Women often enter into these agreements under duress, undue influence or for other factors that would render the marital contract as involuntary under the Uniform Premarital Agreement Act.[235] Until

228. Azizah Y. al-Hibri, Professor Emerita, T. C. Williams Sch. Law, Univ. Richmond, Speech at the Minaret of Freedom Banquet: Muslim Marriage Contract in American Courts (May 20, 2000).

229. *Id. See* THE WORLD'S MUSLIMS, *supra* note 224; *The Gender Gap in Religion*, *supra* note 224. ("*Mahr*…is the expression used in Islamic family law to describe the 'payment that the wife is entitled to receive from the husband in consideration of the marriage'…*Mahr* is usually divided into two parts: that which is paid at the time of marriage is called prompt *mahr* (*muajjal*) and that which is paid only upon the dissolution of the marriage by death or divorce or other agreed events is called deferred *mahr* (*muwajjal*). The deferred payment is due if the husband divorces the wife by *talaq*, a unilateral form of divorce—of which all husbands have the right—that requires no showing of cause. There are other forms of Islamic divorce; however, the wife has no comparable right to unilateral divorce without showing cause (unless that right is expressly granted to her by her husband). There is some uncertainty about the wife's right to the deferred payment for the other forms of divorce, but the majority rule appears to be that she is not due payment if she initiates the divorce *and* her husband is not clearly at fault for the end of the marriage.") (internal citations omitted).

230. al-Hibri, *supra* note 228. *See* Elena M. de Jongh, *Court Interpreting: Linguistic Presence v. Linguistic Absence*, 82 FLA. BAR J. 20, 26—30 (2008) (discussing the prevalence of error in interpreted testimony and several examples of resulting "gross miscarriages of justice"). *See also, e.g.*, Casen B. Ross, *Clogged Conduits: A Defendant's Right to Confront His Translated Statements*, 81 U. CHI. L. REV. 1931 (2014); Gabriel Reyes, *Lost in Translation at Trial: Avoiding Issues Arising from the Use of Interpreters and Faulty Translations During Court Proceedings*, 43 CHAMPION 20 (2019).

231. Reyes, *supra* note 230; Akileh v. Elchahal, 666 So. 2d 246, 247—48 (Fla. Dist. Ct. App. 1996); *See* Aziz v. Aziz, 488 N.Y.S.2d 123124 (N.Y. Sup. Ct. 1985).

232. *See generally* Blenkhorn, *supra* note 223.

233. *Id.*

234. *See, e.g.*, *Families Change: Guide to Separation & Divorce: Financial Abuse*, CAL. CTS. JUD. BRANCH CAL., https://fas.familieschange.ca.gov/en/course/34-financial-abuse [perma.cc/M9RH-H7H6] (last visited Nov. 20, 2024); *Post-Separation Economic Abuse: Understanding Coercive Control in the Context of Economic Abuse*, CANADIAN CTR. FOR WOMEN'S EMPOWERMENT, https://ccfwe.org/post-separation-economic-abuse/ [perma.cc/9XAR-Z4CF] (last visited Nov. 20, 2024).

235. Blenkhorn, *supra* note 223, at 218—24. *See* UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT, § 9(a)(1) (UNIF. L. COMM'N 2012) (codified in 26 states as of 2012); *Uniform Premarital and Marital Agreements Act*, 46 FAM. L.Q. 345, 345 (2012).

there can be a time where "Muslim women are freed from patriarchal and cultural ties that bind them, American courts cannot interpret *mahr*[236] agreements as waivers of women's property rights" in divorce proceedings.[237] If the court is inclined to look at these agreements' validity, they must look into whether the parties entered into the marital contract voluntarily and consider various factors. Those factors can include age and education of the parties; whether the parties understood the legal significance to the document; the opportunity to be represented by counsel when the agreement was drafted; and the fairness of the terms of the marital contract.[238] Domestic violence should also be considered when looking into equitable distribution of marital property.[239]

In other Islamic divorce contract disputes and or divorce proceedings, courts disregard the Statute of Frauds and allow couples to rewrite their marital contracts at the time of divorce due to the marriage contract's lack of specificity and details, potentially altering their intended effect.[240] Courts should not ask the parties to change any of the terms of the agreement they have entered into at the time of divorce. This is especially damaging to survivors of domestic violence who are not primarily English speaking as they may waive their rights or agree to new terms that are more harmful to them.

Some jurisdictions have rejected the application of Islamic law as a matter of public policy. United States courts must consider various factors in determining whether to apply the law of another country including the international system's needs, the forums' applicable policies, the standardization of the outcome, how easy it is to apply the law, and which court has the most "significant relationship" to the presented issue.[241] However, in certain divorce proceedings in the United States, public policy restricts the application of Islamic Law.[242] This can be favorable to survivors of domestic violence where the courts find that it has a significant relationship when it comes to the division of the marital property and so it will make determinations based on U.S. laws that are more favorable than the ones outlined in the Islamic marital contract.[243] While the financial outcome for a survivor will be greater when applying domestic laws, they should also be entitled to the amounts provided in their Islamic marriage contract.[244]

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236. Brian H. Bix, *Mahr Agreements: Contracting in the Shadow of Family Law (and Religious Law)—A Comment on Oman's Article,* 1 WAKE FOREST L. REV. COMMON L. 61 (2011).

237. Blenkhorn, *supra* note 223, at 192; Tobias Scheunchen, *Lost in Translation: Mahr-Agreements, US Courts, and the Predicament of Muslim Women*, 2 J. ISLAMIC L. 33 (2021).

238. Blenkhorn, *supra* note 223, at 223.

239. Joy M. Feinberg & Laura W. Morgan, *The Impact of Domestic Violence on Property Division in Divorce*, 16 DIVORCE LITIG. 146, 147—48 (2004) (discussing different states' laws regarding whether domestic violence may be considered in property division proceedings).

240. Blenkhorn, *supra* note 223, at 212.

241. *Id.* at 225.

242. *Id.* at 226.

243. *Id.* at 225.

244. *Id.* at 226 ("in most cases, overriding the wife's rights under community property or equitable division regimes by applying Islamic law unnecessarily leaves the wife destitute").

While that may seem trivial to jurists, for many Muslim survivors, this makes them whole, as it is an expectation they had at the time of marriage of what they would be entitled to upon divorce. And when so much has been taken from them and so much of their lives have been controlled, this is something that provides them with peace of mind to move forward in their lives. However, as legal scholars, advocates, practitioners, we must refrain from subjugating Muslim women survivors of domestic violence and allow them to freely contract.[245]

When I represented Noora, I asked her what she wanted financially from the American court system. She did not want to file for child support or a divorce. She obtained public benefits, and it allowed her the freedom she so desired while supporting herself and her children. Due to the legal path Noora chose and that her husband did not file for a divorce, she did not have to endure much of what is discussed in this section. Noora was not ready to endure the legal battle of a divorce knowing that it would be complicated due to her Islamic marriage contract and that of the laws that New York state entitled her. She was also able to provide for her children due to their being born in the United States and her being eligible for VAWA. This gave her access to benefits that not all immigrant survivors have the ability to obtain.

Noora's experience is not the norm for all Muslim immigrant survivors of domestic violence. Many cannot obtain any public benefits and their only means to provide for themselves and their family is to go through the courts. When in court, some only want what their Islamic marriage contract entitles them to. Others want to apply the laws of their state when it comes to distribution of marital property. And lastly, some want to apply both sets of laws. This section is intended to be a guide for jurists and practitioners when facing a marital dissolution involving Islamic marriage contracts and to assist in the crafting of legal arguments and strategies. A judge should not deny an Islamic marital contract unless a survivor makes that argument. They should not assume that it is a pre-nuptial agreement and deprive a survivor of property they are entitled to under state law. They should not require the parties to change the terms of the contract as the time of divorce due to vagueness or lack of details. Islamic marriage contract experts should be involved to explain to the jurists what various terms, customs and norms may mean for the parties involved. Like the issues addressed in *Section I* on interpreters, attorneys and parties should be able to obtain different experts if there seems to be an issue with the accuracy of the expert testimony regarding the Islamic Marriage Contracts. Survivors of domestic violence often walk away with less than what they are entitled to under the law as a result of injustices carried out by our American judicial system. Their Islamic marriage contracts may provide them with some protections, but they should be privy to all the financial protections that are available subject to Islamic and state laws and as a matter of public policy.

245. *Id.* at 218—27.

B. Islamophobia Outside the Court System

The United States finally has Muslim women in Congress.[246] However, they face discrimination and death threats by their colleagues and members of the public because of Islamophobia.[247] "Opposition to Muslim Americans is freely expressed, including policies for profiling Muslims," in part due to a former president who passed a "ban on Muslims," and as a result of 9/11.[248] Islamophobia is rampant with stereotypes of Muslim Americans and Americans who look Muslim, ranging from women who wear a veil[249] to the belief that all Muslim men are terrorists.[250]

In the United States, the Muslim population has grown and is continuing to grow.[251] The growth is attributed to the increasing rate of immigration, births, and religious conversions.[252] There are 3.45 million American Muslims, 58% of whom are first-generation immigrants.[253] According to Pew Research Center, it is projected that by 2050, Muslims will make up the second-largest faith group in the United States (excluding those who report to have no religion).[254] Despite the growth of the Muslim population in the United States, there are negative views of Muslims and those are divided along political lines.[255] In a series of surveys

246. Michelle Boorstein, Marisa Iati, & Julie Zauzmer Weil, *The Nation's First Two Muslim Congresswomen Are Sworn In Surrounded by the Women They Inspired*, WASH. POST (Jan. 3, 2019), https://www.washingtonpost.com/religion/2019/01/03/americas-first-two-muslim-congresswomen-are-sworn-surrounded-by-women-they-inspired/ [perma.cc/TS4D-KW44].

247. Associated Press, *Ilhan Omar Airs Death Threat and Presses Republicans on 'Anti-Muslim Hatred'*, THE GUARDIAN (Dec. 1, 2021, 6:04 AM), https://www.theguardian.com/us-news/2021/dec/01/ilhan-omar-airs-death-threat-and-presses- republicans-on-anti-muslim-hatred [perma.cc/EX56-V848]**;** *Florida man sentenced in death threat to Rep. Ilhan Omar*, CBS NEWS MINN. (July 7, 2022, 10:33 AM), https://www.cbsnews.com/minnesota/news/florida-man-sentenced-in-death-threat- to-rep-ilhan-omar/[perma.cc/84RR-2WXM]; Hunter Woodall, *'What Happens if I Am Killed?' Rep. Ilhan Omar Speaks Out About Threats*, STAR TRIBUNE (May 6, 2023, 3:32 PM), https://www.startribune.com/what-happens-if-i-am-killed-minnesota-congresswoman-ilhan-omar-speaks-out-about-threats-harrass/600272947/ [perma.cc/FC8U-9KU9].

248. Goleen Samari, *Islamophobia and Public Health in the United States*, 106 AM. J. PUB. HEALTH 1920, 1921 (2016).

249. The term veil is used to reflect the various head coverings worn by Muslim women globally. *What's the Difference Between a Hijab, Niqab and Burka?*, BBC (Aug. 7, 2018), https://www.bbc.co.uk/newsround/24118241 [perma.cc/5N3P-2Q6K].

250. Samari, *supra* note 248, at 1921.

251. Samari, *supra* note 248, at 1920.

252. Michael Lipka, *Muslims and Islam: Key Findings in the U.S. and Around the World*, PEW RESEARCH CTR. (Aug. 9, 2017), https://www.pewresearch.org/fact-tank/2017/08/09/muslims-and-islam-key-findings-in-the-u-s- and-around-the-world/ [perma.cc/6LEM-QP2J].

253. Basmaa Ali et al., *Domestic Violence in Urban American Muslim Women*, 16 J. MUSLIM MENTAL HEALTH 103, 104 (2022).

254. Lipka, *supra* note 252.

255. Besheer Mohamed, *Muslims are a Growing Presence in the U.S., but Still Face Negative Views From the Public*, PEW RESEARCH CTR. (Sep. 1, 2021), https://www.pewresearch.org/short-reads/2021/09/01/muslims-are-a-growing- presence-in-u-s-but-still-face-negative-views-from-the-public/ [perma.cc/Z45B-LYJS].

conducted by Pew Research Center in 2014, 2017, and 2019, Americans were asked to rate religious groups from 0 to 100, with 0 being the most negative possible view and 100 being the most positive.[256] The results showed that Muslims ranked among the most negative in these surveys.[257]

The Othering & Belonging Institute at the University of California, Berkeley drafted a shadow report to the U.N. Committee on the Elimination of Racial Discrimination reviewing the United States government's compliance with the International Convention on the Elimination of All Forms of Racial Discrimination.[258] They found that, over 20 years, "the federal government, states and local authorities have infringed on the religious freedoms of its Muslim citizens and lawful residents by enacting policies and practices that disproportionately discriminate against Muslims."[259] These anti-Muslim policies include 232 anti-Sharia bills introduced in 44 U.S. state legislatures, and 15 federal actions that discriminate against Muslims.[260] The study titled *Islamophobia Through the Eyes of Muslims: Assessing Perceptions, Experiences, and Impacts*, was conducted in 2020, and included 1,123 Muslim American participants.[261] When asked whether they believe Islamophobia exists in the U.S., 97.8% of the participants said yes.[262] When asked if Islamophobia is a problem in the U.S. 95% said yes.[263] Further, 60.6% of the respondents in the survey felt that Islamophobia is a "very big problem" and 34.4% thought that it was a "somewhat big problem".[264] Looking at Islamophobia and gender, 74.3% believe that women are more at risk of experiencing Islamophobia.[265] Over half the participants had experienced an incident, but did not report it to authorities, with 65.7% of the participants indicating they did not know where to report an incident of Islamophobia.[266] Looking to the psychological and emotional impacts of Islamophobia on American Muslims, 93.7% reported that it affects their wellbeing.[267] Most participants responded that they censor their speech or actions out of fear of how others may respond or react, and women censor themselves at a higher rate—91.8%, compared to the rate of men at 84.6%.[268]

Frequent discrimination is associated with a variation of physical and mental health outcomes, such as coronary artery calcification, high levels of C-reactive protein, high blood pressure, giving birth to low-birth-weight infants,

256. *Id.*
257. *Id.*
258. Basima Sisemore & Elsadig Elsheikh, *The Pervasiveness of Islamophobia in the United States*, OTHERING & BELONGING INSTITUTE (2022), https://belonging.berkeley.edu/pervasiveness-islamophobia-united-states [perma.cc/L5BC-ZGBQ].
259. *Id.* at 2.
260. *Id.*
261. *Id.* at 3.
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.* at 4.
268. *Id.*

cognitive impairment, poor sleep, visceral fat, depression, psychological distress, anxiety, and mortality… and substance abuse.[269] Discrimination can lead to negative health outcomes through other pathways including but not limited: to barriers in accessing resources and increased stress, physiological processes, reduced participation in obtaining healthcare, and violence.[270] Given the adverse health outcomes that are caused by discrimination against Muslim Americans, based on these studies, violence rates increase.[271]

Unfortunately, there is limited data demonstrating the rates of domestic violence American Muslims face.[272] This is attributed to Muslims falling under different ethnic groups and not identifying specifically as Muslims in studies.[273] It is also a taboo subject, which Muslims are reluctant to report or speak about.[274] However, many immigrant Muslim survivors reported that domestic violence began after their arrival to the United States.[275] And survivors report having noticed a change to their partner's behavior due to the increased stress related to assimilating, losses tied to family, social status and career, and threat of deportation.[276] While domestic violence has been prevalent in Muslim households, it increased after the terrorist attacks that took place on September 11th.[277] In addition, the likelihood of increased domestic violence when individuals come from conflict-areas is one that has been discussed at length by academics.[278] So immigrant survivors of domestic violence from Muslim American communities suffer violence by society as a result of Islamophobia, and in their homes due to the Islamophobia their partners may experience living in the United States and or as a result of conflict regions they may have immigrated from.[279] Immigrant Muslim survivors of domestic violence face difficult decisions when deciding to go to family court or involve the police. They must tread carefully in challenging the patriarchy within their community so as to steer clear of allegations that they are "harming the collective interests of Muslims in America," especially when society and the government already has done so much

269. *See* Yin Paradies et al., *Racism as a Determinant of Health: A Systematic Review and Meta-Analysis*, 10 PLOS ONE e0138511 (2015); Samari, *supra* note 248, at 1921.

270. *Id.* at 2.

271. *Id*.

272. Ali, *supra* note 253, at 105.

273. Salma Elkadi Abugideiri, *A Perspective on Domestic Violence in the Muslim Community*, FAITH TRUST INST. (2010), https://scispace.com/pdf/a-perspective-on-domestic-violence-in-the-muslim-community-3az9plzdtn.pdf [perma.cc/JBV5-A8WF].

274. *Id.*

275. *Id.*

276. *Id.*

277. Azizah Y. al-Hibri, *An Islamic Perspective on Domestic Violence*, 27 FORDHAM INT'L L.J. 195, 195—224 (2003).

278. Ali, *supra* note 253; JEANNE WARD, IF NOT NOW, WHEN? ADDRESSING GENDER-BASED VIOLENCE IN REFUGEE, INTERNALLY DISPLACED, AND POST-CONFLICT SETTINGS: A GLOBAL OVERVIEW (2002), https://www.peacewomen.org/assets/file/Resources/NGO/Disp-HR_IfNotNowWhen_Ward_2002.pdf [perma.cc/2SJA-KLY9].

279. Sabrina Alimahomed-Wilson, *Invisible Violence: Gender, Islamophobia, and the Hidden Assault on U.S. Muslim Women,* 5 WOMEN, GENDER, & FAM. OF COLOR 73—97 (2017).

harm to Muslims in America.[280] This denies their ability to challenge religious principles and cultural norms preventing Islam in America from having a healthy evolution.[281] What Muslim women face is similar to what occurs in other communities of color when women raise domestic violence as an issue.[282] They have to fight against the notion that domestic violence and sexual violence are private family matters, affecting many women in their community and so must seek the judicial system's involvement to stop it from the persistence of the systemic issue.[283] Although there is an intersection between racism and sexism, anti-racist practices do not account for feminism.[284]

Race and culture in immigrant communities suppress domestic violence.[285] Survivors may be reluctant to call the police fearful of subjecting their private lives to the "scrutiny and control" of the police. They may choose to remain in their home because their home is a safer place when compared to the racist world outside their door.[286] We must understand that race and gender are separate categories in which survivors may fall into. Therefore, when a Muslim immigrant woman survivor of domestic violence enters our court system, she faces intersectional discrimination that would only be experienced by Muslim women immigrant survivors of domestic violence.[287] As Professor Aziz states, Muslim women are positioned at the bottom of the racial, gender and religion hierarchy.[288] Societal biases and stereotypes against Muslim survivors, especially if coupled with wearing a headscarf, make them susceptible to discrimination.[289] So, once they make a decision to interact with the judicial system—that access can be limited by the courts due to the courts' discriminatory and Islamophobic practices. After 9/11, Muslim women who wear a headscarf have been expelled from courthouses because of "no hats" policies.[290] A court in Georgia held a woman in contempt of the court, because she did not remove her headscarf and

280. *Id.*

281. *Id.*

282. *See, e.g.*, Jenny Rivera, *Domestic Violence Against Latinas By Latino Males: An Analysis Of Race, National Origin, And Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231 (1994); Nimish R. Ganatra, *The Cultural Dynamic In Domestic Violence: Understanding The Additional Burdens Battered Immigrant Women Of Color Face In The United States*, 2 J.L. SOC'Y 109 (2001); Patricia A. Broussard, *Damn It! A Conversation On Being Black, Female, And Marginalized During The Covid-19 Pandemic: Is The World Listening?*, 12 ALA. C.R. & C.L. L. REV. 1 (2020).

283. Crenshaw, *supra* note 128, at 1241—42.

284. *Id.*

285. *Id.*

286. *Id.*

287. Sahar F. Aziz, *From the Oppressed to the Terrorist: Muslim-American Women in the Crosshairs of Intersectionality*, 9 HASTINGS RACE & POVERTY L.J. 191, 224 (2012).

288. *Id.*

289. *See* Iyiola Solanke, *Putting Race and Gender Together: A New Approach to Intersectionality*, 72(5) MOD. L. REV. 723, 735 (2009).

290. Aziz, *supra* note 287.

sentenced her to 10 days in jail.[291] Fortunately, Georgia changed its court policy shortly thereafter, allowing head coverings for religious and medical reasons.[292]

Noora did not make the choice to enter family court. But for her neighbor calling, she may have endured many more years of domestic violence. One of the reasons why Noora did not want to involve the court is because she grew up in a cultural setting where the expectation is to keep quiet about marital issues. She also did not want her husband to face criminal charges. A balance that many immigrant survivors struggle with when considering pursuing legal action; worrying about the impact of their actions on their abusive partner. However, she did end up in court regardless of her reluctance to involve any external parties.

For Noora, the judge that presided over her cases, fortunately did not make any racist or sexist remarks in making his decision. But that was not the case for all Muslim immigrant survivors of domestic violence that I represented in family court. Judges questioned why survivors did not have photos of their body parts showing the bruising at trial—disregarding religious principles that Muslim women strongly believe. They did not comprehend that their head coverings and garments covered most of their injuries so members of the public would not immediately call the police upon seeing them or that the police would not be able to see those injuries even if they did report the domestic violence. These issues highlight the need for training for jurists on other religions and cultures to be able to adequately render fair and unbiased decision in family court.

All courthouses should have policies that allow for religious and medical head coverings to be permissible. And the Department of Justice needs to conduct timely inquiries into religious violations should they arise. Access to the courts is a fundamental right that survivors have. And while Muslim women being excluded from the courts may not happen daily and in all jurisdictions, when it does happen it has a chilling effect on all Muslim women and their decision to utilize the courts. All survivors of domestic violence should feel safe when entering the courts and not have a fear of potential biases based on race, gender, or religion from the courts. There needs to be anti-discrimination campaigns and media coverage highlighting anti-Muslim bias in our judicial system. Domestic violence task forces, agencies, and courts must include Muslim women in leadership advocacy positions and in community outreach efforts. Without their presence, involvement, and leadership, the discrimination that survivors face, who identify as Muslims, may never be accounted for.

IV. DIFFICULTY ACCESSING SERVICES

Noora lived in an apartment with her husband, his parents, and his siblings. When she had children, they continued to live in the apartment with his family members. Noora was not permitted to leave the home or speak to her relatives

291. *U.S. Judge Jails Muslim Woman Over Head Scarf*, NBC NEWS (Dec. 17, 2008), http://www.msnbc.com/id/28278572 [perma.cc/6GD3-7QSD].

292. ACLU of Georgia, *The ACLU of Georgia Applauds Adoption by the Georgia Judicial Council of Policy Allowing for Wearing of Religious Head Coverings in Courthouses* (Jul. 27, 2009), https://www.aclu.org/press-releases/aclu-georgia-applauds-adoption-georgia-judicial-council-policy-allowing-wearing [perma.cc/U9S6-H72D]. *See* Ga. Unif. Mun. Ct. R. 28, Courtroom Attire.

and friends in Palestine on the phone. She was not allowed to leave the house to learn English or work. If she needed anything, her husband would accompany her to the store and purchase what she needed. Her in-laws treated her very poorly, criticizing her for failing to uphold their standards of a "good obedient wife," cursing at her, and sometimes slapping her when she became too vocal.

For many immigrant survivors, limited access to resources can make it difficult for them to seek legal relief–whether in family court or for immigration purposes. Cultural barriers often further discourage immigrant survivors from reporting or escaping their abusive household.[293] Household composition and cultural norms can make it very difficult for a survivor to call for help, due to lack of privacy, or leave their house.[294] Like Noora, many survivors live with their in-laws and/or extended family. Those family members can be an additional weapon utilized by their partner in surveilling a survivor's whereabouts or additional abusers themselves.[295] And so survivors can be entirely dependent on their partners–a goal that many abusers have.

In representing immigrant survivors of domestic violence, advocates must remain cognizant that immigrant survivors of domestic violence vary in terms of social, economic, and political status.[296] This context informs survivors' access to many services: both legal, as discussed in the preceding sections, and non-legal, to support survivors' mental and physical health, safety planning, finances, access to food and shelter, childcare, child visitation supervision, transportation, and more.[297]

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293. Crenshaw, *supra* note 128, at 1248.

294. *See, e.g.*, Safety Net Project, *Why Privacy and Confidentiality Matters for Victims of Domestic & Sexual Violence*, https://www.techsafety.org/privacymatters [perma.cc/C3GT-5JY6] (last visited July 2024).

295. Madeline Fernández, *Cultural Beliefs and Domestic Violence*, 1087 ANN. N.Y. ACAD. SCI. 250—60 (2006). Cultural perceptions exist and are "often held by the women themselves, that violence within the family context (1) is not considered violence and (2) should not be discussed outside of the family, let alone reported to external entities." For example, "[w]omen from Asian cultures are reared in a belief system that stresses the greater need of the family over the needs of an individual member. In many Latin-American cultures, . . .[w]omen are expected to bear a great deal of suffering without protest for the sake of the family. Russian women also report pressure to keep the family together In the Arab culture, women are believed to belong to their agnatic group and men are responsible for the women. Once married, Japanese women are considered the bride of their husband's family. Many Latin American women are accustomed to allow others to make decisions for them. Domestic violence for the purpose of punishment or "correction" is widely accepted. Obedience to husbands and in-laws is an expectation of Vietnamese wives. They are held responsible for maintaining domestic harmony, often at all cost[s]." Further, "[i]n cultures that require women to leave their families of origin, the women are often left with little or no support group. It can be anticipated that women who are culturally expected to move in with their husband's family or considered to belong to their agnatic group, are potentially to be in very vulnerable positions. Culturally sanctioned isolation of women results in the reduction of their social supports and inhibits women's access to resources that might ultimately enable them to escape from the domestic violence."

296. Crenshaw, *supra* note 128, at 1250—51.

297. *See, e.g., Local Resources*, NATIONAL DOMESTIC VIOLENCE HOTLINE, https://www.thehotline.org/get-help/domestic-violence-local-resources/ [perma.cc/ZRW3-

As a preliminary matter, although it should be presumed that all survivors of domestic violence have the capacity to make decisions, it must be acknowledged that some survivors may have mental health issues that "preclude them from accurately judging and responding to their situation."[298] When that occurs, legal providers should refer survivors for mental health services.[299] In addition, there should be an emphasis on intensive advocacy services, including referrals to other agencies, shelters, legal service providers all depending on a survivor's specific needs and following a risk and lethality assessment.[300] The legal case strategy must focus on restoring the survivor's decision-making power and autonomy.

In creating this strategy, legal advocates must incorporate non-legal services for survivors, while taking into consideration the survivor's background, language abilities, race, ethnicity, and financial situation. Unfortunately, many of these factors impede access to services for immigrant survivors like Noora.

For many immigrant survivors, language barriers prevent them from taking advantage of existing support services.[301] These barriers can prevent a survivor from finding and seeking safety in domestic violence shelters. And unfortunately, some shelters have even turned down immigrant survivors of domestic violence due to lack of language services and resources.[302]

Further, "women of color are less likely to have their needs met than women who are racially privileged."[303] In fact, historically, "[t]he experience of violence by minority women is ignored, except to the extent it gains white support for domestic violence programs in the white community."[304] By way of example, "significant proportion of the resources allocated to [counselors who provide rape crisis services to women of color] must be spent handling problems other than rape itself," because many "funding agencies . . . allocate funds according to standards of need that are largely white and middle-class."[305] Such processes "ignore the fact that different needs often demand different priorities in terms of resource allocation, and consequently, [they] hinder the ability of counselors to address the needs of nonwhite and poor women."[306] This results in a drastic gap in access to information between white, privileged communities and

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WCJ7] (last visited July 2024) (database providing local resources for survivors of domestic violence in categories such as "Emergency Financial Assistance," "Food Assistance," "Household Basic Needs," "Health Services," "Transitional Housing," "Transportation Assistance," "Domestic Violence Shelter," etc.).

298. Goldfarb, *supra* note 162, at 1544.

299. Carol M. Suzuki, *When Something Is Not Quite Right: Considerations for Advising a Client to Seek Mental Health Treatment*, 6 HASTINGS RACE & POVERTY L.J. 209 (2009).

300. *See, e.g.*, Jeffrey R. Baker, *Necessary Third Parties: Multidisciplinary Collaboration and Inadequate Professional Privileges in Domestic Violence Practice*, 21 COLUM. GENDER & L. 283, 283 (2011).

301. Crenshaw, *supra* note 128, at 1249.

302. *Id.*

303. *Id.* at 1250.

304. *Id.* at 1260.

305. *Id.* at 1250.

306. *Id.*

non-white, less privileged ones.[307] "[R]eform efforts undertaken on behalf of women" must thus aim to understand and address these disparities, and avoid treating all survivors identically, regardless of background.[308] Such racial discrepancies also affect immigrant survivors financially:

> Many women of color . . . are burdened by poverty, child care responsibilities, and the lack of job skills. These burdens, largely the consequence of gender and class oppression, are then compounded by the racially discriminatory employment and housing practices women of color often face, as well as by the disproportionately high unemployment among people of color that makes battered women of color less able to depend on the support of friends and relatives for temporary shelter.[309]

The statistics speak volumes: "African Americans suffer from high unemployment rates, low incomes, and high poverty rates."[310] And "[t]he economic situation of minority women is, expectedly, worse than that of their male counterparts. Black women . . . make considerably less than [both] Black men . . . and white women. Latino households also earn considerably less than white households."[311]

In addition to linguistic and racial disparities, it is well-established "that poor women are more likely than others to experience physical violence by their partners, partly because they have fewer options, and that the combination of poverty and intimate violence raises particularly difficult issues for them."[312] Correspondingly, "[a]bused women's access to independent economic resources, including welfare, is central to their decision-making and safety planning."[313] As such, "women who experience both domestic violence and poverty are likely to have more, and more complex, needs than those who have more resources."[314] This lack of resources manifests in poorer survivors being even less able to obtain employment due to abusive partner interference, lack of work experience, health problems resulting from the abuse, unavailability of transportation, and discrimination.[315]

These factors—lack of language skills, scarcity of financial resources, racial and ethnic discrimination—all combine to form a cycle of injustice. Immigrant survivors of color, in particular, are crushed under the weight of all of these systems working against them. In representing immigrant survivors of domestic violence, advocates must not only provide legal services, but use an

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307. *Id.* at 1251.

308. *Id.* at 1250.

309. *Id.* at 1245—46.

310. *Id.* at 1245 n.14.

311. *Id.*

312. ELEANOR LYON, WELFARE, POVERTY, AND ABUSED WOMEN: NEW RESEARCH AND ITS IMPLICATIONS 1 (2000).

313. *Id.*

314. *Id.*

315. *Id.*at 3—6.

intersectional approach to ensuring survivor access to imperative non-legal services, regardless of language, racial, financial, and other barriers.

In Noora's case, she was fortunate that New York City has Family Justice Centers in each borough to provide additional support for survivors.[316] Noora could seek assistance for housing, public benefits, mental health support, and art therapy for her children.[317] Family Justice Centers can be extremely helpful for survivors by allowing them to obtain legal and social services in one place.[318] Often a domestic violence trained police officer sits in the space to assist survivors with reporting.[319] But this all comes with risks for immigrant survivors of domestic violence.[320] Family Justice Centers are funded and run by the government.[321] The presence of police officers and district attorneys in the same physical space can be intimidating or discouraging to survivors who seek services.[322] In New York City, there are case workers who spoke a variety of languages, but this may not be the case elsewhere.[323] Depending on the resources provided to such Family Justice Centers, they could be short-staffed, have a long waitlist, and provide insufficient services.[324]

For Noora, a local Family Justice Center helped her obtain legal representation through a non-profit organization, find placements in domestic violence shelters, and join a waitlist to secure Section 8 housing. However, it was extremely difficult to find Arabic-speaking mental health providers offering free

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316. Family Justice Centers are "collaborative, multi-disciplinary" "'one stop shops' for survivors of domestic violence . . . that bring together under one roof domestic violence prosecutors with civil legal service providers, social service providers, and representatives of community-based organizations." Dorchen Leidholdt & Lynn Beller, *Domestic Violence and the Law: A New York State-Centric Overview and Update*, 89 N.Y. STATE BAR ASS'N J. 14, 17 (May 2017).

317. *See, e.g.*, *What We Do*, SAFE HORIZON, https://www.safehorizon.org/our-services/what-we-do/ [perma.cc/T9TS-3954] (last visited July 2024) (offering services under categories including "Safe Place to Stay," "Counseling," "Community Programs," and "Child Advocacy Centers").

318. Leidholdt, *supra* note 316, at 17.

319. *New York City Family Justice Centers*, NYC MAYOR'S OFFICE TO COMBAT DOMESTIC VIOLENCE, https://www.nyc.gov/html/ocdv/downloads/pdf/Materials_FJC_OnePage_English.pdf [perma.cc/NWU9-3ZDM] (last visited July 2024) ("Domestic Violence Prevention Officers from the New York City Police Department who work at the Center will assist you to report a crime."). *See, e.g.*, *Brooklyn Family Justice Center (BFJC)*, THE BROOKLYN DIST. ATTORNEY'S OFF., http://www.brooklynda.org/brooklyn-family-justice-centre/ [perma.cc/7FG3-2D4Q] (last visited July 2024) ("placing lawyers, police, dedicated domestic violence prosecutors, counselors, clergy, and other service providers under one roof").

320. *See* Irvine, *supra* note 101, at 2.

321. NYC MAYOR'S OFFICE TO COMBAT DOMESTIC VIOLENCE, *supra* note 319.

322. *See* Irvine, *supra* note 101.

323. *See* NYC MAYOR'S OFFICE TO COMBAT DOMESTIC VIOLENCE, *supra* note 319 ("We can help you no matter what language you speak.").

324. *See, e.g.*, *New Initiative Reduces Wait Times for Mental Health Appointments for Domestic Violence Shelter Residents*, NYC HEALTH + HOSPITALS (May 30, 2023), https://www.nychealthandhospitals.org/pressrelease/new-initiative-reduces-wait-times-for-mental-health-appointments-for-domestic-violence-shelter-residents/ ($5.8 million initiative introduced to reduce wait times for mental health services in domestic violence shelters).

services. Because of the lack of these resources available to Noora, combined with the cultural stigma around seeking mental health services, she ended up losing custody of her children just a few years after obtaining custody in the first place. While she struggled with the obstacles our court and immigration systems had in place, she succeeded from an attorney's perspective in her legal matters: she obtained immigration status, a neglect finding against her abusive partner, a civil protective order, and sole custody of her children. However, once she was out of the courtroom, she did not receive adequate social services. This ultimately impacted her life much more than her "successful" legal case.

Noora's story is one example of what an immigrant survivor of domestic violence may face when they leave their abusive partners, enter our court system, or both. Noora did not choose to start the process of going to family court: her neighbor called the police, who contacted CPS, who filed a petition against her husband in family court. Had she known that she would ultimately spend years fighting, only to have her kids taken from her, Noora may have chosen to remain in the abusive environment. Just because survivors like Noora may be unaware of just how deficient our court and social service systems are, however, does not excuse these systems' devastating impacts. With the proper involvement of community resources and support following Noora's first court involvement, Noora may have avoided having her kids taken away and having to return to court: her life could have been very different from where it is today. Further, a number of other consequences could have been avoided, including trauma caused to the children and court resources wasted in the extraneous second court proceeding.

CONCLUSION

As is reflected through Noora's case, immigrant survivors of domestic violence encounter many barriers while seeking protection from abuse. These barriers—from exclusively-English courthouses, to impending punishment by the immigration and family regulation systems, to rampant cultural and religious discrimination—can only be diminished if our courts and social service providers utilize an intersectional lens when serving immigrant survivors of domestic violence.

Federal law, through the Civil Rights Act of 1964 (prohibits national origin discrimination on the basis of language) and Executive Order 13166 ("Improving Access to Services for Persons with Limited English Proficiency"), mandates access to language services for limited-English-proficient litigants. State courts, however, have only just started to uphold the principle that access to accurate language interpretation is a constitutional due process right. Even in jurisdictions that do provide language access services, such as New York City, there are still major gaps to be filled. Such deficiencies disadvantage immigrants disproportionally, from the very moment they seek court intervention.

Immigrants are also impeded in seeking judicial assistance by fears of intervention by immigration enforcement or the family regulation system upon appearing at court. ICE apprehension at court has historically led to denials of immigration applications and even deportations. The involvement of CPS can lead to failure-to-protect negligence charges and removal of children. Both the

immigration and family welfare systems disproportionately impact survivors of color, who often are already oppressed due to systemic racism and cultural discrimination, such as Islamophobia. Further, Islamophobia weaves its way through both the court system, through judicial misinterpretation of Islamic marriage laws, and our society at large.

Finally, immigrant survivors of domestic violence are unable to access social services outside of the court system—whether they are trying to avoid court intervention in the first place, or are trying to rebuild their lives following the conclusion of their court cases. This is inefficient, both for the survivors themselves and the system in general, which wastes resources on court matters which are better resolved outside of court.

As legal advocates, we must examine our immigrant survivor clients' cases through an intersectional lens, taking into account nationality, race, ethnicity, culture, religion, finances, and education, among other factors. We must also continue to advocate for reform, both inside and outside of the court system, with the intention of ending these perpetual, overlapping cycles of inequality. There must be more surveys that are undertaken by organizations who work directly with survivors to showcase where our courts are failing immigrant survivors of domestic violence.

We must also pay close attention to cases like Noora's which appear successful, but are too fragile without the proper support and resources. Access to social services can provide a strong enhancement to an immigrant survivor's life should they end up in our courts. With additional support, and an implementation of all the suggestions included in this Article, immigrant survivors of domestic violence—regardless of whether they are outliers like Noora—will be better equipped to overcome all the barriers that they face both in and out of the courthouse and truly have a voice.

IN-HOSPITAL ASSERTIONS OF CHILDCARE PARENTAGE

Jeffrey A. Parness†

ABSTRACT

The parental right to the "care, custody, and control" of a child remains an unenumerated fundamental liberty interest under the federal constitution. This recognition will very likely continue, as will the significant U.S. Supreme Court deference to state laws on who constitutes an entitled parent.

When the right was again expressly recognized in Troxel v. Granville in 2000, the state methods for establishing childcare parentage were in great flux. States frequently looked to the Uniform Parentage Acts (UPAs) for their definitions of childcare parents. The 2000 UPA added new parenthood definitions beyond those found in the 1973 UPA, including provisions on assisted

† Professor Emeritus, Northern Illinois University College of Law. B.A., Colby College; J.D., The University of Chicago

reproduction births (ARBs) and in-hospital voluntary paternity acknowledgments (VPAs). Changes continued under the 2017 UPA, which expanded ARBs to genetic surrogacy births, which first recognized de facto parenthood, and which expanded in-hospital voluntary parentage assertions beyond paternity. The UPAs recognize several different ways in which legal parenthood can depend on parental intentions outside of a formal adoption.

With the UPA revisions and related state enactments, a multitude of case disputes have arisen on parental intentions, including for children born of ARB and for children born of consensual sex. These disputes usually arise long after alleged intentions were made known, including those within coparenting pacts. These disputes, of course, must also be assessed with the long-existing laws on genetic, spousal, and formal adoptive parenthood.

This article explores the need for new state laws on in-hospital assertions of intended parentage, both within and outside of VPAs. Such laws will diminish the numbers of, and certain challenges arising from, factual disputes over parental intentions. After an Introduction in Part I, Part II explores the emergence of VPA processes while Part III addresses current in-hospital parental assertions for any guidance. Then, Part IV examines non-VPA processes for parent establishments by reviewing both the three UPAs and their state law counterparts, particularly those on intended parenthood. Thereafter, Part V reviews constitutional precedents on parental childcare interests since they limit any law revisions on in-hospital parental assertions. Finally, Part VI offers thoughts on law reforms, including new laws on genetic parent acknowledgments, on other multiple person intended parent declarations, and on single person intended parent declarations. In doing so, it recognizes that new in-hospital parental assertion laws will inevitably vary as state laws on genetic, spousal, formal adoptive, and intended parentage vary.

I. INTRODUCTION

In 1993 Congress enacted, as part of the federal Social Security Act, the Omnibus Budget Reconciliation Act.[1] It requires that states, as a condition of receiving federal welfare IV-D funds, implement certain procedures for voluntary paternity acknowledgments (VPAs),[2] chiefly embodying in-hospital assertions. Related mandates came three years later via the Personal Responsibility and Work Opportunity Reconciliation Act.[3] The requirements were driven by the desire to increase reimbursements of state child welfare benefits made on behalf of children born of sex to mothers.[4] Child support for children born into current marriages, or in marriages or attempted marriages within a short time of childbirth, is facilitated by presumptive spousal parent laws

1. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312.

2. 42 U.S.C. § 666(a)(5)(C) (2024).

3. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105).

4. *See, e.g.*, 42 § U.S.C. 654(16) (2024) (mandating data collection on the child "support enforcement and paternity determination process"); 42 U.S.C. § 654(15) (2024) (listing expedited procedures on paternity establishment).

that generally operate across the country and that typically prompt birth certificate recognitions of two parents.

The federal mandates continue. But VPAs are generally used today in all parental child support settings involving genetic ties, not just in cases involving IV-D funds. Further, there is significant usage of VPA processes for establishing genetic parentage solely in nonsupport settings like childcare or probate. Finally, VPA processes are increasingly employed by those having no genetic ties to children.

Unfortunately, while some expanded uses of VPA processes are beneficial, serving important policy goals, other current uses clash with certain federal and state constitutional protections, as well as with some new state law policies on non-VPA parentage, including laws on residency/hold out, de facto and assisted reproduction parentage.

The article first describes the emergence of mandated VPAs in the 1990s. It charts the spread of VPA processes to nonsupport and nongenetic ties settings, involving both children born of sex and children born of assisted reproduction. The article then examines the current ways, old and new, to establish nonacknowledgment parentage, as well as the protected rights and interests of existing legal parents, as they impact any consideration of new VPA laws, as well as of new nonpaternity parentage acknowledgment laws (as with maternity) and new intended parentage declaration laws.

Intended parentage declaration laws, as with parent acknowledgment laws, can involve no less than two people, as with expecting parents under residency/hold out or de facto parent laws. Unlike parental acknowledgments, authorized intended parent declarations could also encompass one designated, intended parent as with current parent registry laws that provide alleged genetic parents a means to ensure their participation in any later formal adoption proceeding.

This article suggests federal law reforms of in-hospital VPA processes. These processes were prompted by the federal statutory requirements for state participation in IV-D funding. This article urges federal acknowledgment laws be expanded to include voluntary maternity acknowledgments. But it also urges acknowledgments be explicitly limited to parentage establishments for gametes providers. Reforms would encompass amendments to the federal Social Security Act. Following, state statutory and common law changes to parentage acknowledgment laws would also be needed.

Further, this article suggests changes to state laws on nonacknowledgment (i.e., nongenetic) parentage, particularly laws establishing mechanisms for in-hospital multiple-person intended childcare parentage declarations having no judgment-like effects. Declarations reflecting parental intentions would be used in later parentage disputes, as under residency, hold out, de facto, and assisted reproduction parent laws. Finally, this article suggests new laws on single person intended childcare parentage declarations which encompass in-hospital assertions of intended childcare parenting, which could be used in later parentage disputes as under formal adoption laws.

II. THE EMERGENCE OF VOLUNTARY PATERNITY ACKNOWLEDGEMENTS

According to a National Vital Statistics Report, in 2021 more than 1.4 million children were born to unwed mothers in the United States.[5] Given public policy interests in determining legal parentage at birth so that nonmarital children may be well-supported, if not cared for and loved, in 1993 Congress enacted the Omnibus Budget Reconciliation Act.[6] The act requires states, as a condition of receiving federal welfare IV-D funds, to implement certain processes, including hospital based and other voluntary acknowledgment of paternity procedures.[7] These processes were expanded three years later under the Personal Responsibility and Work Opportunity Reconciliation Act.[8] At those times, the policy focus was on securing child support from men for children born of sex.

Compliance oversight lies with the Secretary of the Department of Health and Human Services (HHS) and a "separate organizational unit" within the Department established by the Secretary.[9] Required processes include establishment within each participating state of a "data processing and information retrieval system. . . designed . . . to control . . . and monitor all the factors in the support enforcement collection and paternity determination process."[10] This system must transmit annually to HHS such information as may be necessary to measure state compliance with Federal requirements for

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5. 72 MICHELLE J.K. OSTERMAN ET AL., U.S. DEP'T OF HEALTH & HUM. SERVS., BIRTHS: FINAL DATA FOR 2021 1, 5 (2023), http://www.cdc.gov/nchs/data/nvsr/nvsr72/nvsr72-01.pdf.

6. Preceding the Act there were some state laws on paternity acknowledgments of nonmarital children, including both in-hospital assertions and prebirth assertions. The 1973 UPA recognizes presumed male parentage in a man who acknowledges paternity in a state-filed "writing," where the mother, once informed, "does not dispute." UNIF. PARENTAGE ACT § 4(a)(5) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1973). This provision was superseded in the 2000 UPA by Article 3 on VPAs. UNIF. PARENTAGE ACT § 204 cmt., ¶5 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2002). A rather harsh prebirth acknowledgment law, effective for a few years in Michigan in the mid-1970s, was described as "inadequate;" it said the following:

> a new Michigan statute which requires the unmarried father to file what might be called a "notice of fornication" with the Probate Court prior to the birth of a child. This notice must be coupled with an advance acknowledgment of the child's right to support and education as well as the mother's pregnancy-related expenses. If such a notice is not filed, any claim to a child that might be born as a result of the intercourse with the mother is lost.

Harry D. Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 13 (1974) (describing 37 MICH. COMP. LAW ANN. 710.3a, which was repealed by P.A. 1974, No. 296 (eff. 1-1-75)).

7. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312. In particular, *see* 42 U.S.C. § 666(a)(5)(C) (paternity procedures required of states plans for child support 42 § U.S.C. 654(20)).

8. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2150.

9. 42 § U.S.C. 652(a) (2024).

10. 42 U.S.C. § 654(16) (2024) (the system must comply with the requirements of 42 U.S.C. 654a); 42 U.S.C. § 654a(a) (2024) (the system must be "a single statewide automated data processing and information retrieval system.").

expedited procedures, including "level of accomplishment" on "paternity establishment."[11]

The federal laws compel participating states to improve child support enforcement involving noncustodial parents.[12] The laws only apply to those children whose "paternity has not been established" and when there are or have been applications for federally subsidized state services.[13]

Per the Social Security Act, birth mothers and putative genetic fathers may sign paternity acknowledgments. States must provide both with oral and written notices of the rights, responsibilities, and legal consequences attending these acknowledgments.[14] States also must comply with certain procedures underlying acknowledgment services, including procedures for hospital–based programs, birth record agencies, and other state entities.[15] Completed acknowledgments must be gathered in a statewide database accessible by IV-D agencies.[16]

Federal mandates require states to "develop and use an affidavit" which includes certain minimum requirements.[17] A state must "give full faith and credit to such an affidavit signed in any other State according to its procedures."[18] Required acknowledgment elements, as specified by the Office of Child Support Enforcement and approved by the Office of Management and Budget, include

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11. 42 U.S.C. § 654(15) (2024). Failures of compliance can lead, for example, to monetary penalty. 42 U.S.C. § 655(a)(4)(A) (2024).

12. 42 U.S.C. § 651 (2024).

13. 45 C.F.R. § 303.5(a) ("cases referred to the IV-D agency or applying for services under §302.23" of the C.F.R); *but see* 45 C.F.R. § 303.5(b) ("IV-D agency need not attempt to establish paternity in any cases involving incest or forcible rape," or where an adoption proceeding is pending, if paternity establishment "would not be in the best interests of the child").

14. 42 U.S.C. § 666 (a)(5)(C)(i) (2024).

15. 42 U.S.C. § 666(a)(5)(C)(iii)(II)(aa),(bb) (2024). *See also* 45 § C.F.R. 303.5(g)(1) ("hospitals, state birth record agencies, and other entities . . . participating in" the state's VPA program). These federally-driven VPA procedures may be accompanied by an American jurisdiction's recognition of parentage arising from a differing form of paternity acknowledgment. *See, e.g.*, D.C. CODE § 16-909(a)(4) (presumed father if "acknowledged paternity in writing"); *Id.* § 16-909(b-1)(2) (a father who "acknowledged paternity in writing . . . as provided in section 16-909.09(a)(1)," though he is not a presumed father); ARIZ. REV. STAT. § 25-814(A)(3)–(4) (a man is the "presumed" father if a witnessed statement is signed by both parents, though he is not named on the birth certificate); Kamp v. Dep't of Hum. Res., 980 A.2d 448, 454 (Md. 2009) (no indication of Social Security Act VPA when employing Maryland Code, Estates and Trust 1-208(b)(2)(whereby man "acknowledged himself, in writing, to be the father").

16. 45 § C.F.R. 303.5(g)(8).

17. 42 U.S.C. § 666(a)(5)(C)(iv) (2024) (requirements are specified by Secretary of the Department of Health and Human Services).These requirements must include the social security numbers of the parents. 42 U.S.C. § 652 (a)(7) (2024). Some state laws recognize paternity in writings beyond such state-developed affidavit forms. *See, e.g.*, ARIZ. REV. STAT. § 25-814(A)(4) (man is the presumed father where there is a "notarized or witnessed statement signed by both parents acknowledging paternity."), *expanded in* McLaughlin v. Jones, 401 P.3d 492, 496 (Ariz. 2017) (federal constitution, per Fourteenth Amendment, compels the statute's usage by same-sex couples); KAN. STAT. ANN. § 23-2208(a)(4) (man is presumed father when he "notoriously or in writing recognizes paternity"), *construed in* In re Parentage of M.F., 475 P.3d 642, 657 (Kan. 2020) (defining "notorious" recognition of parentage).

18. 42 U.S.C. § 666(a)(5)(C)(iv) (2024).

the current full names of the mother, father, and child; the social security numbers of the mother and father; the birth dates of the mother, father, and child; the address(es) of the mother and father; the birthplace of the child; a brief explanation of rights and responsibilities; a statement that each parent has 60 days to rescind the acknowledgment; and, signature lines for witnesses or notaries.[19] Noteworthy is the absence of any explicit requirement that the female and male signatories expressly acknowledge that the signing man is, or that there is a reasonable belief that he is, the child's genetic father.[20] But, as noted, federal law is geared to "paternity establishment."[21]

Effective acknowledgments result in legal findings of paternity that can be subject to either rescission or contest by challenge.[22] Any signatory may rescind his or her acknowledgment within the earlier of 60 days of signing or the date of an administrative or judicial proceeding relating to the child (including a proceeding to establish a support order) in which the signatory is a party.[23]

Standing to contest an acknowledgment after 60 days seemingly is broader than standing to rescind within 60 days.[24] Further, after 60 days, generally, "a signed voluntary acknowledgment of paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger."[25] Given an absence of federal statutory or regulatory

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19. U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. OF CHILD SUPPORT SERVS., OMB CONTROL NO. 0970-0717, REQUIRED DATA ELEMENTS FOR PATERNITY ESTABLISHMENT AFFIDAVITS (2024), https://www.acf.hhs.gov/sites/default/files/documents/ocse/Required_and_Optional_Data_Elements_for_VAP.pdf.

20. *See* UNIF. PARENTAGE ACT § 301 cmt. (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2002) (commenting on this absence). The 2000 UPA says that a VPA should be signed by the "mother of the child and a man claiming to be the genetic father" in "order to prevent circumvention of adoption laws." *Id.* Curiously, the 1973 UPA recognized a paternity presumption for a man who receives a child into his home and openly holds out the child as his own, with no mention of adoption law circumvention. UNIF. PARENTAGE ACT §§ 204(a)(5), 204 cmt. (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1973) (in 1973, hold out had no required time period, but demanded hold out as "his natural child;" since 2002 a man's residence in household "for the first two years of the child's life" is required, but the man's hold out only goes to a "child as his own"). Not all states require paternity acknowledgers to know or reasonably believe there are genetic ties between male signatories and children. *See, e.g., In re* Moiles, 843 N.W.2d 220 (Mich. 2014) (reviewing Michigan Acknowledgment of Parentage Act, Mich. Comp. Laws 722.1001 et. seq.).

21. 42 U.S.C. § 654(15) (2024).

22. 42 U.S.C. § 666(a)(5)(D)(ii),(iii)(2024). *See generally* Paula Roberts, *Truth and Consequences: Part III. Who Pays When Paternity is Disestablished?*, 37 FAM.L.Q. 69, 82-90 (2003) (Appendix B).

23. 42 U.S.C. § 666(a)(5)(D)(ii) (2024).

24. While a "signatory" may rescind, 42 U.S.C. § 666(a)(5)(D)(ii) (2024), a "challenger" may seek to undo "a signed voluntary acknowledgment of paternity,"42 U.S.C. § 666(a)(5)(D)(iii) (2024). Post 60-day signatory rescissions of, rather than challenges to VPAs are sometimes recognized by state statutes. *See, e.g.*, CAL. FAM. CODE § 7580(b) (signing minor may rescind "at any time up to 60 days after the parent reaches the age of 18 or becomes emancipated whichever first occurs.").

25. 42 U.S.C. § 666(a)(5)(D)(iii) (2024). Some states have additional bases for challenge. *See, e.g.*, MICH. COMP. LAWS § 722.1443(12)(d) ("misrepresentation or misconduct").

definitions of fraud, duress or mistake, states have exercised broad and diverse interpretive authority,[26] as they also do regarding who may challenge paternity acknowledgments after 60 days.[27]

Acknowledgments "must be filed with the state registry of birth records" so that there is "a statewide database" to which an IV-D agency has "timely access."[28] There is no federally mandated record keeping on acknowledgment rescissions or challenges.[29]

The Social Security Act has prompted states to develop acknowledgements for use in securing paternity for child support purposes. While the Act has some mandates on VPAs, the mandates are not comprehensive, leaving states with broad discretion on the VPA processes.

III. THE SPREAD OF VOLUNTARY PARENTAGE ACKNOWLEDGMENTS

Federal welfare law "child support" mandates prompted states to initiate VPA procedures in IV-D child-support settings.[30] These procedures have been used both historically and recently by the states in non-IV-D child support settings[31] and in non-support paternity parentage settings, like custody[32] and

26. On the varied state laws on fraud, duress, and mistake, *see, e.g.*, Jeffrey A. Parness & David A. Saxe, *Reforming the Processes for Challenging Voluntary Acknowledgments of Paternity*, 92 CHI. KENT L. REV. 177, 194-96 (2017).

27. On the varied state laws on who may challenge VPAs after 60 days, *see e.g.*, *id.*, at 186-194.

28. 45 C.F.R. 303.5(g)(8).

29. Records on VPA challenges are often not maintained by state governments. In 2016, American state vital records (and other birth information) officers were surveyed. Survey results revealed that these officers frequently have (at best) incomplete information on post 60-day VPA rescissions. Survey results were reported in Reforming the VPAs, *supra* note 26 at n.37. And *see e.g.*, April 6, 2016 email from E. Nicholl Marshall, N.H. DIV. OF VITAL RECS. ADMIN. ("We also do not keep track of how many… rescissions of paternity were made, although we promptly update the birth record when a rescission of paternity is made," and presumedly prompts a request for birth record change); April 11, 2016 email from Greg Crawford, KAN. VITAL STAT. DATA ANALYSIS ("we do not have any information"); April 18, 2016 letter from John R. Mier, MO. DEP'T OF SOC. SERVS. ("we do not generally track the VPA submitter's follow-up actions"); and email from Carmell R. Barth, N.D. DEP'T OF HEALTH ("unfortunately, we don't have information available on rescissions").

30. VPAs predated the 1995 federal laws in some states. *See e.g.*, Uniform Parentage Act § 4(a)(5) (1973) (man presumed a natural father of a child when he "acknowledges paternity . . . in writing" filed with government) and Neb. Stat. 43-1409, set out in 1994 Neb. Laws L.B. 1224.

31. *See e.g.*, Cal. Fam. Code §§ 7570(a) ("child support award") and 7570(b) ("greater access to child support and other benefits", including per 7570(a), "social security, health insurance, survivors' benefits, and inheritance rights"). *But see* CAL. FAM. CODE § 7570(a) (VPA promotes "knowledge of family medical history…often necessary for correct medical diagnosis and treatment," as well as knowledge "important to a child's development").

32. *See e.g.*, Uniform Parentage Act §§ 305(a) (2017) (VPAs are "equivalent" to parentage adjudications and confer "all rights and duties of a parent") and 203 (a parent-child relationship established under the Act "applies for all purposes").

tort.[33] Further, VPA procedures are increasingly employed in parentage situations outside of gametes providers, that is, parentage not founded on genetic ties. State parentage acknowledgment laws are driven today by not only the federal IV-D directives, but also by the Uniform Parentage Acts (UPAs) promulgated by a national, nongovernmental commission.[34]

Each of the three UPAs recognize childcare parentage in those who have undertaken a voluntary paternity or parentage acknowledgment. With acknowledgments, there is actual consent to parentage by expecting or existing legal parents and by non-parents. Such non-parents may have no actual genetic ties to the acknowledged children. Increasingly, acknowledgment signors need not even believe there are genetic ties.[35]

The 1973 UPA recognizes "a man is presumed to be the natural father of a child," thus prompting childcare parentage, if "he acknowledges his paternity in a writing" filed with the state which is not disputed by the birth mother "within a reasonable time after being informed."[36] Beliefs about "natural" bonds seem quite important, even if mistaken.

The 2000 UPA, as amended in 2002, recognizes no childcare parentage presumption based on a paternity acknowledgment signature.[37] It does recognize the birth mother and "a man claiming to be the genetic father of the child may sign an acknowledgment of paternity with intent to establish the man's

33. *See e.g.*, 410 ILL. COMP. STAT. 535/12(4) (unless otherwise provided in the Vital Records Ac, the name of the father of a child born to an unwed mother "shall be entered on the child's birth certificate" only if there is a VPA). *See also* Hussey v. Woods, 2015 WL 5601777 (Tenn. App. 2015) (birth mother, on behalf of child, seeks to employ in Tennessee a VPA executed in Mississippi in a wrongful death lawsuit first pursued by the deceased male signor's mother).

34. THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, also known as the UNIFORM LAW COMMISSION, has operated since 1892. https://perma.cc/D5BE-L3CV. A provision in the draft leading to the 1973 UPA recognized that if no second legal parent was pursued or recognized within a year of the birth of a nonmarital child born of consensual sex, "an action shall be brought promptly on behalf of the child by the appropriate state agency." Krause, *supra* note 6, at 1 and 11-12 (reporter-draftsman to the drafting committee deemed the striking of this provision before UPA passage was regrettable).

35. In contrast to VPAs, where presumed spousal parents can deny parentage due to lack of genetic ties so that genetic parents may undertake VPAs, at times presumed spousal parents can deny parentage without any accompanying new VPA undertaking. *But see* Mackley v. Openshaw, 2019 UT 74, ¶3 (holding that a husband could not rescind his earlier denial of paternity in order to secure an order of legal fatherhood because any mistake in making the denial involved legal, not factual matters).

36. Uniform Parentage Act § 4(a)(5) (1973). Rebuttal of such a presumption occurs only with "clear and convincing evidence of no biological ties," together with "a court decree establishing paternity of the child by another man." Uniform Parentage Act § 4(b) (1973).

37. 2000 Uniform Parentage Act § 204(a) (2000).

paternity."[38] Here too, genetic bonds seem quite important even when beliefs are mistaken.[39]

The 2017 UPA also recognizes a VPA can prompt childcare parentage without a presumption. [40] But it is revolutionary in that it recognizes parentage establishments under an expanded field of acknowledgment signatories, including not only those who claim to be "an alleged genetic father" of a child born of sex,[41] but also those who do not allege genetic ties. This includes a presumed parent (man or woman) due to an alleged or actual marriage;[42] a presumed parent due to a holding out of the child as one's own while residing in the same household "for the first two years of the life of the child;"[43] and, an intended parent (man or woman) in a non-surrogacy, assisted reproduction setting.[44] The UPA thus recognizes parentage acknowledgments beyond VPAs. Acknowledgments under the 2017 UPA may be undertaken "before or after the birth of the child."[45] Beliefs on genetic ties need not always exist in undertaking parentage acknowledgments. The lack of genetic ties cannot always undo such parentage.[46]

In recognizing parentage acknowledgments by those with no genetic ties to acknowledged children, the 2017 UPA allows circumvention of formal adoption laws and the safeguards they provide for children, including background checks

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38. *Id.* § 301. The accompanying Comment indicates that "a sworn assertion of genetic parentage of the child" is needed though not "explicitly" required by federal welfare subsidy statutes that often prompt state VPA laws, a federal statutory "omission" that is corrected in the 2000 UPA. The Comment also recognizes a male sperm donor may undertake a VPA in an assisted reproduction setting where his "partner" is the birth mother. The 2000 UPA declares a VPA can be rescinded within 60 days of its effective date by a "signatory," *Id.* § 307; thereafter, a signatory can commence a court case to "challenge" the VPA, but only on "the basis of fraud, duress, or material mistake of fact" within two years of the VPA filing, *Id.* §308(a).

39. The U.S. Dept of Health and Human Services, in 2003, did opine that the federal Social Security Act did not allow IV-D states to "require genetic testing" before accepting a VPA. Sherri Heller, Paternity Disestablishment: Policy Interpretation Questions, OFFICE OF CHILD SUPPORT SERVS. (April 28, 2003), https://perma.cc/9UUR-F2YE.

40. Uniform Parentage Act § 201(5) (2017). Some marital parentage presumptions, including marriages occurring after birth, can be prompted by parentage assertions in records filed with the state. Uniform Parentage Act § 204(a)(c)(i) (2017).

41. *Id.* § 301.

42. *Id.* §§ 301 and 204(a)(1)(A)-(C).

43. *Id.* §§ 301 and 204(a)(2).

44. *Id.* §§ 301 and 703.

45. *Id.* § 304(c).

46. As with the 2000 UPA, signatories may rescind within 60 days. *Id.* § 308(a)(I) (within two months of their effective dates). Challenges may proceed thereafter, "but no later than two years after the effective date" and "only on the basis of fraud, duress or material mistake of fact." *Id.* § 309 (a). While non-signatory challenges may be pursued within "two years after the effective date of the acknowledgement" such challenges usually will only be sustained when a judge finds the child's "best interest" is served. *Id.* §§ 309(b) and 610(b)(1) and (2). Non-signatory challengers are limited. Those with standing include the child; a parent under the 2017 UPA; "an individual whose parentage is to be adjudicated;" an adoption agency; and a child support, or other authorized, governmental agency. *Id.* §§ 610(b) and 602. Thus, the parents or siblings of an alleged sperm provider of a child born of consensual sex seemingly cannot challenge.

and best interest findings. Gone is the concern in the 2000 UPA, lamenting that the federal statutes guiding state paternity acknowledgment laws did not expressly "require that a man acknowledging paternity must assert genetic paternity."[47] Further, a related Comment indicates that the 2000 UPA was "designed to prevent circumvention of adoption laws by requiring a sworn statement of genetic parentage of the child."[48] Thus, in 2017, the UPA policies on acknowledgments changed dramatically.

Current U.S. state laws reflect the varying UPA approaches. Only a few states to date have extended parentage acknowledgments to married same-sex female couples where a child is born of consensual sex.[49] Parentage acknowledgment opportunities are not, and clearly could not be, extended to same-sex male couples where one of the men naturally conceived a child born of sex. There, the birth mother is an existing legal parent,[50] and state laws as of yet generally fail to recognize acknowledgments for third parents.[51]

Acknowledgment statutes are most often employed by those involved in births outside of marriage who establish legal paternity.[52] VPAs are typically distinguished from birth certificate recognitions of parents who were or are married to birth mothers and who are presumed parents who never undertake VPAs.[53] VPA parentage is distinct from presumptive spousal parentage, as the latter is more easily rebutted.[54] Acknowledged parents who reside and hold out

47. Uniform Parentage Act, Opening Comment to Article 3 (2000).

48. *Id.*

49. *See e.g.*, 15C VT. STATS. §§ 301(a)(4) and 401(a)(1) (person married to birth mother at time child is born can undertake voluntary parentage acknowledgment) and Stat.WASH. REV. STAT. § 26.26A.200 (birth mother and "presumed parent" may sign acknowledgment; presumed parent includes the spouse of birth mother under 26.26A.115(1)(a)(i)). On the need for allowing parentage acknowledgments for same-sex female couples, *see e.g.*, Jessica Feinberg, "A Logical Step Forward: Extending Voluntary Acknowledgments of Parentage to Female Same-Sex Couples," 30 YALE L.J. OF LAW & FEMINISM 99, 135 (2018) (same-sex female couples who conceive children using donated sperm). On the problems with two women VPAs for children born of consensual sex, *see* Jeffrey A. Parness, "Unnatural Voluntary Acknowledgments Under the 2017 Uniform Parentage Act," 50 UNIV. OF TOL. L. REV. 25 (2018) [Unnatural VPAs]. And *see infra* notes 267 and 268 (commentators advocating VPA processes for same-sex female couples).

50. *See e.g.*, Quilloin v. Walcott, 434 U.S. 246, 256 (1978) (distinguishing sperm providers), Tuan Anh Nguyen v. Immigr. and Naturalization Serv., 533 U.S. 53, 64-65 (2001) (by giving birth one always has developed "a real, meaningful relationship" with the child).

51. In California there can be three parents under law. Cal. Fam. Code § 7612(c). But a presumed parent does not include a VPA parent. Cal. Fam. Code §§ 7612(c) and 7611 (voluntary parentage acknowledgment does not prompt presumed parentage).

52. *But see* In re Sebastian, 879 N.Y.S. 2d 677 (N.Y. Surr., N.Y. 2009) (suggesting woman whose ova was used by her partner to bear a child born of assisted reproduction might employ the voluntary acknowledgment process) and Orosco v. Rodriguez, 376 So.3d 92 (Fla. 6th Dist. Ct. App. 2023) (genetic father of child born to one who is married to another cannot, by statute, undertake a VPA).

53. *See e.g.*, Castillo v. Lazo, 386 P. 3d 839 (Ariz. App. 2d 2016) (birth certificate naming husband is not "equivalent" to a VPA).

54. *Compare e.g.*, Uniform Parentage Act§ 308 (2000) (VPA challenge after 60 days only "on basis of fraud, duress or material mistake of fact") with Uniform Parentage Act § 607 (2000) (presumed parent can seek to disprove parent-child relationship within two years of birth).

children as their own thus differ from residency/hold out parents who never undertake acknowledgments.[55]

State parentage/paternity acknowledgment laws vary significantly.[56] In New York, the "Acknowledgment of Parentage" form, as of April, 2021, requires the "birth parent" to sign with the "other parent," who is said to be the "genetic or intended parent" of the named child.[57] In California, there is a form for "Acknowledgment of Paternity/Parentage,"[58] which can be employed by an unmarried birth-giver and "another person who is a genetic parent"[59] or by a birth-giver and an intended parent of a child "conceived through assisted reproduction,"[60] but which seemingly needs post-birth signatures.[61] In Maine, an "Acknowledgment of Parentage" can be employed by a "parent" who "resided with the mother/parent in the same household with the child and openly held out the child as the person's own child from the time the child was born or adopted and for a period of at least two years thereafter while assuming personal, financial, or custodial responsibilities for the child."[62] And in Massachusetts, a "Voluntary Acknowledgment of Parentage" can be employed by a parent who obtained a pre-birth court order establishing he/she is "the parent of the child (delivered by a gestational surrogate)."[63] Some states, including Texas and Vermont, provide for acknowledgments to be filed prior to birth.[64] Others require information on any completed genetic testing be submitted; provide forms be

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55. *See, e.g.*, VT. STAT. ANN. tit. 301 15C § (a)(4) (West 2018) (stating a presumed hold out/residency parent may, but need not, sign a VPA).

56. *See* Jeffrey A. Parness and Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 UNIV. BALT. L. REV. 53 (2010) ; Jayna Morse Cacioppo, *Voluntary Acknowledgments of Paternity: Should Biology Play a Role in Determining Who Can Be a Legal Father?*, 38 IND. L. REV. 479 (2005). State VPA laws also vary in their disestablishment standards. Due to federal welfare subsidy mandates, VPAs must conform to the federal Social Security Act. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, § 102, 110 Stat. 2105 (codified in scattered sections of 42 U.S.C.). *See* Paula Roberts, Truth and Consequences: Part III. Who Pays When Paternity Is Disestablished, 37 FAM. L.Q. 69, 82-90 (2003) (discussing disestablishment norms and including table citing all statutes).

57. New York Acknowledgment of Parentage, LDSS-5171 (Rev. 04/21) (defining intended parent is defined as "an individual who intends to be legally bound as the parent of a child resulting from assisted reproduction"). Such an intent to be a parent (and not just a sperm donor) seemingly must exist at the time of conception, so that a post-birth VPA executed by a sperm donor (here, there was at conception an agreement not to be a father) is void. C.A. v. R.R., No. A167444, 2023 WL 8735242 at *9 (Cal. Ct. Apr. Dec. 19, 2023).

58. California Acknowledgment of Parentage, Form VS 22 (Rev. 04/20).

59. CAL. FAM. CODE § 7573(a)(1) (West 2020).

60. CAL. FAM. CODE § 7573(a)(2) (referencing CAL. FAM. CODE § 7613 (West 2020)).

61. CAL. FAM. CODE § 7573(b) ("record signed by the woman who gave birth").

62. Maine Acknowledgment of Parentage, S:\VS27-A 12/2021.

63. Massachusetts Acknowledgment of Parentage, R-130-07012018.

64. *See, e.g.*, TEX. FAM. CODE ANN. § 160.304(b) (West 2025) (prescribing that paternity acknowledgment "may be signed before the birth of the child"). VT. STAT. ANN. tit. 15C § 304(b) (West 2018).

used by residents for out-of-state births; require witnesses or notaries; or require parental or guardian consent if the signing birth-giver is young.[65]

There are significant differences in current acknowledgment challenge laws. As noted, under federal statutes, in participating IV-D states, paternity acknowledgments in child support settings can only be challenged by the signatories on the grounds of fraud, duress, or material mistake of fact.[66] These grounds are not further defined by Congress and are differently implemented in the states.[67]

State laws vary on VPA challenges beyond signatories,[68] with recognized challengers including at times, alleged genetic fathers, governmental offices and/or officers, the children, and certain family members of VPA signatories.[69] The standards for successful challenges can vary between non-signatory challengers.[70]

There are also varied time limits on post 60-day parent acknowledgment challenges. Challenges must be commenced under written laws within a year in Massachusetts,[71] within two years in Delaware,[72] and within four years in Texas.[73] In Utah, a statutory challenge may be made "at any time" on the ground of fraud or duress, but only within four years for a material mistake of fact.[74] In Michigan an alleged genetic father can seek to revoke an acknowledgment of parentage "within 3 years after the child's birth" or within 1 year "after the

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65. *See* Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgements at Birth*, 40 UNIV. BALT. L. REV. 53, 63-87 (2010).

66. 42 U.S.C. § 666(a)(iv)(D)(iii) (1982).

67. *See, e.g.*, Jeffrey A. Parness & David A. Saxe, *Reforming the Process for Challenging Voluntary Acknowledgements of Paternity*, 92 CHI. – KENT L. REV. 177, 183-203 (2017).

68. *Id.* at 186-94.

69. *Id.*

70. *See, e.g.*, State ex rel. J.E., 524 P.3d 1009, 1017-18 (Utah Ct. App. 2023) (holding that a child can challenge VPA based simply on genetic testing, with no need to show fraud, mistake or duress as required of other challengers(citing Utah Code Ann. §78B-15-623(2) (West through 2024 Legis. Sess.); Utah Code Ann. §78B-15-307(1) (West through 2024 Legis. Sess.).

71. MASS. GEN. LAW 209C, §(11)(a) (West current through 2024 Legis. Sess). *See also* State v. Smith, 392 P.3d 68 (Kan. 2017) (holding that a one year (after birth) limit on signatory challenges applied though there were found technical violations (e.g., no proper notarizations) of the statute); J.M. v. C.G., 212 N.E.3d 776 (Mass. 2023) (holding that there is a one year limit for genetic father to challenge another man's VPA notwithstanding genetic father's allegation of fraud, though he could pursue common law parentage if he proved substantial parent-child relationship existed).

72. DEL. CODE ANN. tit. 13, § 8-308(a)(2) (West 2024). *See also* VT. STAT. ANN tit. 15C, §308(a)(2) (West 2018); Paul v. Williamson, 322 P. 3d 1070 (Okla. App. Div. 1 2014) (employing Oklahoma two-year limit against alleged biological father per 10 Okl. Stat. 7700-609(B)). *Compare* LA. STAT. ANN. §9:406 (West through 2024 Legis. Sess.) (repealing a two-year prescriptive period previously imposed for revocation of authentic acts of acknowledgement in 2016), *with* DEL. CODE ANN. tit. 13, § 8-308(a)(2) (West 2024).

73. TEX. FAM. CODE ANN. §160.308(1) (West through 2023 Legis. Sess).

74. UTAH CODE ANN. §78B-15-307 (West through 2024 Legis. Sess.).

acknowledgment was signed."[75] Where there are no written time limits, trial court discretion reigns (and is often quite broad).[76]

Failure to meet express time limits in VPA challenge laws may not foreclose a parentage action by a genetic father of a child born of consensual sex. In Massachusetts, a father has a "common law claim pursuant to the court's equity jurisdiction" to "establish paternity" by demonstrating "a substantial parent-child relationship by clear and convincing evidence."[77] However, there are interstate differences in whether a successfully challenged VPA eliminates past child support arrearages.[78] Further, there is precedent that different timing requirements for VPA challenges operate in different settings.[79]

IV. NONACKNOWLEDGMENT PROCESSES FOR ESTABLISHING PARENTAGE

Beyond parentage acknowledgments, there are several other avenues to legal parentage. Some are old and predate the 1993 federal VPA laws, while others are quite new. Upon a review of these, the non-VPA avenues, and of current constitutional constraints on state childcare parentage establishments, this paper will demonstrate the pressing need for reforming in-hospital parent assertion laws, including laws on parent acknowledgments and declarations. Reforms are needed not only because some contemporary state nonacknowledgment parentage laws clash with the state's parent acknowledgment laws, but also because some parent in-hospital assertion laws, including VPAs, run afoul of constitutional limits. Following is a brief review of the major state law avenues for establishing nonacknowledgment legal parenthood.

The following review chiefly focuses on nonacknowledgment legal parentage for childcare (custody, visitation, allocation of parental responsibilities) and child support purposes. This review demonstrates the increasing roles played by parental intentions in parentage establishment.[80] This review also recognizes that a state need not employ a nonacknowledgment form

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75. MICH. COMP. LAWS ANN. §722.1437(1) (West through 2024 Legis. Sess.), *applied in* Taylor v. Brown, No. 366736, 2024 WL 207022 (Mich. Ct. App. 2024) (holding a revocation petition dismissed as no showing of mistake of fact or newly-discovered evidence).

76. *See, e.g.*, Matter of Neal, 184 A.3d 90 (N.H. 2018) (finding sustainable exercise of trial court discretion where a 2009 VPA was challenged by male signatory in 2015 after a 2012 paternity test revealed that he was not the biological father; challenge brought in November, 2015, after child contact was cut off in March, 2014); Kelley v. Kelley, 55,358 (La. App. 2 Cir. 12/20/23), 376 So. 3d 320, 324 (finding that 2012 and 2014 acknowledgments by one then the mother's husband are challenged in 2022, and found to be "absolute nullities" as there were no genetic ties).

77. J.M. v. C.G, 212 N.E.3d 776, 783 (Mass. 2023).

78. *See, e.g.*, Adler v. Dormio, 872 N.W.2d 721 (Mich. Ct. App. 2015) (reviewing Michigan laws on when responsibility for arrearages may be eliminated).

79. *See, e.g.*, *In re* Beck, 2023 OK. CIV APP 47, 541 P.3d 208 (allowing VPA challenge in probate proceeding regarding whether a child was an heir, though a Uniform Parentage Act challenge would be differently assessed).

80. *See* Emily J. Stolzenberg, *Nonconsensual Family Obligations*, 48 BYU L. REV. 625, 625 (2022) (reviewing "distinct roles consent plays in justifying family obligations," with much "uncritical consent-based reasoning").

of parentage to encompass parentage in all contexts.[81] Thus, legal parentage can be established for child support, but not for childcare.[82] Similarly, legal parentage can operate in probate, but not in childcare.[83]

A. Paternity/Maternity Suits

In many instances, those genetically tied to children can pursue parental recognition. As will be seen, with births arising from assisted reproduction, including artificial insemination and fertilized egg implants, there are usually special avenues.[84] These special pursuit avenues vary for genetic and nongenetic contributors and for nongenetic contributors who were or were not intended childcare parents at the time of birth.

With births arising from sex, those giving birth need not pursue judicial actions in maternity as legal parentage arises automatically.[85] With births arising from consensual sex, sperm contributors can pursue childcare parentage actions in "paternity," which are particularly important for them to undertake when they are otherwise not presumed "natural" fathers.[86] Sperm contributors may also be pursued as child support parents though they have not themselves pursued paternity.

B. Residency/Hold Out Parentage

All UPAs recognize childcare parentage in those who have resided with children whom they held out as their own. Residency/hold out parentage, as a form of parentage for those without genetic or formal adoption ties, can be grounded on the actual, apparent, or presumed consents by existing legal parents to share custody with their partners, roommates, family members, or others.[87] Here, the consents are in some ways like the consents in common law marriage settings in that generally they are only recognized by the state after disputes

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81. *See, e.g.*, Jeffrey A. Parness, *Who Is a Parent? Intrastate and Interstate Differences*, 34 J. AM. ACAD. MATRIM. LAW 455, 460-462 (2022).

82. *See, e.g.*, N.E. v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004). This distinction sometimes goes unrecognized, to the detriment of children. *See, e.g.*, *In re* M.B., 2022 IL App (5th) 220245, ¶ 15, 216 N.E.3d 328, 332 (finding that a statute bars the state from pursing the genetic father for paternity, and presumedly later for child support, where another man's parentage arising from his marriage to the birth mother could not be challenged by the genetic father, who presumedly would seek an allocation of parental childcare rights).

83. *See, e.g.*, In re Scarlett Z.-D., 28 N.E.3d 776, 792 (Ill. 2015).

84. *See infra*, Sections IV(vi)(a-d).

85. There must be "proof of having given birth." *See, e.g.*, UNIF. PARENTAGE ACT § 3(1) (UNIF. L. COMM'N 1973).

86. Presumed natural fatherhood is typically dependent upon actual or attempted marriage to one giving birth at some time before birth, at the time of birth, or at some time after birth. *See, e.g.*, UNIF. PARENTAGE ACT § 4(a)(1-3) (UNIF. L. COMM'N 1973), *and* UNIF. PARENTAGE ACT § 204(a)(1-4) (UNIF. L. COMM'N 2002).

87. To date, there are no residency/hold out parents recognized for childcare purposes wherein there are agreements to share childcare involving expecting legal parents (i.e., pregnant women and those awaiting formal adoption approval) and their partners or others. Expecting parents and their partners or others can utilize other forms of parentage by consent (like agreements regarding assisted reproduction births) to prompt childcare parentage.

regarding family relationships erupt. Yet, implied consents to marriage are, in some important ways, quite distinct from implied consents to dual parentage.

The 1973 UPA itself is very different than the later UPAs on residency/hold out parentage. The 1973 Uniform Parentage Act has this parentage presumption:

(a) A man is presumed to be the natural father of the child if. . .
(4) while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child.[88]

The 2017 Uniform Parentage Act, like the 2000 Uniform Parentage Act,[89] by contrast, says:

(a) An individual is presumed to be a parent of a child if: …
(2) the individual resided in the same household with the child for the first two years of the life of the child, including periods of temporary absence, and openly held out the child as the individual's child.[90]

Many current U.S. state laws reflect the policies of either the 1973 UPA or the 2017 UPA on residency/hold out parentage, with only a few states expressly extending it to same-sex couples.[91] Nevertheless, residency/hold out parentage seems generally available to a female partner of a birth mother given equality demands.[92] Residency/hold out parentage is generally unavailable, however, to a male partner of a birth father where there is a birth mother who remains a legal

88. UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. L. COMM'N 1973).

89. UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. L. COMM'N 2002) (stating same household residence and hold out for the child's first two years).

90. UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM'N 2017).

91. *See, e.g.*, VT. STAT. ANN. tit. 15C § 401(a)(4) (West 2018) (using "person," not man), *and* WASH. REV. CODE § 26.26A.115(1)(b) (2018) (using "individual," not man). *See* Jeffrey A. Parness, *Marriage Equality, Parentage Inequality*, 32 WIS. J.L., GENDER & SOC'Y 179, 188-89 (2017) (discussing the need to treat equally men and women involved in same-sex residency/hold out parentage (and other parentage) settings).

92. *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 670 (Cal. 2005) (finding former unwed lesbian partner a child support parent under California statutory law on presumed natural hold out fathers); *See* Chatterjee v. King, 280 P.3d 283, 291-93 (N.M. 2012) (holding residency/hold out woman is "natural mother"), *and* Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 972 (Vt. 2006) (deciding that upon dissolution of civil union of lesbian couple, both women are custodial parents as statute making husband the presumed "natural parent" of a child born to his wife was applicable via a second statute saying that civil union and married couples shall have the "same" rights under 15 Vt. Stat. 308(4) and 1204(f)). Similar equality mandates operate when there is common law, rather than statutory, hold out parentage. *See, e.g.*, Wendy G-M. v. Erin G-M., 985 N.Y.S.2d 845 (Sup. Ct. Monroe Cnty. 2014). *See also*, Nancy D. Polikoff, *From Third Parties to Parents: The Case of Lesbian Couples and Their Children*, 77 LAW AND CONTEMP. PROBS. 195, 212-19 (2014) (discussing that even where statutes only explicitly recognize residency/hold out parentage for men, women are sometimes deemed parents under the statutes).

parent since state laws recognizing three parents simultaneously are quite limited.[93]

As noted, there are varying U.S. state laws reflecting the distinct UPA approaches to residency/hold out parentage. Some states limit residency/hold out parentage to those who child-rear from birth,[94] following the 2017 UPA.[95] In California, following the 1973 UPA, a man is "presumed to be the natural father of a child" if he "received the child into his home and openly holds out the child as his natural child."[96] There is no explicit statutory requirement that a man who holds out a child as a "natural child" needs to have any beliefs about actual genetic ties. California cases have recognized as residency/hold out parents those who knew there were no genetic ties, but who acted in the community as if there were.[97]

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93. In California, though, there can sometimes be three legal parents, including the birth mother, her spouse, and a residency/hold out parent. *See* CAL. FAM. CODE § 7612(c) (West 2020) (stating that three parents where recognition of only two parents "would be detrimental to the child"). *But see* C.G. v. J.R. 130 So. 3d 776, 782 (Fla. Dist. Ct. App. 2014) (holding Florida law does not support enforcement of an agreement on sharing child custody which was entered into by the married birth mother, her spouse, and the biological father of a child born of sex).

94. *See, e.g.*, TEX. FAM. CODE ANN. § 160.204(a)(5) (West 2015) (holding a man is a presumed father if "during the first two years of the child's life, he continuously resided in the household in which the child resided and he represented to others that the child was his own"). *But see* WASH. REV. CODE § 26.26.115(1)(b) (2018) (stating an individual "who resided in the same household for "first two years of life").

95. There are other variations interstate in custodial parentage based on residency/hold out. For example, some U.S. state laws do not require receipt into the home. *See, e.g.*, N.J. REV. STAT. § 9:17-43(a)(4) (2023) (receiving into his home or "provides support for the child"). Some U.S. state laws more explicitly require existing legal parents to agree to such matters as residency or hold outs by nonparents who can later morph into new childcare parents on equal footing with existing legal parents. *Compare* VT. STAT. ANN. tit. 401 (a)(4) (West 2018) (presuming residency/ hold out parent if in child's first 2 years, where "another parent" of child jointly held child out as presumed parent's child), *with* N.J. REV. STAT. §§9:17-43(a)(4)-(5), 9:17-40 (2023) (stating a man can be "presumed to be the biological father of a child on equal footing with the unwed birth mother, if he "openly holds out the child as his natural child" and either "receives the child into his home" or "provides support for the child").

96. CAL. FAM. CODE § 7611(d) (West 2020). How long an alleged residency/hold out parent must so act is determined on a case-by-case basis. *See, e.g.*, *In re* J.B., No. B291208, 2019 WL 1451304 (Cal. Ct. App. 2019) (holding a two day hold out is insufficient for presumed parent status). *See, e.g.*, *In re* N.V., No. G049597, 2014 WL 2616603 (Cal. Ct. App. 2014) (reviewing cases) (discussing what constitutes receipt into the home). *See also*, MONT. CODE ANN. § 40-6-105(d)(1) (1997) (stating that a person is presumed the natural father if "while the child was under the age of majority," the person "receives the child into the person's home and openly represents the child to be the person's natural child"). Such a presumption has been sustained when challenged on the ground of interfering with federal constitutional childcare interests. *See, e.g.*, R.M. v. T.A., 182 Cal. Rptr. 3d 836 (Cal. Ct. App. 2015)(holding preponderance of evidence norm used to establish presumption).

97. *See, e.g.*, *In re* Jesusa V., 85 P. 3d 2, 15 (Cal. 2004) (holding both Paul (also the husband) and Heriberto (also the biological father) were each judicially declared to be "presumed" California fathers because each had received Jesusa V. into his home and held her

U.S. state laws also vary on the standing to present a challenge to residency/hold out parentage. Consider challenges by nonresident genetic parents (like unwed genetic fathers) who did not know, and could not reasonably have known, that residency/hold out was being undertaken by a nonparent together with an existing legal parent (usually the birth mother). In Vermont, such a person may challenge a residency/hold out parentage within two years of "discovering the potential genetic parentage" in cases where there was no earlier actual or reasonably assumed knowledge of the potential due to "material misrepresentation or concealment."[98]

There are also different time limits on challenges,[99] as well as on the unavailability of "misrepresentation" or "concealment" as a condition of extending the time limits for challenging the residency/hold out parentage of others.[100] Thus, some state laws effectively foreclose nonresidential genetic parents, with constitutional rights/interests, from challenging the establishment of residency/hold out parentage in others.[101]

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out as his natural child); Barnes v. Cypert, No. F049259, 2006 WL 3361790 (Cal. Ct. App. 2006) (holding a birth mother's uncle is a presumed parent), *and In re* Jerry P., 116 Cal. Rptr. 2d 123, 816 (Cal. Ct. App. 2002) (holding presumed residency/hold out parent need not have, or even claim to have, biological ties).

98. VT. STAT. ANN. tit. 15C § 402(b)(2) (West 2018).

99. *See, e.g.*, UNIF. PARENTAGE ACT § 608(b) (UNIF. L. COMM'N 2017) (stating presumed parentage under § 204, including residency/hold out parentage, often "cannot be overcome after the child attains two years of age"). *See also*, Del. Code Ann. tit. 8 § 204(a)(5) (West 2024), *and* DEL. CODE ANN. tit. 8 § 607(a) (West 2010) (following presumed parentage until the child attains the age of two). *But see* UNIF. PARENTAGE ACT §4(b) (UNIF. L. COMM'N 1973) (stating a presumed residency/hold out parentage can be "rebutted in an appropriate action," with no time limit expressed). *See also*, CAL. FAM. CODE § 7612(a) (West 2020) (following the rebuttal with no time limit).

100. *Compare, e.g,* UNIF. PARENTAGE ACT §§ 204(a)(2)-(b), 608(b) (UNIF. L. COMM'N 2017) (stating a two year limit on challenging residency/hold out parentage of an "individual" does not operate when the individual is "not a genetic parent, never resided with the child, and never held out the child as the presumed parent's child"), *with* UNIF. PARENTAGE ACT §§ 204(a)(5)-(b), 607(b) (UNIF. L. COMM'N 2000) (stating a two year limit on actions to disprove earlier determined presumed residency/hold out parentage in a "man" does not operate when there was, in fact, no cohabitation or sexual intercourse during the probable time of conception and the presumed parent never openly held out the child as his own), *and* UNIF. PARENTAGE ACT § 4(a)(4), 6(b) (UNIF. L. COMM'N 1973) (stating that a presumed residency/hold out parentage can be challenged "at any time").

101. Even where there is standing in a genetic parent to challenge, the challenger's parental rights, *see* Troxel v. Granville, 530 U.S. 57 (2000), or the parental opportunity interests, *see* Lehr v. Robertson, 463 U.S. 248, 262 (1983), may be overcome in a child's best interest hearing which does not have the substantive and procedural safeguards of a parental rights termination proceeding, *see* Santosky v. Kramer, 455 U.S. 745, 769 (1982) (at least "clear and convincing evidence"), as occurs, for example, in a formal adoption case. *See, e.g.*, UNIF. PARENTAGE ACT § 613 (UNIF. L. COMM'N 2017) (adjudicating competing claims of parentage, as between a residency/hold out parent and a male genetic parent). A case wherein a residency/hold out nongenetic parent won out in a parentage dispute with a residency/hold out genetic parent is *Jesusa V*., 85 P.3d at 2. Commentaries generally have failed to address such foreclosures. Such failures are especially problematic when the nonresident genetic parent has maintained a substantial, or even some, degree of childcare, thus arguably able to

C. De Facto Parentage

The 2017 UPA, but neither of its predecessors, expressly recognizes "de facto" parenthood as a form of childcare parentage for those without biological or formal adoption ties.[102] Such parenthood is grounded in far more explicit agreements for shared custody between existing legal parents and those then nonparents than are required in any agreements on residency/hold out parentage.[103]

While both de facto parentage and residency/hold out parentage in the 2017 UPA encompass human acts occurring at no particular time or in no particular place, only de facto parentage has all of the following conditions:

> (a) A proceeding to establish the parentage of a child under this section may be commenced only by an individual who: (1) is alive when the proceeding is commenced; and (2) claims to be a de facto parent of the child.
> (b) An individual who claims to be a de facto parent of a child must commence the proceeding (1) before the child is 18 years of age and (2) while the child is alive …

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maintain his or her "superior" parental rights. For example, Professor Higdon only implicitly acknowledges that states must "adequately protect" a legal parent's right to continue to childcare where the acts of others thwart that right. Professor Higdon expressly recognizes state responsibility to protect "adequately" an expecting (or potential) parent's "opportunity to become" a legal parent. Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1537 (2018). He focuses on how parental intentions should sometimes prompt "constitutional parenthood," primarily via the consensual acts of would-be parents before children are conceived (or perhaps born), not on the consensual acts of legal parents involving intended parentage that prompt new parental status for living children (as with residency/hold out parentage and with, what he terms, "psychological" parenthood). *Id*. at 1534-1540 (stating obviously Equal Protection must be afforded). Thus he does not address, for example, how recognitions of residency/hold out parentage in stepparents might be limited by the parental interests of nonresidential, spousal, biological parents who continue to childcare.

While Professor NeJaime supports federal constitutional liberty interests for certain intended parents of living children, he reviews only briefly the limits on such interests, focusing mainly on state policies (like promoting a child's best interests, preventing detriment to a child, and preserving nonresidential parent's "continuing relationship") and not on any federal constitutional limits on impacting negatively the superior parental rights of an existing legal parent uninvolved in (and unaware of) the childcare undertaken by someone then a nonparent. *Compare* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2260 (2017) (focusing "primarily on reform of family law at the state level," though contemplating "eventual constitutional oversight"), *with* David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of Faultless Father*, 41 ARIZ. L. REV. 753, 788-92 (1999) (recognizing the Lehr case limits on formal adoptions posed by the constitutional interests of biological fathers who were not given notice of adoption proceedings).

102. The term "de facto" parent did not originate in the 2017 UPA. The Comment to the Act indicates that the Act's de facto parentage standard was modeled on Maine and Delaware statutes. UNIF. PARENTAGE ACT §609 cmt. (UNIF. L. COMM'N 2017).

103. Expecting legal parents are foreclosed under the 2017 UPA from being bound to any agreements on de facto parentage for children to be born of sex later, as the model law requires, e.g., "a bonded and dependent relationship with the child." UNIF. PARENTAGE ACT §609(d)(5) (UNIF. L. COMM'N 2017). Thus, there is not recognized a possible "bonded and dependent relationship" with a fetus, a fertilized egg, or some child of sex yet unconceived.

> (d) In a proceeding to adjudicate the parentage of an individual who claims to be a de facto parent of the child, if there is only one other individual who is a parent or has a claim to parentage of the child, the court shall adjudicate the individual who claims to be a de facto parent to be a parent of the child if the individual demonstrates by clear and convincing evidence that:
> 1. the individual resided with the child as a regular member of the child's household for a significant period;
> 2. the individual engaged in consistent caretaking of the child;
> 3. the individual undertook full and permanent responsibilities of a parent of the child without expectation of financial benefit;
> 4. the individual held out the child as the individual's child;
> 5. the individual established a bonded and dependent relationship with the child which is parental in nature;
> 6. another parent of the child fostered or supported the bonded and dependent relationship required under paragraph (5); and (7) continuing the relationship between the individual and the child is in the best interest of the child.
>
> (e) In a proceeding to adjudicate the parentage of an individual who claims to be a de facto parent of the child, if there is more than one other individual who is a parent or has a claim to parentage of the child and the court determines that the requirements of paragraphs (1) through (7) of subsection (d) are met, the court shall adjudicate parentage under Section 613, subject to other applicable limitations in this [part].[104]

Clearly, de facto parentage, but not residency/hold out parentage, expressly requires intentional acts by existing legal parents that have prompted healthy, parental-like relationships between their children and those than nonparents.[105]

Of particular note in the 2017 UPA is the de facto parentage requirement that an existing legal parent (i.e., "another parent") "fostered or supported" the parental-like relationship between the child and the nonparent. This fostering and support seemingly includes "actual consent" (whether "express" or "inferred"), "apparent consent," or "presumed consent" to shared custody by the existing legal parent.[106] While addressing childcare arrangements between one legal parent and a nonparent, the 2017 UPA makes no mention, however, of any conduct-consensual or otherwise- of any second (or third) existing legal parent (like a voluntary acknowledgement parent or a presumed spousal parent), or of any expecting legal parent (like a genetic father of a child born of sex who maintains a paternity opportunity interest). Such an unmentioned legal parent may not even know of "another" parent's fostering and support. Under the 2017

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104. UNIF. PARENTAGE ACT § 609(a)-(b), (d)-(e) (UNIF. L. COMM'N 2017).

105. *Compare* UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM'N 2017), and § 609(d)(6).

106. *See, e.g.*, Jeffrey A. Parness, *The Constitutional Limits on Custodial and Support Parentage by Consent*, 56 IDAHO L. REV. 421, 423-425 (2020) (discussing the requisites for differing forms of consent relevant to custodial and support parentage).

UPA, a fostering and support nonparent can later be deemed a de facto parent concurrent with the (effective) termination or diminution of the unaware second legal parent's childcare interests.[107]

The 2017 UPA provides that a proceeding to establish de facto parentage may only be commenced by a living individual claiming to be a de facto parent.[108] Thus, upon a breakup of a family unit between an individual and an existing legal parent and his or her child, the parent or the child seemingly may not seek to establish de facto parentage for child support purposes. By contrast, an existing legal parent and/or the child (and others, like a child-support agency) may pursue an alleged residency/hold out parent for support.[109] The differences in the standing norms present significant Equal Protection, as well as public policy, concerns.[110]

On challenges to earlier determined de facto parentage, the 2017 UPA is relatively silent. It does provide that a child is not bound by an earlier de facto parentage finding unless "the child was a party or was represented" in the earlier proceeding.[111] Further, it recognizes that a party with standing "to adjudicate

107. UNIF. PARENTAGE ACT § 613 (UNIF. L. COMM'N 2017) (stating that where there is no state law recognition of the possibility of three or more custodial parents, a court must "adjudicate parentage in the best interest of the child," with guiding factors enumerated). In the 2017 UPA, there is provided no express and significant mechanism for a second existing legal, or an expecting legal parent, to challenge a petition to establish de facto parentage. *See, e.g.*, *Id*. at §609(e) (UNIF. L. COMM'N 2017) (beyond the birth or adoptive parent, if there is another individual "who is a parent or has a claim to parentage of the child" for whom an alleged de facto parent seeks parental status, that individual's interests must be adjudicated.) Yet how would a court learn of this individual? And is it reasonable to assume that such an individual would likely know of the de facto parent petition and thus be able to intervene?

In Vermont, which substantially enacted the 2017 UPA, an alleged de facto parent's petition to adjudicate his/her "claim to parentage" is to be determined by "clear and convincing evidence," with no explicit statutory mention of the participatory rights of a nonresidential person with "a claim to parentage." VT STAT. ANN. tit. 15C §§ 501(a)(1) and 501(b). *But see* Id. at 501(b) and 206(a)(6) (in considering claims of de facto parentage, courts must consider the "likelihood" of "harm to the child"). *Compare* DEL. CODE ANN. tit. 13, §§ 8-201(c) (de facto parent norms, wherein there is not any presumed parentage if the norms are met) and 8-609(b) (adjudicated father may be challenged no later than two years after the adjudication). While findings of de facto parentage in favor of petitioners can effectively terminate parentage or parental opportunity interests for many, such findings-unlike findings in formal adoption proceedings- need not, at least expressly under the statutes- be preceded by reasonable attempts to notify those whose parental interests are possibly terminated should the petitions be granted.

108. UNIF. PARENTAGE ACT § 609(a) (UNIF. L. COMM'N 2017).

109. UNIR. PARENTAGE ACT §§ 602, 204(a)(2), and 203 (residency/hold out parent) ("[A] parent-child relationship established under this [act] applies for all purposes"). Few public policy or equality concerns have surfaced when there is standing to pursue child support against, for example, an unwed biological father who has lost any childcare parentage opportunity he once possessed. *See, e.g.*, *In re* Stephen Tyler R., 584 S.E.2d 581(W. Va. 2003).

110. *See, e.g.*, Jeffrey A. Parness, *Comparable Pursuits of Hold Out and De Facto Parentage: Tweaking the 2017 Uniform Parentage Act,* 31 J. OF THE AM. ACAD. OF MATRIM. LAW. 157 (2018).

111. UNIF. PARENTAGE ACT §623(b)(4) (UNIF. L. COMM'N 2017).

parentage"[112] may not challenge an earlier de facto parentage finding if that party was a party in the earlier proceeding or received notice of that earlier proceeding.[113]

Both the 2000 American Law Institute (ALI) Principles of the Law of Family Dissolution: Analysis and Recommendations (2000 ALI Principles)[114] and the 2023 ALI Draft of the Restatement of the Law: Children and the Law (2023 ALI Draft)[115] also recognize a form of "de facto" or comparable parentage. Each form requires both residence and consent by at least one existing legal parent. The requirements for these forms differ not only from the 2017 UPA "de facto" parent requirements, but also, perhaps surprisingly, from each other.

The 2000 ALI Principles recognize, as a "parent by estoppel," an individual who lived with the child for at least two years, with "a reasonable, good-faith belief" of biological ties and who continued to accept parentage responsibilities when the belief ended; an individual who lived with the child for at least two years pursuant to an agreement with the child's legal parent (or, if there are two legal parents, both parents) and who held out parentage while accepting "full and permanent" parental responsibilities, assuming the child's best interests are served; and an individual who lived with the child since birth pursuant to a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents), assuming the child's best interests are served.[116] A parent by estoppel can bring an action for an allocation of custodial responsibility.[117]

The 2000 ALI Principles recognize as a "de facto parent" one who is "other than a legal parent or a parent by estoppel"[118] and who lived with and cared for the child for at least two years under an "agreement of a legal parent to form a

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112. UNIF. PARENTAGE ACT §602 (UNIF. L. COMM'N 2017) (standing recognized for an individual, personally or through an authorized legal representative, "whose parentage of the child is to be adjudicated").

113. UNIF. PARENTAGE ACT §611(b) (UNIF. L. COMM'N 2017). *See also* UNIF. PARENTAGE ACT § 603 (UNIF. L. COMM'N 2017) (governing notice of "an individual whose parentage of the child is to be adjudicated," which seemingly could include a nonbirth mother who claims to be a biological parent and thus claims protected parentage opportunity interests). Of course, as in formal adoption proceedings, notice may never reach such a biological parent, as when notice is served by publication.

114. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§2.03(1)(c), 3.02(1)(c) (AM. L. INST. 2000) (including requirements of residence with the child, as well as "the agreement of a legal parent to form a parent-child relationship" unless the legal parent completely fails, or is unable, to perform caretaking functions).

115. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, §1.72(a) (AM. L. INST. Tentative Draft 2023) (including requirements of residence with the child, as well as establishing that "a parent consented to and fostered the formation of the parent-child relationship").

116. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 2.03(1)(b)(ii), 2.03(1)(b)(iv), and 2.03(1)(b)(iii) (AM. L. INST. 2000).

117. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATION §§ 204(1)(b) and 208 (AM. L. INST. 2000).

118. A "legal parent" is "an individual who is defined as a parent under other state law." PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §2.03(1)(a) (AM. L. INST. 2000).

parent-child relationship."[119] A de facto parent can "bring an action" for "an allocation of custodial responsibility for a minor child when the parents do not live together."[120] Unlike a legal parent or a parent by estoppel, however, a de facto parent has no presumptive right to an allocation of decisionmaking responsibility for the child[121] and no presumptive right of "access to the child's school and health-care records to which legal parents have access by other law."[122]

The 2023 ALI Draft describes a de facto parent as a third party who establishes that he/she "lived with the child for a significant period of time," was "in a parental role" long enough that he/she established "a bond and dependent relationship . . . parental in nature," he/she had no "expectation of financial compensation," and "a parent" consented to third party's parental-like role.[123] As of yet, there is no "parent by estoppel."

The 2023 ALI Draft and the 2000 ALI Principles on de facto parentage recognize new childcare parentage designations that adversely impact the childcare interests of one expecting to be a legal parent due to an "agreement" with, or the consent by, another existing legal parent. By contrast, under the 2000 Principles parentage by estoppel can only arise with the agreement of the two existing legal parents of the child.

There are some U.S. state laws on nonmarital, nongenetic and nonadoptive childcare parentage similar to the suggestions in the 2017 UPA, the 2000 ALI Principles and the 2019 ALI Draft on de facto parents. For example, before 2017 there were quite comparable Maine and Delaware statutes[124] and a less

119. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(c) (AM. L. INST. 2000). Alternatively, a de facto parent is one who is other than a legal parent or a parent by estoppel and who lived with and cared for the child for at least two years "as a result of a complete failure or inability of any legal parent to perform caretaking functions." *Id*. Precedents predating the 2000 ALI Principles recognize the concept of de facto parentage in different settings. *See, e.g*., *In re* Kieshia E., 859 P.2d 1290, 1296 (Cal. 1993) (standing of a de facto parent in a juvenile delinquency proceeding); *In re* Dependency of J.H., 815 P.2d 1380, 1384 (Wash. 1991) (stating that in a delinquency case, permissive intervention, not intervention as of right, is available to some foster parents claiming de facto (or psychological) parent status); *In re* B.G., 523 P. 2d 244, 254 n. 21 (Cal. 1974) (not resolving whether a de facto parent may have the same rights of notice, hearing or counsel as have natural parents in Juvenile Court Law proceedings under due process or equal protection principles). The Reporter's Notes to the 2000 ALI Principles observes the "law that most closely approximates the criteria for a 'de facto' parent relationship is that of Wisconsin" where visitation (but not custody) may be awarded "to an individual who has formed a 'parent-like relationship' with a child." PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 cmt. c (AM. L. INST. 2000).

120. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 2.01, 2.04(c) (AM. L. INST. 2000).

121. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.09(2) cmt. *c* (Am. L. Inst. 2000).

122. *Id.* at §2.09(4).

123. *Id.* at app. A § 1.82(a) (AM. L. INST., Tentative Draft No. 2, 2019). *See also id.* at app. A § 1.82(b)–(c) (proof by clear and convincing evidence is required to allow de facto parent's contacts with child or "custodial and decisionmaking responsibility for a child").

124. ME. STAT. tit. 19-a, § 1891 (2023), DEL. CODE ANN. tit. 13, § 8-201(c) (2024).

comparable Wisconsin Supreme Court precedent,[125] that were utilized by the 2017 UPA drafters.[126] Since 2017, a few states have statutorily recognized de facto parenthood utilizing the 2017 UPA guidelines.[127]

Current U.S. de facto parentage laws vary by state.[128] In Delaware, a de facto parent can be judicially recognized for one who had "a parent-like relationship" with "the support and consent of the child's parent or parents," who exercised "parental responsibility," and who "acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature."[129] In Washington, a de facto parent resides with the child for a significant period; engages in consistent childcare, expects no financial compensation for acting in parent-like way, has a bonded and dependent relationship parental in nature, and has the support of "another parent."[130]

On occasion, a state has recognized both residency/hold out and de facto parentage. Thus the Maine Parentage Act, effective in July, 2016, provides for presumed parents who resided since birth with a child for at least 2 years and "assumed personal, financial, or custodial responsibilities,"[131] as well as for de facto parents who, inter alia, resided with the child "for a significant period of time," established with the child "a bonded and dependent relationship," and "accepted full and permanent responsibilities as a parent . . . without expectation of financial compensation."[132] Similarly, there is both residency/hold out and de

125. Holtzman v. Knott (*in re* H.S.H.-K.), 533 N.W.2d 419, 421 (Wis. 1995) (parental-like relationship can prompt visitation rights when in child's best interests).

126. UNIFORM PARENTAGE ACT, § 609 cmt 1 (Unif. L. Comm'n 2017).

127. *See, e.g.*, WASH. REV. CODE. § 26.26A.440 (2018); VT. STAT. ANN. tit. 15C, § 501 (2024).

128. RESTATEMENT CHILD. & THE L. §1.82 cmt *l*. (AM. L. INST., Tentative Draft, 2019).

129. DEL. CODE ANN. tit. 13, §§ 8-201(a)(4) (mother), 8-201(b)(6) (father), 8-201(c) (the three factors to attain "de facto parent status." Together these statutes put de facto parents on equal footing with biological parents) (2003). *See, e.g.*, Smith v. Gues*t*, 16 A.3d 920, 928 (Del. 2011). *But see* Bancroft v. Jameson, 19 A. 3d 730, 750 (Del. Fam. Ct. 2010) (finding statute overbroad and violative of fit mother's and father's due process rights when the mother's boyfriend seeks to be a third parent). *Compare* K.A.F. v D.L.M., 96 A.3d 975, 981 (N.J. Super. Ct. App. Div. 2014) (citing Watkins v. Nelson, 748 A.2d 558, 565 (N.J. 2000) to show former female domestic partner of birth mother has standing to seek childcare order where birth mother ceded some of her parental authority, but where adoptive parent had not; former partner must show "exceptional circumstances").

130. *See, e.g.*, WASH. REV. CODE. § 26.26A.440(4) (2018) (preponderance of evidence); DEL. CODE ANN. tit. 13, § 8-201(c) (2024) (allowing de facto parentage without the consent of the two legal parents arguably diluting the nonconsenting legal parent's rights); *See, e.g.*, V.P. v. A.F., 2023 WL 9327942, n. 43 (Del. Fam. Ct. 2023) (citing Martin v. MacMahan, 264 A.3d 1224, 1234 (Me. 2021), E.N. v. T.R., 255 A.3d 1, 31 (Md. 2021)).

131. ME. STAT. tit. 19-A, § 1881(3) (2016).

132. Id. (de facto parentage allows one who began childcare shortly after birth to achieve parental status though there was no childcare since birth). UNIFORM PARENTAGE ACT, § 609 cmt 4 (Unif. L. Comm'n 2017).

facto parentage in distinct statutes in Delaware,[133] Washington,[134] and Vermont.[135]

Beyond statutes, some judicial precedents beyond Wisconsin recognize de facto parentage. In 2008 the South Carolina Supreme Court, adopting the Wisconsin high court analysis, determined that a nonparent could petition for psychological parent status if the petitioner could meet the following criteria: (1) the biological or adoptive parents consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) the petitioner and the child lived together in the same household; (3) the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) the petitioner had been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.[136] And in 2009, a federal appeals court noted that the Mississippi Supreme Court had long recognized that a person standing "in loco parentis," meaning "one who has assumed the status and obligations of a parent without a formal adoption," has the same "rights, duties and liabilities" as a natural parent. [137] Finally, in Nebraska there operates a common law "in loco parentis" doctrine whose requirements are similar to de facto parent norms, but where the result does not entitle one "to all the same rights as a legal parent would enjoy."[138]

By contrast, in some states where there are no de facto parent statutes, courts choose not to develop precedents (even when they are sympathetic to the pleas for de facto or comparable parentage). In Illinois[139] and elsewhere,[140] high courts have refused to act because any new de facto parentage norms are deemed the responsibility of state legislators. Beyond separation of power concerns, there

133. DEL. CODE. ANN. tit. 13, §§ 8-204(a)(5) (2003) (presumed residency/hold out parent) and § 8-201(c) (2003) (de facto parent).

134. WASH. REV. CODE. §§ 26.26A.115(1)(b) (2018) (presumed residency/hold out parent "for the first four years") and26.26A.440 (2018) (de facto parent).

135. VT. STAT. ANN. tit. 15C, §§ 401(a) (2024) (presumed residency/hold out parent after the first two years) and 501(a) (2024) (de facto parent).

136. Marquez v. Caudill, 656 S.E.2d 737, 743 (S.C. 2008) (following *H.S.H.-K.*, 533 N.W. at 435–436, which sets out norms for nonparent child visitation orders). *See also* Conover v. Conover, 141 A.3d 31, 446–447 (Md. 2016) (using *H.S.H.-K.* in recognizing de facto parent doctrine).

137. First Colony Life Ins. Co. v. Sanford, 555 F.3d 177, 183 (5th Cir. 2009) (relying on, inter alia, Favre v. Medders, 128 So.2d 877, 879 (Miss. 1961)).

138. Noland v. Yost, 998 N.W.2d 57, 71 (Neb. 2023).

139. *See, e.g. in re* Parentage of Scarlett Z.-D., 28 N.E.3d 776, 789–90, 795 (Ill. 2015) (while there is a need for a "comprehensive solution," it must come from the legislature).

140. *See, e.g.* Jeffrey A. Parness, *State Lawmaking on Federal Constitutional Childcare Parents: More Principled Allocations of Powers and More Rational Distinctions*, 50 CREIGHTON L. REV. 479, 489 (2017) [hereinafter *More Principled Allocations*]. For a forceful argument on the need for continuing the common law "equitable parenthood doctrine" even where there are related statutes, *see* Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55 (2017).

are expansive and detailed statutory schemes on parentage, in and outside of childcare, which are said to balance competing individual and societal interests.

Whether in model laws, principles, statutes, or precedents, forms of de facto childcare parentage can arise without the "actual consent" or "apparent consent," per the 2019 ALI Torts Restatement draft, of an existing legal parent, such as a voluntary acknowledged or spousal parent. Such de facto parentage is condoned by some state laws, as well as by the 2017 UPA, where only one of two parents needs to foster or support the de facto parent's dependent relationship.[141]

Similarly, the 2019 ALI Draft on de facto parentage requires only that "a parent" consent to the "formation of the parent-child relationship."[142] By contrast, the 2000 ALI principles on parentage by estoppel require the support, fostering or consent of two existing legal parents.[143] Perhaps this requirement arises because here there can be an allocation of decision-making responsibility for the parent by estoppel or, at least, access to school and health-care records.[144]

D. Spousal Parentage

With advances in reproductive technologies and the advent of same sex marriages, there are increased opportunities for children born into a marriage to have no genetic, biological, or adoptive ties to one of their legal parents. All UPAs recognize spousal parentage, wherein the spouse of one who gives birth is a (oftentimes presumed) second parent under law.

The 1973 UPA presumes that a man is the "natural father of a child if…he and the child's mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated."[145] The requirements for male spousal parentage differ in the case of a child born into marriage via "artificial insemination" utilizing semen that was not donated by a husband: distinct requirements include the husband's consent and the "supervision of a licensed physician."[146]

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141. UNIFORM PARENTAGE ACT, § 609(d)(6) (Unif. L. Comm'n 2017).

142. PARENTAL AUTH. & RESPS. § 1.82(a)(4) (AM. L. INST., TENTATIVE DRAFT NO. 21, 2019).

143. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 203(1)(b)(iii) and (iv) (AM. L. INST. 2000).

144. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 209(2) and (4) (Am. L. Inst. 2000).

145. UNIF. PARENTAGE ACT § 4(a)(1) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LS. 1973). The 1973 UPA also recognizes male parentage presumptions in certain men who married or attempted to marry the natural mothers before or after the births. UNIF. PARENTAGE ACT § 4(a)(2) and (3) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LS (1973).

146. UNIF. PARENTAGE ACT § 5 (NAT'L CONF. OF COMM'RS ON UNIF. STATE LS. 1973). Other forms of artificial insemination, raising "complex and serious legal problems," are not dealt with, as was noted in the earlier Section 5 Comment. This example assumes that the means of conception were known to a court. Failure to follow Section 5 mandates may nevertheless prompt a marital parentage presumption under Section 4 for a child born of artificial insemination. See, e.g., UNIF. PARENTAGE ACT § 4(a)(1) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LS. 1973). (husband is presumed natural father of a child born to his wife "during the marriage").

The 2000 UPA similarly recognizes presumptive male spousal parentage for children born of sex[147] and nonpresumptive spousal male parentage via consent to "assisted reproduction."[148] Further, the 2000 UPA recognizes nonpresumptive spousal parentage via a "validated" gestational mother "agreement."[149]

The 2017 UPA recognizes spousal parentage presumptions that are applicable to both male and female spouses[150] who are married to the birth mothers at the time of birth; married to the birth mothers within 300 days of the marriage's termination; or married to the birth mothers after the child's birth as long as the spouses "asserted parentage."[151] Such presumptive parentage does not, and should generally not, arise for those marrying expecting or existing legal fathers; here, the typical bar on three legal parents is implicated since there is already another expecting or existing legal parent: the birth mother.[152] Presumptive spousal parentage may not arise where a birth occurs through assisted reproduction.[153]

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147. UNIF. PARENTAGE ACT § 204(a)(1) and (2) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LS. 2000) (amended 2002); As with the 1973 UPA, there is also a marital parentage presumption for a man who attempted to marry the birth mother before the child's birth and the child is born "during the invalid marriage," or within 300 days after its termination UNIF. PARENTAGE ACT § 204(a)(3) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LS. 2000) (amended 2002), as well as for a man who married or tried to marry the mother "after the birth of the child" and who "voluntarily asserted his paternity of the child," UNIF. PARENTAGE ACT § 204(a)(4) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LS. 2000) (amended 2002).

148. UNIF. PARENTAGE ACT § 703 (NAT'L CONF. OF COMM'RS ON UNIF. STATE LS. 2000) (amended 2002) (with the consent requisites in § 704). Within 2 years of birth, a husband may dispute paternity if he did not provide sperm or consent. *Id.* at § 705(a). However, if the husband did not provide sperm and did not consent, he may pursue "at any time" an adjudication of nonpaternity where he and the mother "have not cohabited since the probable time of assisted reproduction" and he "never openly held out the child as his own." *Id.* at § 705(b).

149. UNIF. PARENTAGE ACT § 201(b)(6) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LS. 2000) (amended 2002). As to a child born to a gestational carrier where there is a validated agreement, a man and woman are parents, *Id.* at § 801(b), unless the agreement is terminated. *Id.* at §806.

150. UNIF. PARENTAGE ACT § 204(a) (UNIF. L. COMM'N 2017) ("an individual is a presumed parent"). To date, only a few states recognize marital parentage in the female spouse of a birth mother for a child born of sex. *See, e.g.*, WASH. REV. CODE § 26.26.A.115(1)(a)(2018);); VT. STAT. ANN. TIT. 15C, § 401(a)(1).

151. UNIF. PARENTAGE ACT § 204(a)(1) (UNIF. L. COMM'N 2017). There is precedent recognizing spousal parentage where a same-sex female partner, though not married at relevant times, can claim spousal parentage if she proves there were legal bars to marriage at the times, but otherwise there would have been a marriage. *In re* L.E.S., 233 N.E.3d 1259 (Ohio Ct. App 2024).

152. UNIF. PARENTAGE ACT § 613 at Alternatives A and B (UNIF. L. COMM'N 2017).). On polyamorous relationships and three parents under law, see, for example, Note, *Throuples and Family Law*, 108 MINN. L. REV. 1559 (2024).

153. UNIF. PARENTAGE ACT § 701 (UNIF. L. COMM'N 2017).). Nonpresumptive parentage under the 2017 UPA attaches to consenting individuals who agree with birth mothers on joint future parentage where the mothers give birth via "assisted reproduction." *Id.*

In each UPA, marital-like acts can also prompt spousal parentage. Thus, attempts to marry which do not result in actual marriages can trigger childcare parentage in the would-be spouse. For example, under the 2017 UPA there is presumed parentage in a person who married the birth mother after the birth of the child, even if the marriage "is or could be declared invalid."[154]

So spousal parentage can arise, at times, where there is no explicit consent to parentage, or even when there is a likely adversity to parentage: for example, when a wife's extramarital affair prompts for her and her betrayed spouse a pregnancy, birth, and childcare parentage. Yet at other times, the spousal parent presumption does not operate when the marital status remains, but there is no longer an intact family or a marriage to preserve.[155]

Current state laws generally reflect the policies of the UPAs on spousal parentage, but states do not comparably implement these policies.[156] For example, spousal parentage can arise from a marriage in existence at the time of birth, in existence at the time of conception, or in existence during a pregnancy though not at conception or birth.[157]

Spousal parentage, as a form of parentage for those without genetic or adoptive ties, may be seen as grounded in the inferred consent to share custody inherent in actual or purported marriages between expecting or existing legal parents and their actual or would-be spouses. Inferred consents arise when the

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at § 801(3). *See also* UNIF. PARENTAGE ACT §§ 802-807 (UNIF. L. COMM'N 2017) (comparable requirements for each form of agreement, with additional special rules for gestational surrogacy pacts, at Sections 808-812, and for genetic surrogacy pacts, at Sections 813-818). Further, nonpresumptive parentage also attaches to married spouses, unmarried couples, "or one or more intended parents" where there are either gestational or genetic surrogacy agreements. *Id.* at § 703 (consent by an "individual," with the consent requisites in Section 704). *But see* L.E.S., 233 N.E.3d at 1261.

154. UNIF. PARENTAGE ACT § 204(A)(1)(C) (UNIF. L. COMM'N 2017) (assuming the person is "in a record filed" with the state agency maintaining birth records or is named on the child's birth certificate). *See also* UNIF. PARENTAGE ACT § 4(a)(3) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LS. 1973) (similar) and UNIF. PARENTAGE ACT § 204(a)(4) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LS. 2000) (amended 2002) (similar). State laws include 750 ILL. COMP. STAT. ANN. 46/204(a)(3) (West 2017) and CAL. FAM. CODE § 7611(b)(2020).

155. *See, e.g.*, Glover v. Junior, 306 A.3d 899 (Pa. Super. Ct. 2023).

156. On state spousal parentage laws, *see, e.g.*, Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 248-260 (2019) (reviewing past and present spousal parent laws).

157. *See, e.g.*, UNIF. PARENTAGE ACT § 204(a)(1)(A) (UNIF. L. COMM'N 2017) ("an individual is presumed to be a parent of a child if… the individual and the woman who gave birth to the child are married to each other and the child is born during the marriage."). *Compare* GA. CODE ANN. § 19-7-20 (West 1988) (child "born in wedlock or within the usual period of gestation thereafter"); ARIZ. REV. STAT. ANN. §25-814(a)(1) (2017) (marriage "at any time in the ten months preceding the birth"); and MICH. COMP. LAWS § 722.1433(e) (West 2015) (marriage at time of conception or birth). And see State v. EKB, 35 P. 3d 1224 (Wyo. 2001) (two spousal parents as birth mother was married twice during pregnancy; first husband was presumed spousal parent as child was born within 300 days of his divorce, while second husband was presumed spousal parent as he was married to birth mother at the time of birth); *Ex Parte* Kimbrell, 180 So. 3d 30 (Ala. Civ. App. 2015) (child born to woman and her supposed second husband, though there was no divorce from her first husband; both men were presumed spousal parents); and Glover v. Junior, 306 A.3d 899 (Pa. Super. Ct. 2023) (discussing when existing marriage is not intact so as to preclude spousal parentage).

marriage ceremony occurs or is attempted. These inferred consents to parentage encompass future children, whether or not now conceived, as well as some current living children (as with parentage arising from some post-birth marriages).

The circumstances permitting spousal parentage disestablishments vary between states. Variations arise when state public policies differ on the import of genetic ties. Genetic ties are less (or not at all) important when marriage, as in the *Obergefell* ruling, is viewed as "the basis for an expanding list of governmental rights, benefits and responsibilities,"[158] including child custody and support.[159] But in Vermont, genetic ties are more important. Here, a presumed parent is a person who is married to the birth mother at the time of the birth of a child born of consensual sex, but where an alleged unwed genetic father may challenge the presumption within two years of discovering "the potential genetic parentage," though the court may subsequently choose not to disestablish the presumed spousal parentage.[160] Genetic ties are less important where a child is born of consensual sex into a marriage where the nonbirth spouse is not a genetic parent, but is a presumed parent, and where the childcare parentage presumption may not be easily overcome by the birth mother or by a person (like an alleged genetic father) who is outside the marriage.[161] Difficulties in

158. Obergefell v. Hodges, 576 U.S. 644 (2015) (finding that the U.S. Constitution protects same-sex marriage).

159. *See, e.g.*, *McLaughlin*, 401 P. 3d at 495-96 (holding that marital paternity presumption applies to female spouse of birth mother; Arizona spousal parentage presumption statute, ARIZ. REV. STAT. ANN. § 25-814(A)(1), does not specifically reference any likelihood of biological ties in the spouse, but rather addresses the spouse's rights and responsibilities). *See also* Henderson v. Box, 947 F. 3d 482, 487 (7th Cir. 2020) (same sex female spouses are both legal parents of child born in wedlock). *See also* LC v. MG and Child Support Enf't Agency, 420 P. 3d 400, 424-425 (Haw. 2018) (majority opinion on Part III B) (not allowing female spouse to rebut marital parentage due to spouse's failure to consent to assisted reproduction involving her wife since the child's best interests require "a child have two parents to provide financial benefits").

160. VT. STAT. TIT. 15C, § 401(a)(1) and 402(b)(2) (2024).

161. Spousal parentage sometimes can be challenged solely due to lack of genetic ties. *See, e.g.*, *In re* Waites, 152 So. 3d 306 (Miss. 2014) and Castro v. Lemus, 456 P. 3d 750 (Utah 2019) (denial of challenge opportunity would raise constitutional issue, especially where the unwed biological father came forward and provided childcare; constitutional issue is not addressed as the relevant statute allowed a challenge to spousal parentage "by a man whose paternity of the child is to be adjudicated," under UTAH CODE ANN. § 78B-15-602(3) (West 2008). *But* see Michael H. v. Gerald D., 491 U.S. 110, 129 (1989) (federal constitution does not bar a state marital parentage presumption law where the presumption cannot be rebutted by an unwed genetic parent). *See also* Strauser v. Stahr, 726 A. 2d 1052 (Pa. 1999) (marital presumption not rebuttable by genetic father where marriage is intact) [Strauser], employed in Interest of A.M., 223 A. 3d 691 (Pa. Super. Ct. 2019) (transgender spouse of birth mother entitled to marital paternity presumption regarding child born during same-sex marriage). And compare B.S. v. T.M., 782 A.2d 1031 (Pa. Super. Ct. 2001) (no irrebuttable marital parent presumption here as marriage was not intact at relevant times). While an unwed biological father may not himself be able to petition for an adjudication of custodial parentage, he may still be able to be pursued, as by state welfare officials seeking welfare payment reimbursements, for an adjudication of child support parentage, especially when a cuckolded husband is disestablished as a presumed parent. *See, e.g.*, Vargo v. Schwartz, 940 A. 2d 459 (Pa. Super. Ct. 2007).

overcoming a spousal parent presumption are illustrated by short limitation periods for pursuing challenges.[162]

Spousal parentage might also arise where there is a common law marriage. Here, there is no actual or attempted ceremony. Rather, the marriage may only be judicially recognized after receiving proof of an earlier marital-like relationship which did not arise on a particular date, as does a formal marriage. While the UPAs and written state laws today do not expressly address childcare parentage for common law spouses of birth mothers, seemingly such a spouse can attempt to pursue childcare parentage by proving a common law marriage existed at the time of conception, pregnancy, or birth (depending on the state law) so that the child can be deemed to be born into a marriage.[163]

E. Formal Adoption

There is some interstate uniformity in approaching parentage issues in formal adoption proceedings due to state enactments of all, or parts, of the Uniform Adoption Act, a model law proposed by the Uniform Law Commission.[164] The act contains a comprehensive description of both the substantive and procedural law elements for placements of children for adoption, including requisites on consents and relinquishments;[165] on parental rights termination proceedings;[166] and on evaluations of adoptees and prospective adoptive parents.[167] Of course, as with the Uniform Parentage Act, state laws

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162. For example, the UNIF. PARENTAGE ACT § 608(b) (UNIF. L. COMM'N 2017) provides a spousal parent presumption cannot be overcome after the child attains two years of age, with some exceptions, followed in CONN. GEN. STAT. § 46(b)-489(b) (West 2022). In Washington the child must be under four. WASH. REV. CODE § 26.26A.435(2) (2019).

163. *See, e.g.,* Valentine v. Wetzel, 215 A.3d 639 (Pa. Super. Ct. 2019) (unpublished opinion) (holding that while state law barred common law marriages entered into after January, 2005, earlier common law marriage norms must be applied to conduct before 2005 since the bar was not made retroactive); *In re* Marriage of Hogsett & Neale, 480 P.3d 696 (Colo. App. VI 2018) (holding that Obergefell applied retroactively to give same-sex couple right to prove common law marriage for purposes of a dissolution proceeding), *aff'd*, 478 P.3d 713 (Colo. 2021); Gill v. Nostrand, 206 A. 3d 869 (D.C. 2019) (applying common law marriage doctrine in a case involving alimony and marital property).

164. UNIFORM ADOPTION ACT (1994) [UAA]. Specifically, the UAA had the following purpose, *id.* at Prefatory Note at 3: The Act goes beyond existing statutory laws to create a coherent framework for legitimizing and regulating both direct-placement and agency-supervised adoptions. The Act will facilitate the completion of consensual adoptions and expedite the resolution of contested adoptions. By promoting the integrity and finality of adoptions, the Act will serve the interests of children in establishing and maintaining legal ties to the individuals who are committed to, and capable of, parenting them. The Act's history and rationales are set out by its Reporter in Joan Heifetz Hollinger, *The Unif. Adoption Act: Rep.'s Ruminations*, 30 FAM. L. Q. 345 (1996).

165. UAA, at §§ 2-401 to 2-409.

166. UAA, at §§ 3-501 to 3-506.

167. UAA, at §§ 3-601 to 3-603.

vary interstate even where portions of the Uniform Adoption Act apply. Further, state adoption laws vary intrastate.[168]

Beyond the Uniform Adoption Act, there are additional forces prompting some uniform interstate requirements for formal adoptions. Federal constitutional precedents, as with Due Process hearings on parental rights terminations,[169] and federal statutes, as the laws on formal adoptions of Indian children,[170] unify state adoption laws to a degree.

F. Assisted Reproduction

Assisted reproduction laws in American states recognize both expecting and existing legal parentage. They differ between non-surrogacy and surrogacy-assisted reproduction births.

1. Expecting Non-surrogacy Assisted Reproduction Parent

Children to be born of non-surrogacy assisted reproduction often have two expecting parents, sometimes recognized preconception, sometimes recognized only during a pregnancy, and sometimes only recognized after birth. Conduct by a gestating parent (i.e., birth-giver) indicating a choice about non-gestational parenthood after live birth of one can bar later parentage for another who was an expecting legal parent. Current parentage models and laws illustrate this post-birth conduct by gestational parents and its effects.

In non-surrogacy settings, the 1973 UPA only recognized an assisted reproduction birth undertaken by a married, opposite sex couple who employed "a licensed physician" and "semen donated by a man" other than the husband.[171] The donor here is always "treated in law as if he were not the natural father."[172] The husband is only "treated in law as if he were the natural father" if

168. In a single state there often varying procedures for different types of adoptions. Thus, procedures sometimes vary when placements are made by public agencies and by private entities, as with OHIO REV. CODE ANN. § 5103.15 (West 1996) (no child "place or received" for adoption unless, inter alia, placement is made by "a public children services agency" or an institution certified by the department of job and family services). When adoptions are undertaken by certain parties, like stepparents, as with N. C. GEN. STAT. § 48-4-101 (West 1996); when adoptions of adults are pursued, as with N. J. STAT. ANN. § 2A:22-1 (West 1991); and when adoptions involve children crossing state borders (often, but not always, guided by the Interstate Compact on Placement of Children, as with VT. R. PROB. P. RULE 80.5 (Vermont Probate Procedure) and Vt. Stat. Ann. Tit. 33 § 5901 (West 2021), et seq. (compact described)).

169. *See, e.g.*, *Santosky*, 455 U.S. at 748 (holding that "clear and convincing evidence" of permanent neglect is needed to terminate parental rights).

170. *See, e.g.*, 2525 U.S.C. § 1913 (consent of a parent or Indian custodian to termination of parental rights); 2525 U.S.C. § 1917 (tribal affiliation information relevant to Indian individual subject to an adoptive placement); and 2525 U.S.C. § 1915 (adoptive placement preferences for Indian child).

171. 1973 UPA, at §5(a). UNIF. PARENTAGE ACT § 5(a) (NAT'L CONF. COMM'RS ON UNIF. STATE L. 1973).

172. *Id.* § 5(b).

insemination occurred "under the supervision of a licensed physician and with the consent" of the husband.[173]

The 2000 UPA expanded parentage opportunities for non-spousal donors who provide sperm,[174] as well as for nondonor men who consent to non-surrogacy assisted reproduction "with the intent to be the parent."[175] Such donors and consenting nondonor men are expecting legal parents whose parentage arises when children are born.[176] The "husband" of a "wife" who gives birth via assisted reproduction has limited opportunities to "challenge his paternity"[177] in settings where there is no resulting parentage at birth for a non-spousal sperm donor or for a nondonor man who consented to assisted reproduction with "the intent to be the parent."[178]

The 2017 UPA further expands parentage opportunities in non-surrogacy assisted reproduction settings. That act is "substantially similar" to the 2000 UPA, but it is updated to apply "equally to same-sex couples."[179] Thus, an "individual" who consents to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child.[180] Where there is a non-surrogacy assisted reproduction birth having no such person who consented with the intent to be a parent, the spouse of the person giving birth has limited opportunities to challenge parentage.[181]

The 2017 UPA expansion is laudable. But it includes no explicit indication that parentage acknowledgment processes are urged, or should be available, for intended parents of children born of assisted reproduction.

2. Expecting Surrogacy Assisted Reproduction Parent

The 2000 UPA recognizes that a "prospective gestational mother" may agree with "intended parents" who are a "man" and a "woman" that "the intended parents become parents of the child."[182] An agreement must be validated by a court in a proceeding commenced by "the intended parents and the prospective gestational mother."[183] Before a pregnancy begins, a validated agreement may be terminated by the prospective gestational mother, her husband, or either of the

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173. *Id.* § 5(a).

174. 2000 UPA, at §703. UNIF. PARENTAGE ACT § 703 (NAT'L CONF. COMM'RS ON UNIF. STATE L. 2000).

175. *Id.* §§ 703–4 (consent "must be in a record" that is signed).

176. *Id.* § 703 ("a parent of the resulting child").

177. *Id.* § 705. One opportunity involves a lack of consent, "before or after birth of the child," shown in a proceeding brought "within two years after learning of the birth." *Id.* § 705(a). Another opportunity involves a challenge at any time where there was either no sperm donation or no consent; no cohabitation "since the probable time of assisted reproduction;" and no open hold out of the child as one's own. *Id.* § 705(b).

178. *Id.* § 703.

179. Unif. Parentage Act art. 7 cmt. (UNIF. L. COMM'N 2017).

180. *Id.* § 703.

181. *Id.* § 705(a) (spouse "at the time of the child's birth").

182. UNIF. PARENTAGE ACT § 801(a) (NAT'L CONF. COMM'RS ON UNIF. STATE L. 2000) (signatories also include the "husband" of the prospective gestational mother and "a donor or the donors").

183. *Id.* § 802(a).

intended parents.[184] After pregnancy, a "court for good cause shown may terminate the gestational agreement."[185] Upon the birth of a child pursuant to a validated gestational agreement, a court will issue an order "confirming that the intended parents are the parents of the child."[186] A gestational agreement "that is not judicially validated is not enforceable."[187] Should a prospective gestational mother deliver a child not conceived through assisted reproduction," genetic testing" is used to "determine the parentage of the child."[188]

While the 2000 UPA treated surrogacy agreements comparably where the "prospective gestational mother" utilized either one or two donors,[189] the 2017 UPA distinguishes between gestational (i.e., two donors)[190] and genetic (i.e., one donor)[191] surrogacy. While some requirements are comparable,[192] others differ, with genetic surrogacy having more stringent requirements.[193]

The 2017 UPA does not require, as did the 2000 UPA,[194] that all surrogacy agreements be validated by a court in a proceeding involving all the relevant parties.[195] Rather, a surrogacy agreement, gestational or genetic, "must be in a record signed by each party."[196] However, a genetic surrogacy agreement is generally only enforceable when validated by a court "before assisted reproduction" takes place.[197]

Importantly, the 2017 UPA authorized genetic and gestational surrogacy agreements involving "one or more intended parents."[198] The 2000 UPA on surrogacy agreements encompassed "intended parents."[199] Also significantly, the 2017 UPA effectively characterizes an intended parent or intended parents in a genetic surrogacy setting as legal parents only after 3 days following the surrogate giving birth; the surrogate likewise has 72 hours to withdraw consent

184. *Id.* § 806(a).

185. *Id.* § 806(b) (cause is left undefined).

186. *Id.* § 807(a) (notice filed with court by the intended parents); *id.* § 807(c) (notice filed with court by the gestational mother or the appropriate state agency).

187. *Id.* § 809(a).

188. *Id.* § 807(b).

189. *Id.* § 801(a) (written agreement including "a donor or the donors").

190. UNIF. PARENTAGE ACT § 801(2) (UNIF. L. COMM'N 2017) (woman using "gametes that are not her own").

191. *Id.* § 801(1) (woman using "her own gamete").

192. *See*, *e.g.*, *id.* §§ 802(a)(1)-(5) (to execute a surrogacy agreement, woman must be 21 years old, have previously given birth, and have independent legal representation); *id.* § 803 (process for executing such an agreement).

193. *Compare*, *e.g.*, *id.* § 814(a)(2) (genetic surrogate may withdraw consent any time before 72 hours after the birth), *with id.* § 808(a) (any party may terminate a gestational surrogacy agreement "any time before an embryo transfer").

194. UNIF. PARENTAGE ACT § 802(a) (NAT'L CONF. COMM'RS ON UNIF. STATE L. 2000).

195. The relevant parties include each intended parent, the surrogate and the surrogate's spouse, if there is one. UNIF. PARENTAGE ACT § 803(3) (UNIF. L. COMM'N 2017).

196. *Id.* § 803(4).

197. *Id.* §§ 816(a), 813(a). Exceptions include when all parties agree to validation after assisted reproduction has occurred. *Id.* at § 816(a); *see id.* §§ 816(d), 818.

198. *Id.* § 801(3).

199. UNIF. PARENTAGE ACT § 801(a) (NAT'L CONF. COMM'RS ON UNIF. STATE L. 2002).

to the surrogacy agreement.[200] Upon the genetic surrogate's withdrawal of consent within the 3 day period, the surrogate establishes a "parent-child relationship" as the surrogate is "the individual" who gave birth to the child.[201]

But some intended parents may also establish a "parent-child relationship" even upon such withdrawals. Thus, an intended parent who is a sperm provider can become a legal parent upon birth if the sperm provider, with the genetic surrogate, signed a parentage acknowledgment before birth and the VPA remains unrescinded and unchallenged.[202]

3. Existing Non-surrogacy Assisted Reproduction Parent

The 1973 UPA does not deal with the "many complex and serious problems raised by the practice of artificial insemination."[203] It does, however, address "one fact situation that occurs frequently,"[204] a "consent" by a husband to the artificial insemination of his wife with "semen donated by a man not her husband."[205] Here, the husband is to be "treated in law as if he were the natural father" where the consent was in writing and "signed by him and his wife," with certification undertaken and then filed by the supervising "licensed physician" with state governmental officials.[206] The husband is a nonpresumptive spousal parent. The semen donor who is not the husband is to "be treated in law as if he were not the natural father."[207]

In response to the increasing numbers of children born of assisted reproduction, both the 2000 and the 2017 UPA contain distinct articles on non-surrogacy and surrogacy births. In non-surrogacy settings, the 2017 UPA "is substantially similar" to the 2000 UPA, with the "primary changes… intended to update the article so that it applies equally to same-sex couples."[208] The 2017 UPA recognizes that a sperm donor is not always a parent of a child conceived by assisted reproduction.[209] For there to be two legal parents, a consent to parentage must be signed by the person giving birth and "an individual who intends to be a parent," though the "record" need not be certified by a physician.[210] Seemingly, "consent in a record" can be undertaken "before, on, or

200. UNIF. PARENTAGE ACT § 814(a)(2) (UNIF. L. COMM'N 2017).

201. *Id.* § 815(c) (upon withdrawal, "parentage of the child" is determined under Articles 1-6); *id.* § 201(1) (parent-child relationship for individual who gives birth).

202. *Id*. § 815(c); *id.* § 201(5) (parent-child relationship for individual who acknowledges parentage)*; id.* § 301 (woman giving birth and "alleged genetic father" may sign acknowledgment)*; id.* § 304(b)-(c) (acknowledgment signed before birth becomes effective at birth), *id*. §§ 308–309 (procedures for rescission and challenge).

203. UNIF. PARENTAGE ACT § 5 cmt. (NAT'L CONF. COMM'RS ON UNIF. STATE L. 1973).

204. *Id.*

205. *Id.* § 5(a).

206. *Id.* (all papers and records pertaining to the insemination are to be kept confidential, though may be subject to inspection pursuant to a court order "for good cause shown").

207. *Id.* § 5(b).

208. UNIF. PARENTAGE ACT § 701, introductory cmt. (UNIF. L. COMM'N 2017).

209. *Id.* §§ 702–704.

210. *Id.* § 704(a).

after birth of the child."[211] The lack of this form of consent does not foreclose childcare parentage for an intended parent where there is clear-and-convincing evidence of an express agreement between the individual and the person giving birth, entered before conception.[212] Further, the lack of such consent or agreement does not foreclose an individual's parentage where the child was held out as the individual's own in the child's first two years.[213] The nonparental status of one married to a person giving birth to a child born by assisted reproduction, even if a gamete donor, may be established by a showing of a lack of consent, of any agreement, and of holding out of the child as one's own. [214]

The non-surrogacy assisted reproduction parentage norms in the UPAs are now reflected in some state statutes[215] and in precedents untethered to statutes,[216]

211. *Id.* § 704(b).

212. *Id.* § 704(b)(1). It is clear why an "express agreement" undertaken post-conception does not prompt comparable childcare parentage. Here, there is much greater certainty that a child will be born, so an agreement is far less speculative. Perhaps instead of a post-conception agreement, the 2017 UPA contemplated a prebirth VPA, as it recognizes an "intended parent" can sign a VPA. Yet an "intended parent" under the 2017 UPA in many states has no prebirth VPA access, as states follow the 1973 UPA or 2000 UPA which only authorize post-birth (paternity) VPAs. UNIF. PARENTAGE ACT § 4(a)(5) (NAT'L CONF. COMM'RS ON UNIF. STATE L. 1973) ("paternity" acknowledgment "of the child" in a "writing filed with" the state, which is not disputed by "the mother"); *see also* UNIF. PARENTAGE ACT § 301 (NAT'L CONF. COMM'RS ON UNIF. STATE L. 2002) ("man claiming to be the genetic father of the child" signs together with the "mother of a child").

213. UNIF. PARENTAGE ACT § 704(b)(2) (UNIF. L. COMM'N 2017).

214. *Id.* § 705.

215. *E.g.*, Tex. Fam. Code Ann. § 160.7031 (2024) (fatherhood for unwed man, intending to be father, who provides sperm to licensed physician and consents to the use of that sperm for assisted reproduction by an unwed woman, where consent is in a record signed by man and woman and kept by the physician); N.H. Rev. Stat. Ann. § 5-C:30(I)(b) (2024) (unwed mother has sperm donor "identified on birth record" where "an affidavit of paternity" has been executed); 13 Del. Code Ann. tit. 8, § 704(a) (2024) ("Consent by a woman and a man who intends to be a parent of a child born to the woman by assisted reproduction must be in a record signed by the woman and the man."); Wyo. Stat. Ann. 14-2-904(a) (2024) (similar to Delaware); N.M. Stat. Ann. § 40-11A-703 (2024) ("A person who provides eggs, sperm, or embryos for or consents to assisted reproduction as provided in Section 704 ["record signed . . . before the placement"] . . . with the intent to be the parent of a child is a parent of the resulting child").

216. *E.g.*, Shineovich v. Shineovich, 214 P.3d 29 (Or. Ct. App. 2009) (holding that assisted reproduction statute as written solely for married opposite sex couple applied to same sex domestic partners); Jason P. v. Danielle S., 171 Cal. Rptr. 3d 789 (Cal. Ct. App. 2014) (holding that though the statute explicitly bars paternity for this semen donor, he statute on presumed parentage for one who receives a child into the home and openly holds out the child as one's own natural child can support legal paternity for a semen donor); Ramey v. Sutton, 362 P.3d 217 (Okla. 2015) (holding that unwritten preconception agreement prompts in loco parentis childcare status for former lesbian partner of birth mother, though she contributed no genetic material); and In re Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016) (holding that an agreement between lesbian partners can prompt parentage in non-birth mother) [hereinafter Brooke S.B.].

with significant interstate variations.[217] The 2017 UPA provisions have been enacted in a few states.[218]

Parentage for intended parents in non-surrogacy settings often involves express consent. In general, there are no state-required forms guiding consent determinations. In California, however, there are statutorily recommended consent forms that may be used in non-surrogacy settings.[219] But regardless of the non-surrogacy parentage norms, state-formulated consent forms should be made available, as there would be greater certainty regarding party intentions and greater likelihood of actual informed consent.[220] Such forms could be somewhat comparable to the required forms for VPAs, although—as with VPA forms—the forms would vary between states, since state non-surrogacy assisted reproduction laws differ.[221]

As with VPAs, there could be state-filed records of intended parentage for children born of, or to be born of, non-surrogacy assisted reproduction. Like VPAs, inquiries into those intended parentage records should be required in related adoption or parental rights termination cases in order to protect the Due Process parental or parental opportunity interests of those not giving birth.

For now, parentage can arise from a non-surrogacy assisted reproduction births where there is not a signed record on intended parenthood filed with the

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217. Deborah H. Forman, *Exploring the Boundaries of Families Created with Known Sperm Donors: Who's In and Who's Out?*, 19 UNIV. PA. J. L. & SOC. CHANGE 41 (2016) (reviewing and critiquing the laws).

218. UNIF. PARENTAGE ACT §§ 701-708 (UNIF. L. COMM'N 2017) (suggesting assisted reproduction statutes involving no surrogates also appear in Washington and Vermont). *See also* WASH. REV. CODE § 26.26A.610 (2019); VT. Stat. ANN. tit. 15C, § 701 (2019).

219. CAL. FAM. CODE § 7613.5(d)-(e) (West 2020) (optional forms on assisted reproduction pacts by two married or by two unmarried people, where signatories may or may not have used their own genetic material to prompt a pregnancy).

220. Jeffrey A. Parness, *Formal Declarations of Intended Childcare Parentage*, 92 NOTRE DAME L. REV. ONLINE 87, 87 (2017) (urging that such forms be created in the states).

221. *See, e.g.*, Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgements at Birth*, 40 U. BALTIMORE L. REV. 53, 63-87 (2010) (reviewing similarities and differences in state-generated VPA forms). At times, some written parentage acknowledgments operate though state-generated forms were not utilized. *See, e.g.*, D.C. CODE § 16-909(a)(4) (2023) (presumption that a man is the father of a child if he "has acknowledged paternity in writing"); N.M. STAT. ANN. § 40-11A-204(A)(4)(c) (2010) (a man is presumed to be the father of a child that "he promised in a record to support… as his own" if he married the birth mother after the child's birth); KAN. STAT. ANN. § 23-2208(a)(4) (2024) (a man is presumed to be the father of a child if he "notoriously or in writing recognizes paternity of the child," including but not limited to acts in accordance with the voluntary acknowledgement statutes).

state.[222] Here, inquiries into parental intentions are needed, as difficult factual disputes can arise.[223]

4. Existing Surrogacy Assisted Reproduction Parent

As to surrogacy, the 1973 UPA is silent.[224] The 2017 UPA, like the 2000 UPA, distinguishes between genetic ("traditional") and gestational surrogacy, [225] recognizing that parentage arises for nonbirth-givers upon meeting certain conditions. Their surrogacy provisions are limited to instances of assisted reproduction births.[226] Unlike the 2000 UPA, the 2017 UPA does not propose that all surrogacy agreements be validated by a court order prior to any medical procedures.[227] The 2017 UPA imposes differing requirements for the two surrogacy forms, however, with "additional safeguards or requirements on genetic surrogacy agreements,"[228] as only they involve a woman giving birth while "using her own gamete." [229] The 2017 UPA recognizes there can be "one or more intended parents"[230] in surrogacy settings.

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222. *See* UNIF. PARENTAGE ACT § 704(a) (UNIF. L. COMM'N 2017). *See also id.* § 704(b)(1) (in a non-surrogacy assisted reproduction birth where there is no "consent in a record," parentage depends on clear and convincing evidence of a preconception "express agreement"), enacted in WASH. REV. Code § 26.26A.615(2)(a) (2019). *But see In re* Parentage of W.L., 475 P.3d 338, 381-82 (Kan. 2020) (no need for same-sex romantic partner of a woman bearing a child in a non-surrogacy assisted reproduction birth to prove parentage by written or oral coparenting pact as long as she shows by a preponderance of the evidence that she notoriously recognized her own maternity with the birth mother's consent). There are also factual issues, including issues of parental intentions, when parentage depends on post-birth actions. UNIF. PARENTAGE ACT § 704(b)(2) (UNIF. L. COMM'N 2017) (residency/hold out parentage dependent upon parental-like acts for "the first two years of the child's life").

223. *See* UNIF. PARENTAGE ACT § 704(b)(1) (UNIF. L. COMM'N 2017) ("clear and convincing evidence" of an express agreement to parent). Factual disputes are more likely to arise when there is non-surrogacy assisted reproduction without medical assistance. *See, e.g.*, Gatsby v. Gatsby, 495 P.3d 996 (Idaho 2021); Rivera v. Salas, 391 So.3d 639 (Fla. Dist. Ct. App. 2024) (sperm provider's standing to seek paternity has split the appellate districts).

224. UNIF. PARENTAGE ACT § 5 cmt. (UNIF. L. COMM'N 1973) (while addressing husband-wife pacts on assisted reproduction where the wife bears the child and intends to parent, the Act "does not deal with many complex and serious legal problems raised by the practice of artificial insemination").

225. UNIF. PARENTAGE ACT § 801 cmt. preceding (UNIF. L. COMM'N 2017).

226. UNIF. PARENTAGE ACT § 801(a)(1) (UNIF. L. COMM'N 2000) ("agrees to pregnancy by means of assisted reproduction"); UNIF. PARENTAGE ACT § 801(3) (UNIF. L. COMM'N 2017) (surrogacy agreement on pregnancy "through assisted reproduction"). This is not to say there are no instances of surrogacy undertaken through consensual sex. *See, e.g.*, K.B. v. M.S.B., 2021 BCSC 1283 (parentage action by person who gave birth against sperm provider and spouse).

227. UNIF. PARENTAGE ACT § 808 cmt. preceding (UNIF. L. COMM'N 2017).

228. *Id.* § 801 cmt. preceding; *Id.* §§ 802-807 (common safeguards or requirements for all surrogacy pacts). *See also id.* §§ 808-812 (special requirements for gestational surrogacy agreements); *Id.* §§ 813-818 (special requirements for genetic surrogacy agreements).

229. *Id.* § 801(1); *Id.* § 801(2) (gestational surrogacy covers births to a woman who uses "gametes that are not her own"); *Id.* §§ 808-812 (special rules for gestational surrogacy pacts); *Id.* §§ 813-818 (special rules for genetic surrogacy pacts).

230. *Id.* § 801(3).

The two forms of surrogacy pacts have several common requirements, including signatures in a record "attested by a notarial officer or witnesses;" independent legal counsel for all signatories; and execution before implantation.[231] In addition to the common requirements, the UPA imposes additional special provisions on gestational and genetic surrogacy pacts. Special provisions for gestational surrogacy pacts include an opportunity for "party" termination "before an embryo transfer" and opportunity for a prebirth court order declaring parentage vesting at birth.[232] Special provisions for genetic surrogacy pacts include the general requirement that "to be enforceable," an agreement must be judicially validated "before assisted reproduction" upon a finding that "all parties entered into the agreement voluntarily" and understood its terms;[233] that a genetic surrogate may withdraw consent "in a record" at any time before 72 hours after the birth;[234] and that a genetic surrogate cannot be ordered by a court to "be impregnated, terminate or not terminate a pregnancy, or submit to medical procedures."[235]

UPA surrogacy parentage norms are now reflected both in state statutes[236] and precedents untethered to statutes.[237] Certain provisions of the 2017 UPA have been enacted in a few states.[238] Elsewhere, major sections of the 2000 UPA on surrogacy are operative.[239] To date, there are no state-required or suggested

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231. *Id.* § 803(6)-(7), (9). Thus, by definition, a person who may become pregnant through sex cannot agree to be a surrogate, as cannot a person who is pregnant and only agrees to surrogacy post-pregnancy. *Id.* § 801(1)-(2) (each surrogacy form applies only to a person "who agrees to become pregnant through assisted reproduction").

232. *Id.* §§ 808(a), 811(a).

233. *Id.* § 813(a)-(b).

234. *Id.* §814(a)(2).

235. *Id.* §818(b).

236. *See, e.g.*, WASH. REV. CODE § 26.26.A.715 (2018) (gestational and genetic surrogacy pacts) and N.H. REV. STAT. ANN. § 168-B:(I) (gestational carrier pacts), (2013).

237. *In re* Paternity of F.T.R., 2013 WI 66, ¶73, 349 Wis. 2d 84, 833 N.W. 2d 634 (enforcing surrogacy pact between two couples as long as child's best interests were served, while urging the legislature to "consider enacting legislation regarding surrogacy" to insure "the courts and the parties understand the expectations and limitations under Wisconsin law"); *In re* Baby, 447 S.W.3d 807, 833 (Tenn. 2014) ("traditional surrogacy contracts do not violate public policy as a general rule" where surrogate artificially inseminated with sperm of intended father, who was not married to intended mother); *In re* Amadi, No. W2014-01281-COA-R3-JV, 2015 WL 1956247 (Tenn. Ct. App. 2015) (gestational surrogate for married couple is placed on birth certificate, as said to be required by statute where intended father's/husband's sperm used with egg from unknown donor and intended mother/wife was recognized by all parties as legal mother; reiterates plea from *In re* Baby, that the legislature should enact a comprehensive statutory scheme); Raftopol v. Ramey, 12 A.3d 783, 793 (Conn. 2011) (biological father's male domestic partner can also be intended parent of a child born to a gestational surrogate). Beyond enforcing a surrogacy pact in the absence of statute, an intended parent (also the sperm donor) who employed a gestational surrogate was allowed in one case to adopt formally his genetic offspring. *In re* John, 103 N.Y.S. 3d 541 (N.Y. App. Div. 2019).

238. *See, e.g.*, WASH. REV. CODE § 26.26.A.715 (2024) (requiring contents for a gestational or genetic surrogacy agreement); VT. STAT. ANN. tit 15C § 801 (2023) (outlining eligibility to execute a gestational carrier agreement); and 15 R.I. GEN. LAWS § 15-8.1-801(2021) (outlining eligibility to execute gestational carrier agreements).

239. *See, e.g.*, UTAH CODE ANN. § 78B-15-801 (2024) (corresponding to 2000 UPA).

forms on intended parentage in surrogacy births, though there are suggested forms on intended parentage in non-surrogacy assisted reproduction births in California.[240] New mandates on required forms, or an increased availability of suggested forms, would significantly diminish the number of disputes over consents to parentage, non-parentage, and conditions of pregnancy.[241] Form developments should be easy for state officials as there are typically requirements for surrogacy pacts in state statutes.[242]

V. PROTECTED PARENTAL RIGHTS AND INTERESTS

State parentage laws, of course, are limited not only by Congressional acts (as with VPAs), but also by federal constitutional precedents. This section analyzes the constitutional rights and interests of expecting and existing childcare parents. Constitutional approaches can vary by context, as with childcare parenthood[243] and child support involving children born of sex parenthood.[244]

In 2000, the U.S. Supreme Court recognized in *Troxel v. Granville* that the "liberty interest . . . of parents in the care, custody and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized" by the Court.[245] This unenumerated parent childcare "interest" was said to date back at least a century.[246] It has prompted no significant resistance by later federal or

240. *See* CAL. FAM. CODE § 7613.5 (West 2020).

241. *See, e.g.*, Parness, *supra* note 221 at 104. *See also* Guardianship of Keanu, 174 N.E.3d 1228, 1230 (Mass. App. Ct. 2021) (recognizing a need for legislation on surrogacy pacts given "the risks of an informal surrogacy"). Formal developments should be easy for state officials as rigid requirements for surrogacy pacts typically already exist in state statutes.

242. *See, e.g.*, N.H. REV. STAT. ANN. § 168-B:25(iv) (2023) (explaining eligibility requirements for a gestational carrier agreement).

243. Troxel v. Granville, 530 U.S. 57 at 65 (2000) (plurality opinion) (finding that childcare interests encompass "care, custody and control").

244. *See, e.g.*, *In re* Adoption of Baby A., 944 So.2d 380, 395 n. 1 (Fla. Dist. Ct. App. 2006), *disapproved in other respects*, Heart of Adoptions v. J.A., 963 So.2d 189 (Fla. 2007) (There are "substantially different approaches" in Florida "to the rights and responsibilities of genetic fathers of children born to unmarried mothers depending upon the issue at stake"; man may be obligated for child support, but his rights in an adoption "are guarded"). *See* N.E. v. Hedges, 391 F.3d 832, 836 (finding a genetic relationship between a father and his offspring is "constitutionally sufficient to support . . . child support requirements," but not childcare opportunities) and *In re* Stephen Tyler R., 584 S.E.2d at 581, 581 (W. Va. 2003) (holding that there is a child support duty for man though parental custody/visitation rights are ended).

245. Troxel, 530 U.S. at 65. *See also id.* at 70 ("long recognized" parental interest) (Souter, J., concurring).

246. *See, e.g.*, *id*. at 65-66 (plurality opinion) ("A constitutional dimension to the right of parents to direct the upbringing of their children") (citing early decisions in Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (parental control over education of children)); Pierce v. Soc'y of Sisters, 268 U.S. 571 (1925) (enjoining as unconstitutional the Compulsory Education Act); and Prince v. Massachusetts, 321 U.S. 158 (1944) (holding that parental freedom and authority in matters of conscience and religious conviction).

state courts or by state lawmakers.[247] The continuing recognition of this unenumerated constitutional interest was raised only by Justice Thomas in *Dobbs v. Jackson Women's Health Organization*, noting that no party asked for a reconsideration of the "entire Fourteenth Amendment jurisprudence" on unenumerated rights.[248]

While there is some confusion in utilizing both the terms "interests" and "rights" in childcare parent settings, the recognition of a constitutional "right to parent" under *Troxel* is accompanied by the recognition of a constitutional liberty interest of certain persons in establishing childcare parentage in a child with whom there are genetic ties. In *Lehr v. Robertson*, the U.S. Supreme Court recognized that an unwed genetic father of a child born of consensual sex to an unwed mother has "an opportunity that no other male possesses to develop a relationship with his offspring," which, once grasped, allows the father to "enjoy the blessings of the parent-child relationship."[249] Seemingly, an egg provider whose contribution prompts the birth of a child to another has a comparable opportunity interest, especially when the contributor and birth-giver agreed ahead of the fertilized egg implant that there would be dual parentage upon birth.[250]

Since *Troxel* and *Lehr*, the liberty interests in actual and potential childcare parentage continues. But the U.S. Supreme Court continues to be unwilling to articulate in more precise terms who qualifies as a parent possessing these interests, and whether parentage is recognized prebirth, at birth, or long after

247. While general recognition of parental childcare interests has been widespread, there have been significant interstate differences in the breadth of such interests, as with parental interests in determining nonparental visitations with their children. *See, e.g.*, Troxel, 530 U.S. at 73 (holding that Washington statute unconstitutionally infringed on fundamental rights of parents; however, limits on any laws guiding nonparent child visitation remained unclear as Justice O'Connor, writing for four, did not consider whether a showing of harm or potential harm to a child is a condition of nonparental child visitation). *See also id.* at 76 (Souter, J., concurring) ("No need to decide whether harm is required").

248. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 331 (2022); *See also* Troxel, 530 U.S. at 80 (Thomas, J., concurring) ("In future cases, we should reconsider all of this Court's substantive due process precedents").

249. Lehr v. Robertson, 463 U.S. 248, 262 (1983).

250. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993) (holding that husband and wife whose genetic material prompted a birth to a surrogate were "the child's natural parents") and D.M.T. v. T.M.H., 129 So.2d 320, 327 (Fla. 2013) (recognizing two parents, woman who provided the egg and woman who gave birth). *But see In the Matter of* S.D.S., 539 P.3d 722 (Or. 2023) (holding that an egg donor for a child born to a surrogate, where the surrogate eschewed parentage, is not automatically a parent; here, there was no intended dual parent pact with sperm donor, though there may have been an agreement that the egg donor have certain nonparental visitation rights) [S.D.S.]. A reluctance to utilize Lehr in assisted reproduction settings is promoted by parentage laws that distinguish genetic contributions to childbirth in consensual sex settings. *See, e.g.*, 2017 UNIF. PARENTAGE ACT § 412 (UNIF. L. COMM'N 2017) (establishing no parental registry interests where a child is or is to be born of assisted reproduction).

birth.[251] The following paragraphs survey the pre-*Dobbs* cases on custodial parentage at birth.

To date, the precedents only speak expressly to parental custody interests in children born of consensual sex, whether in or outside of marriage.[252] The precedents do not speak much on to how custodial parentage can arise exclusively from post-birth acts beyond the generalities in *Lehr* on seizing the parental opportunity by a genetic father[253] and from state-authorized adoptions.[254]

As to the person giving birth to a child born of sex, the Court has long recognized automatic custodial rights. It reasoned in the Quillon case that the gestating parent was a custodial parent because she necessarily "exercised actual or legal custody" and "shouldered . . . significant responsibility with respect to the daily supervision, education, protection, or care of the child."[255] However, the Court has never applied this recognition to a person giving birth via assisted reproduction (AR), utilizing either artificial insemination (AI) or fertilized egg implantation (FEI).[256] With FEI births, not AI births, the Court may someday face competing constitutional claims to motherhood by a genetic parent and a gestational surrogate (i.e., a biological, not genetic parent). If it does, statutory language that does not so distinguish will require modification.[257]

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251. *See, e.g.*, Jeffrey A. Parness, *Federal Constitutional Childcare Parents*, 90 ST. JOHN'S L. REV. 965, 968 (2016) (finding no reasonable justification for "extreme deference" to state laws defining federal constitutional parents, resulting in "significant interstate variations" which prompt "many problems" for children and their caretakers).

252. *See, e.g.*, Karen Syma Czapanskiy, *The Constitution, Paternity, Rape, and Coerced Intercourse: No Protection Required*, 35 J. AM. ACAD. MATRIM. LAW 83 (2022) (explaining the difficulties with current laws on parent custody rights when sex with a gestating parent is not, or is arguably not, consensual).

253. Lehr, 463 U.S. at 252 n. 5. (indicating an unwed genetic father could seize this opportunity in an adoption proceeding, prompting notice and hearing opportunity rights, by following the New York law requiring such fathers to do something affirmatively, like secure a paternity adjudication, secure placement on a birth certificate, openly live with the child, or file a notice of intent to claim paternity).

254. On adoptions, the Court has been chiefly concerned with securing fair procedures for actual or possible parents when their children may be adopted by others, as well as with insuring fair procedures in terminations of recognized parental rights/interests. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 779 (holding that "clear and convincing" evidence should be a minimum standard set by states when childcare parentage might be ended).

255. Quilloin v. Walcott, 434 U.S. 246, 256 (1978) (holding that persons providing sperm for births arising from consensual sex differ as there is not always custody/responsibility) and Nguyen v. Immigr. and Naturalization Serv., 533 U.S. 53, 64-65 (2001).

256. *See, e.g.*, Jeffrey A. Parness, *American Constitutions and Artificial Insemination Births*, 13 CONLAW NOW 125 (2022) (reviewing Due Process and Equal Protection constraints on parentage laws for such births). *See also In the matter of* S.D.S., 593 P.3d 722 (Or. 2023) (holding that egg donor is not automatically a legal parent of child born to gestational surrogate; but she may have contractual rights to nonparent visitation).

257. *See, e.g.*, 750 ILL. COMP, STAT 50/1 (T-5) (2017) ("'Biological parent,' 'birth parent,' or 'natural parent' of a child are interchangeable terms that means a person who is biologically or genetically related to that child as a parent.") and CAL. FAM. CODE § 7601(a) (West 2024) (under Uniform Parentage Act, "natural parent" means "a nonadoptive parent established under this part, whether biologically related to the child or not").

Where a birth arises from consensual sex with a gestating parent who is married to another, states may presume custodial parentage in the spouse. In the *Michael H.* case the Court recognized the validity of a state law presuming custodial parentage in the spouse, whether the presumption was rebuttable or irrebuttable; however, the Court did not require such a presumption.[258] State laws have long recognized such presumptions and do not vary much on when such presumptions arise.[259] But some state laws do differ in important ways on how spousal parent presumptions can be rebutted, if at all.[260]

As for a birth arising from consensual sex with an unwed mother, the Court in *Lehr* recognized that the sperm provider may have parental opportunity interests recognized by state laws.[261] In *Lehr*, the interests were not seized under state law (for example, by putative father registration or paternity suit) in a setting where an adoption of the child was sought by the gestating parent's post-birth spouse.[262] Parent custody interests outside of adoption, as in a paternity suit,

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258. Michael H. v. Gerald D., 491 U.S. 110 129-30 (J. Scalia, joined by Chief Justice, J. O'Connor and J. Kennedy) ("It is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted"). One justice assumed there were constitutional custodial interests in sperm provider settings; *id.* at 133 (J. Stevens, concurring) ("I am willing to assume for the purpose of deciding this case that Michael's relationship with Victoria is strong enough to give him a constitutional right" to seek visitation), while four other justices recognized such interests, *id.* at 136 (J. Brennan in dissent, joined by J. Marshall and Blackmun) and *id.* at 2360 (J. White, in dissent, joined by J. Brennan).

259. The similarities in spousal parentage establishment seemingly result from state employments of the Uniform Parentage Acts, whether the 1973, 2000, or 2017 version, which all have a spousal parent presumption arising for a child "born during the marriage" or within 300 days after the termination of the marriage. UNIF. PARENTAGE ACT § 4(a)(1) (UNIF. L. COMM'N 1973); UNIF. PARENTAGE ACT § 204(a)(1)-(2) (UNIF. L. COMM'N 2000); UNIF. PARENTAGE ACT § 204(a)(1)(A)-(B) (UNIF. L. COMM'N 2017). Regarding how a marriage is terminated, each of the Uniform Parentage Acts include death, annulment, declaration of invalidity, divorce, and a court decree of separation, while the Uniform Parentage Act (2017) also includes a decree of separate maintenance. UNIF. PARENTAGE ACT § 4(a)(1) (UNIF. L. COMM'N 1973); UNIF. PARENTAGE ACT § 204(a)(1)-(2) (UNIF. L. COMM'N 2000); UNIF. PARENTAGE ACT § 204(a)(1)(A)-(B) (UNIF. L. COMM'N 2017).

260. *Compare* Strauser v. Stahr, 726 A.2d 1052, 1054-56 (Pa. 1999) (holding that, where marriage continued, genetic father could not seek to rebut husband's spousal parentage), *with* Kinnett v. Kinnett, 366 So. 3d 25, 39-40 (La. 2023) (upholding a state statute allowing a genetic father to institute avowal action within one year of the birth of the child), *and* Callender v. Skiles, 591 N.W.2d 182 (Iowa 1999) (holding that, under the Due Process Clause of the Iowa Constitution, a genetic father of a child born into an intact and continuing marriage may have standing to overcome paternity through a serious and timely challenge) (different approaches to third party rebuttals of spousal parent presumption). See also Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 246 (2019) [hereinafter *Restructuring Rebuttal*] for a review of state rebuttal laws and possible reforms and a discussion of how reconceptualizing rebuttal norms means assessing the import of genetic ties, parental intentions, and established and healthy parent-child relationships.

261. Lehr v. Robertson, 463 U.S. 248, 262 (1983) ("The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring.").

262. *Lehr*, 463 U.S. at 250.

can also be lost under state laws due to a sperm provider's failure to seize parenthood, leaving the gestating parent as the sole custodial parent.[263]

VI. REFORMING IN-HOSPITAL PARENTAGE ASSERTION LAWS

New parentage assertion laws are needed in and outside of genetic paternity acknowledgments. They can meet the federal constitutional law precedents on parental rights and interests described in Part V and facilitate improved implementations of some of the new childcare parentage doctrines described in Part IV.

Some new laws should operate like, but expand, current VPA laws, establishing further (presumptive) genetic acknowledgment parentage that is subject to some rebuttal. Other new assertion laws should operate in order to improve the implementations of existing laws on intended, nongenetic parenthood, including laws on residency/hold out, de facto, and assisted reproduction parentage. Such new laws would provide significant evidence on parental intentions. Here, new assertion laws should include new mechanisms for both multiple and singular declarations on intended parenthood.

Only some of any new parentage assertion laws should *always* prompt immediate (though perhaps rebuttable) legal parentage as long as assertion processes are followed, as with current VPA laws. Such new assertion laws, outside of genetic parent acknowledgments, would encompass only intended parentage. They should be labeled as intended parent "declarations," in order to avoid confusion with the term "acknowledgments". These new laws would later be employed in settings where parental intentions are important and where disputes about such intentions might otherwise prompt difficult factual issues (i.e. he said/she said or she said/she said disputes). Immediate legal parentage, as with VPAs, is quite appropriate in both non-surrogacy assisted reproduction births and in gestational surrogacy births where there are relevant statutes or precedents and where clear and informed intentions on accepting and rejecting (i.e., sperm donors) future childcare parentage are declared.

Further, only some of the new childcare parentage declaration laws should require filing/registration with the state, with assertions made in a form provided by the state or in ways meeting state law requirements on informed consent and the like. State-provided forms, as earlier noted, are generally available for VPAs. They should be available for other (nonpaternity) genetic parent

263. For example, there are time bars to paternity actions brought by sperm providers seeking parental custody. *See, e.g.*, UNIF. PARENTAGE ACT § 7 (UNIF. L. COMM'N 1973) (allowing alleged father three years after birth of the child to bring action to determine the father and child relationship where there is no presumed father); UNIF. PARENTAGE ACT § 607(a) (UNIF. L. COMM'N 2002) (allowing alleged father two years after birth of the child to bring action to adjudicate parentage of the child having a presumed father); UNIF. PARENTAGE ACT § 607(a)(1) (UNIF. L. COMM'N 2017) (allowing alleged genetic parent to bring action to adjudicate parentage of the child before child becomes an adult); UNIF. PARENTAGE ACT § 608(b) (UNIF. L. COMM'N 2017) (restricting alleged parent's ability to challenge a presumption of parentage after the child attains two years of age). Similarly, an egg provider's failure to seize parenthood, under state laws on fertilized egg implant births, might prompt a loss of a parental opportunity interest.

acknowledgments, as well as for some later-described multiple intended parentage declarations and for some single intended parentage declarations.

Finally, state lawmakers can avoid current confusion by using different terms for genetic and nongenetic parentage assertions. Thus, parentage acknowledgment and declaration laws should carefully employ the terms paternity, maternity and parentage so that a gay woman, for example, need not utilize "paternity" declaration laws.[264] Further, as with Congressional intentions behind the Social Security Act reforms that led to state voluntary paternity acknowledgements ("VPA") forms, the employment of the term "acknowledgment" should be limited to genetic parent assertions,[265] with both paternity (sperm provider) and maternity (egg provider in fertilized egg implant birth). For nongenetic, intended parentage declarations, multiple person and single person assertions must be distinguished.

A. New Genetic Parentage Acknowledgment Laws

Considerations of new genetic parentage acknowledgment laws should encompass both the problems with current laws and the necessities for new laws. Problems include the failure of state parentage acknowledgment laws to embody gametes providers as parents of children born of assisted reproduction.[266]

For non-signing genetic fathers of children born of consensual sex, some current VPA laws present significant constitutional problems. These problems include certain obstacles to VPA challenges by the genetic fathers who have a federal constitutional opportunity interest, under *Lehr*, in developing a parent-child relationship for childcare purposes with children born to unwed mothers.[267] For example, there are non-signing genetic fathers who did not know that other men, or women in some states, were acknowledgers alongside birth mothers, where such fathers did not know of, and did not reasonably foresee, their potential genetic parentage for some time. Such a father is effectively unprotected: concealments of or misrepresentations about a pregnancy and/or a live birth by a birth mother (and, at times, others) may mean that a genetic father runs out of time to challenge an acknowledgment or to pursue paternity in jurisdictions with strict repose periods.[268]

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264. *See, e.g.*, *In re* W.L., 475 P.3d 338 (Kan. 2020) (finding that "notoriously," under the Kansas Parentage Act, § 23-2208(a)(4), a women can recognize "paternity" in child(ren) born of assisted reproduction to her same-sex romantic partner).

265. As noted earlier, distinctions between assertions by intended parents who allege genetic ties and by intended parents who do not allege genetic ties are not always made. Parness & Townsend, *supra* note 56.

266. *See, e.g.*, L.F. v. Breit, 736 S.E.2d 711 (Va. 2013).

267. *See Lehr*, 463 U.S. at 262 ("The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring."). *But see* Michael H. v. Gerald D., 491 U.S. 110 (discussing whether such an opportunity is recognized for a natural father when the birth mother was married to another who continues to live with the mother and child within a stable family unit).

268. *See, e.g.*, *Reforming VPAs*, *supra* note 26, at 197-200 (noting that VPA challenges within the relevant time limits may also be foreclosed by laches or estoppel).

Further, for non-signing genetic fathers (and their family members), state laws that limit the non-signatories with standing to challenge VPAs can be problematic. Challenges are sometimes available to a person who is not a signatory to the acknowledgement of parentage.[269] But sometimes standing is more limited, as with standing provisions expressly encompassing only certain challengers, like children and governments.[270] With such statutory limitations, paternity suits might still be available to effectively nullify VPAs, but such suits depend on eschewing a separation of powers bar on expanding standing to those not expressly noted statutorily or on finding that limited standing provisions present invalid constitutional rights deprivations.

Some voluntary paternity/maternity/parentage models, principles and laws invite infringements on the childcare (under *Troxel*) and childcare opportunity (under *Lehr*) interests of some sperm contributors whose consensual sex prompted births, as well as of some sperm and egg contributors who were intended parents of children to be born of assisted reproduction to others who employed those persons' genetic material. Here, troubles arise where the laws on voluntary parentage acknowledgment opportunities are limited to men via VPAs whose consensual sex with birth-givers led to births. If men whose sex with unwed women that led to births prompt federal constitutional paternity opportunity interests in the men even where there were no contemplations of or intention about later pregnancies, surely similar interests should be recognized for certain sperm and egg contributors involved in assisted reproduction births to unwed mothers or to gestational surrogates where all involved parties *did* plan on later births of children with parentage in all with genetic ties.[271] Beside parental opportunity interests, there is perhaps parentage arising from contracts/intentions. Consider agreements with gestational carriers with only biological ties (e.g., birth-givers employing implanted fertilized eggs). Consider parentage as well in others with no genetic or biological ties (e.g., spouses of birth-givers employing assisted reproduction techniques), through agreements on parenthood, or agreements on nonparental visitation rights between birth-givers and egg providers for children born to gestational surrogates.[272]

Some commentaries do recognize the constitutional problems with and limits on current voluntary parentage acknowledgment laws in assisted reproduction settings. For example, Professor Feinberg limits her proposal to

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269. ME. REV. STAT. ANN. tit. 19-A, § 1868(2) (2023). *See also* VT. STAT. ANN. tit. 15C, § 308(b) (2024); MINN. STAT. § 257.34(3) (2024).

270. *See, e.g.*, *Reforming VPAs*, *supra* note 26, at 188-94. While the Uniform Parentage Act (2017) expressly recognizes a VPA may be challenged by a non-signatory, UNIF. PARENTAGE ACT §§ 309(b), 610(b) (UNIF. L. COMM'N 2017), the Uniform Parentage Act (2000) only explicitly recognized signatory challenges, UNIF. PARENTAGE ACT § 308(a) (UNIF. L. COMM'N 2000), and the Uniform Parentage Act (1973) recognized challenges brought by "any interested party," UNIF. PARENTAGE ACT §§ 4(a)(5), 6(b) (UNIF. L. COMM'N 1973).

271. *See, e.g.*, *In re* S.D.S., 539 P.3d 722 (2023) (finding that egg donor involved in assisted reproduction unsuccessfully urged that she is a parent of the child born to a gestational surrogate).

272. *See, e.g.*, *In re S.D.S.*, 539 P.3d at 722 (remanding the issue of nonparental rights to determine if an egg donor had nonparental visitation rights with respect to a child born to a gestational surrogate).

extend voluntary parentage acknowledgments to same-sex female couples in settings where children are conceived "using sperm provided in compliance with state donor non-paternity laws."[273] But Professor Harris has problematically posited that "unmarried same-sex couples may successfully argue that they are constitutionally entitled to use existing VPA statutes [per Equal Protection] to establish legal parentage for the partner who is not the biological parent of a child born in the relationship."[274] More explicit recognitions of the limits on VPAs in assisted reproduction settings by those with no genetic ties are warranted, especially given the 2017 UPA invitation to certain spouses and resident/hold out parents to undertake VPAs.

B. New Multiple Person Intended Parentage Declaration Laws

As noted, the 2017 UPA and some of its state adopters recognize voluntary nongenetic parentage acknowledgments, including signatories who are allegedly spouses of birth-givers, residency/hold out parents, and intended parents for some assisted reproduction births.[275] At least in some settings involving nongenetic acknowledgments, the effects of completed acknowledgment forms should vary from the presumptive parentage/judgment effects of VPAs. Like genetic ties in VPAs, alleged relevant spousal relations are easily proven or disproven. But unlike VPAs, residency/hold out, de facto, and intended assisted reproduction parent norms are likely subject to more, and more contentious, factual disputes. Here, nongenetic parent assertions should not be deemed acknowledgments. They should be recognized as declarations containing biased statements of fact that would be subject to later challenge, especially by those outside the signature process. Consider declarations by a birth mother and her live-in partner who are jointly raising the mother's child, but who have not co-resided for the two (or more) years that residency/hold out parentage laws require. A dual declaration as to intended parentage for the partner can serve many important purposes, like diminishing the numbers or contentiousness of future parentage disputes or providing guidance to courts in the unfortunate event

273. Jessica Feinberg, *A Logical Step Forward: Extending Voluntary Acknowledgments of Parentage to Female Same-Sex Couples*, 30 YALE J.L. & FEMINISM 99, 99-100 (2018) [hereinafter *Extending Voluntary Acknowledgements of Parentage*] (explaining that voluntary parentage acknowledgments are limited by "the law's historical privileging of genetic connections in parentage determinations").

274. Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 467, 487 (2012). The author also posits that "a better course is for states to enact statutes based on the VPA that are adapted to the particular circumstances of same-sex couples," *id. See also* Jennifer P. Schrauth, Note, *She's Got to Be Somebody's Baby: Using Federal Voluntary Acknowledgments to Protect the Legal Relationship of Married Same-Sex Mothers and Their Children Conceived Through Artificial Insemination*, 107 IOWA L. REV. 903, 937-38 (2022) (discussing how federal VPA laws do not require genetic ties for male signers).

275. *See supra* notes 40—45, 54—61 and accompanying text on 2017 UPA; see also *supra* notes 57—62 on nongenetic state parentage acknowledgment laws covering, e.g., residency/hold out parents and assisted reproduction parents.

of the mother's death before the required co-residency time has been completed.[276]

As with VPAs, challenges to intended parent declarations may be foreclosed by limitations/repose periods, especially those serving the interests of the children. Further, challenges may be foreclosed by earlier informed and voluntary assertions whose trustworthiness cannot be challenged.

Unfortunately, the 2017 UPA fails to distinguish between alleged spousal and residency/hold out parents who are "presumed" parents eligible to pursue acknowledgments.[277] In each setting, signatures on compliant and filed acknowledgment forms "[are] equivalent to an adjudication of parentage."[278] Non-signatories have "two years after the effective date of the acknowledgment" to challenge, assuming the court "finds permitting the proceeding is in the best interests of the child."[279] There are no guarantees or protective measures insuring that interested non-signatories receive notices of the acknowledgments. For example, genetic fathers may not receive notice of the acknowledgement if they are not "presumed" parents and if they have not filed paternity actions, despite being recognized as the genetic fathers by the birth-givers (and others) and providing some childcare and child support.

The 2017 UPA, as well, fails to treat an alleged residency/hold out parent and an alleged de facto parent comparably. Only the former, as a presumed parent,[280] is able to pursue parentage acknowledgments with the birth-giver who bore a child of consensual sex.[281]

The 2017 UPA does recognize that parentage acknowledgments (beyond VPAs) are available to alleged "intended" parents in non-surrogacy assisted reproduction births.[282] Here, as with residency/hold out parentage, factual disputes can arise because such "intended" parents sometimes need only allege there was a preconception "express agreement" on dual parentage.[283]

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276. These and similar purposes cannot be served where statutes limit intended parent declarations to a time subsequent to completion of the required residency. *See, e.g.*, ME. REV. STAT. ANN. tit. 19-A, § 1881(3) (2023) (requiring a two-year residency and hold out period to establish nonmarital presumption of parentage); ME. REV. STAT. ANN. tit. 19-A, § 1861(3) (2023) (requiring two years of co-residency and at least two years from the time the child was born or adopted for a presumed parent to submit a VPA).

277. UNIF. PARENTAGE ACT § 204(a)(1)-(2) (UNIF. L. COMM'N 2017) (outlining requirements to be a presumed parent); UNIF. PARENTAGE ACT § 301 (UNIF. L. COMM'N 2017) (allowing presumed parents to sign acknowledgments of parentage).

278. *Id.* § 305(a).

279. *Id.* § 309(b) (non-signatory challenge governed by § 610); *id.* § 602 (defining non-signatory challengers); and *id.* § 610(b)(1) (two years assuming best interests).

280. *Id.* § 204(a)(2).

281. *Id.* § 301.

282. *Id.* § 301; *id.* Article 7 (covering births in non-surrogacy assisted reproduction, per § 701).

283. *Id*. § 704(b)(1). Comparable state laws include Wash. Rev. Code § 26.26A.600; *id.* § 26.26A.610; and *id.* § 26.26A.615(2) (2019). Disputes over such alleged nonrecorded pacts have arisen in cases involving do-it-yourself assisted reproduction births. *See, e.g.*, Gatsby, 495 P.3d 996, 1004 (Idaho 2021) ("far from clear" that online form used by same sex couple

While those with parental childcare rights are largely left to state lawmakers, as are the means of seizing protected parental opportunity interests, once parentage is established under state law there are constitutional protections. The protections include the Due Process rights of existing legal parents whose parentage evaporates when others become parents. In *Santosky v. Kramer*,[284] the Court held that a state needed to demonstrate permanent neglect by "clear and convincing evidence" before terminating the childcare rights of a "natural" parent. In doing so, it observed that the "fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."[285] The same proof, and the same liberty interest, however, are often not required when other childcare parents are recognized via acknowledgment processes.

Nonadoptive, nongenetic childcare parentage has grown dramatically since *Santosky* under the previously described spousal, residency/hold out, de facto, and artificial insemination parentage laws. When nonadoptive, nongenetic parents are recognized for children with existing adoptive or genetic parents, it is troubling that "clear and convincing evidence" of neglect or comparable acts by the existing parents under *Santosky* is often not required.[286]

Commentators and courts alike, to date, generally do not speak to the constitutional dimensions of spousal parentage when they consider the rights or interests of the genetic fathers of children born of consensual sex to women who are married (at the relevant time) to others who are presumed parents.[287] Those fathers, it is usually agreed, have no federal constitutional right to state recognition of their childcare parentage, per the ruling in *Michael H. v. Gerald D*.[288] Those fathers, however, sometimes do have state constitutional rights to state-recognized childcare parentage,[289] thus limiting the scope of spousal parentage.

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included nonbirth-giver consent to her partner "being inseminated"). The rulings in the case on parentage are reviewed and critiqued in Jeffrey A. Parness, *DIY Artificial Insemination: The Not-So-Great Gatsby*, 55 CREIGHTON L. REV. 465 (2022). In surrogacy assisted birth settings there are no acknowledgement opportunities. § 301 U.P.A. (2017) (referencing only non-surrogacy assisted reproduction births in Article 7 on voluntary parentage acknowledgments); and *id.* § 804 (detailed contract requirements for all surrogacy pacts).

284. Santosky v. Kramer, 455 U.S. 745, at 769—70 (1982).

285. *Id*. at 753.

286. *See, e.g.*, Jeffrey A. Parness, *Unconstitutional Parenthood*, 104 MARQ. L. REV. 183, 185—86 (2020) (most troublesome development is recognition of a new parent without the "express, implied, or apparent consent" of an existing legal parent or of a person with continuing constitutional parental opportunity interests).

287. *See, e.g.*, Treto v. Treto, 622 S.W.3d 397, 401 (Tex. App. 2020) (reviewing state cases concluding spousal parentage (including for support purposes) arises for a nonbiological female spouse of a birth mother). *See also* Stone v. Thompson, 833 S.E.2d 266, 268—72 (S.C. 2019) (reviewing common law marriage cases in U.S. state courts while eliminating this marriage form prospectively).

288. Michael H. v. Gerald D., 491 U.S. 110, 129 (1989).

289. *See, e.g.*, Callender v. Skiles, 591 N.W.2d 182, 192 (Iowa 1999) (holding statute unconstitutional under Due Process Clause where unwed biological father of a child born of consensual sex had no standing to overcome male spousal parentage).

Commentators and courts alike also do not speak much of the constitutional dimensions of spousal parentage when children are born other than by consensual sex.[290] Consider children born of do-it-yourself assisted reproduction where the sperm donor was not the spouse of the birth-giver, but was an intended parent (that is, intended by the birth mother and the donor). Here, unlike for children born of sex, there could be stronger claims to protected procreational interests by those outside the marriage, notwithstanding the *Michael H.* ruling.

As to assisted reproduction births to married mothers where their spouses contributed no genetic material, Professor Feinberg well describes how new state spousal parentage laws may be crafted. She suggests varying rationales for parentage recognitions in spouses and non-spouses, including genetic ties, parental interest, parental function, "the protection of marital family units from outside intrusion, the promotion of marriage as the preferred site for parentage establishment, and the furtherance of children's best interests."[291] Further, she suggests lawmakers might explore "the possibility of states establishing two distinct presumption standards, the applicability of which would depend upon whether conception occurred through sexual or nonsexual means."[292]

C. New Single Person Intended Parentage Declaration Laws

New single person, genetic and nongenetic parent assertion laws are also needed. Here, those intending to childcare in the future can assert their intentions at the time of birth with the in-hospital declarations later employed, together with other evidence, to determine whether legal, childcare parenthood is warranted.

Single genetic parent assertion laws are today found in registry of paternity laws.[293] They typically are used by those claiming childcare fatherhood who, notwithstanding (alleged) genetic ties, have not had parenthood formally established, as by marriage to a birth-giver or by a successful paternity suit, or have not had the parenthood issue brought before a court or similar tribunal for adjudication. Registry laws provide a means of assuring notice to successful registrants of a later related proceeding for an adoption or for a termination of parental rights. These laws should be expanded so that notices are additionally conveyed to registrants, as when an alleged nongenetic childcare parent seeks to

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290. *But see* Extending Voluntary Acknowledgments of Parentage, *supra* note 273, at 105—06 (need to amend laws to account for both intent and function based spousal parentage presumption). *See also* Restructuring Rebuttal, *supra* note 156, at 246—47 (similar).

291. Restructuring Rebuttal, *supra* note 156, at 246.

292. Restructuring Rebuttal, *supra* note 156, at 248. Unfortunately, neither Professor Feinberg nor the 2017 UPA (which takes assisted reproduction births outside of the spousal parent presumption) explore the implications of government inquiries into how children were conceived, especially where there were no intended parent/consent to parent forms utilized and there were no prebirth parentage cases initiated.

293. State laws often adopt the 2000 UPA provisions, §§ 401-416, or the 2017 UPA provisions, §§ 401-415. The 1973 UPA had no registry provisions; but in adoption cases where the mother "relinquishes or proposes to relinquish" her child for adoption, the 1973 UPA demanded an "inquiry to be made of the mother and any other appropriate person" to "identify the natural father," § 25(b), with notice then given to anyone deemed "a possible natural father," § 25(c).

secure legal parenthood via such doctrines as residency/hold out or de facto parentage.[294]

In-hospital, at birth opportunities for childcare parentage assertions within paternity registries would be made available to possible genetic fathers at the hospitals where VPAs cannot be undertaken, perhaps because the birth-giver will not sign a VPA or the birth-giver is married to another who is not then present, or willing, to sign. Here, the assertions, of course, do not operate as paternity judgments, like VPAs. But they can serve to protect parental childcare rights/interests not only in adoption/parental rights termination cases, but also in later child custody/visitation/parental time allocation cases where a signer's parenthood is challenged.

Finally, with advances in assisted reproduction technologies and uses, current paternity registry laws should be expanded to include alleged maternity. Such laws would include all (alleged) genetic parents, thus including both sperm and egg providers. Here, as with paternity registration, notices of all related parentage proceedings should go to successful registrants, thus encompassing related proceedings on de facto and similar parentage outside of formal adoption and/or on termination of parental rights.

This matter presents many questions for lawmakers to ponder. Beyond (alleged) genetic parents, should any nongenetic would-be childcare parents be able to register? Further, should any existing childcare parents be able to register their objections to future childcare parentage efforts by others, effectively indicating their opposition to any later childcare parent initiatives by them? Recall that under the 2017 UPA provisions on de facto parentage, only such an alleged parent may seek a legal parentage judgment.[295]

These preliminary questions lead to others. Under what circumstances, if any, should a would-be parent be able to register if that person acted as a parental figure to a former partner's child when all three lived together for an extended time as a self-described family unit, with registration coming upon the unit's collapse? And under what circumstances might a legal parent seek to register objections to any future childcare parent initiatives by another (e.g., a would-be residency/hold out parent from a now-collapsed family unit)?

VII. CONCLUSION

Extensive reliance by states on federal VPA mandates in many parentage settings, whether or not state welfare or other government-provided child support is involved and whether or not genetic-based paternity is involved, thwarts development of state law voluntary parentage norms which would specially operate outside of welfare reimbursement settings, as with childcare, and would operate in the absence of alleged male genetic ties.

While a few states permit post-conception, prebirth VPAs, many do not. Prebirth parentage assertion opportunities, in and outside of VPAs, make sense. They could be employed not only by future genetic parents seeking to secure

294. My earlier thoughts on expanding single parent registry laws are found in Jeffrey A. Parness, *Expanding State Parent Registry Laws*, 101 NEB. L. REV. 684 (2023).

295. § 609(a) U.P.A (2017).

childcare rights,[296] but also by future intended nongenetic parents seeking similar rights. Employments should be made available through in-hospital parent assertions at the time of birth.

For nongenetic parents (as with spouses of those then gestating) and for would-be parents (as with possible parents under de facto or assisted reproduction parent laws), voluntary parentage assertion opportunities should track the state parentage laws that require factfinders to determine parental intentions for nongenetic childcare parenthood. Voluntary in-hospital parentage assertion opportunities thus should be available beyond VPAs. Like VPAs, they could involve two or more signors. Like VPAs, they could prompt legal parentage (whether or not rebuttable) upon signing. But unlike VPAs, new laws could also reflect assertion opportunities regarding future parental intentions by those who are not genetically tied to the children, and which could be undertaken by a single person, not unlike current parent registry laws employed in assessing parental intentions in formal adoption settings.

296. Consider male military service members subject to deployment during pregnancy who wish to secure parental status in case, shortly after birth, an unwed mother chooses to place the child for adoption, where the man's participation (and veto) in the adoption process can be foreclosed easily, per Lehr, by his failure to seize in a timely manner his federal constitutional parental opportunity interests. VPAs are clearly often easier to pursue than paternity cases. And consider pregnant female military service members subject to deployment where the prospective biological fathers wish to secure parental status under law in case birth mothers die during childbirth. Additionally, future paternal grandparents, or certain other relatives, for the same reasons, may desire prebirth VPA opportunities on behalf of genetic fathers who die before their children are born. *Compare* Estate of Swift ex rel. Swift v. Bullington, 309 P.3d 102 (N.M. Ct. App. 2013) (after son's death, grandparent brought a paternity action in the son's name as a means of enhancing the chance for grandparent visitation), *with* Bullock v. J.B., 725 N.W.2d 401, 403 (Neb. 2006) (unwed father's paternity case abated upon his death and could not be revived by his mother whose "motivation in seeking to revive the action" was "her belief that a paternity determination is necessary in order for her to be awarded grandparent visitation").

REVISITING STATE COMPELLED SURGERY AFTER *DOBBS*

Kathleen Kinnen†

INTRODUCTION

In 1978, Robert McFall sought court intervention to compel his cousin, David Shimp, to donate bone marrow to save his life.[1] Shimp was uniquely able to assist.[2] The rare and life-threatening disease McFall suffered from could only be cured by a transplant from a compatible donor.[3] Because of the complexities of bone marrow transplantation, only close relatives can be viable matches.[4] After testing all known family members, Shimp proved to be the only viable donor.[5] Shimp repeatedly turned down the pleas from his sick cousin and other family members to donate the marrow.[6] In a desperate attempt to live, McFall filed suit against Shimp, relying on a 700 year old law from England as his only precedent.[7]

McFall's claim failed.[8] The trial court rejected the idea that the government could force a medical intrusion on one's body to support another, no matter how

†Thanks to Joseph Diedrich for his invaluable support. And a special thank you to my parents, who raised four daughters; your strength and love shaped our independent spirits.

1. McFall v. Shimp, 10 Pa. D. & C.3d 90, 90 (Pa.Com.Pl. 1978).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Anemia Victim McFall Dies of Hemorrhage*, MICH. DAILY, Aug. 11, 1978, at 11.
7. McFall v. Shimp, 10 Pa. D. & C.3d 90, 90 (Pa.Com.Pl. 1978).
8. *Id.* at 92.

dire the circumstances or how little invasion the procedure requires.[9] Such an order, the court reasoned, would "change every concept and principle upon which our society is founded."[10] The court also expressed concern that a different ruling would be impossible to contain.[11] While the judge felt sorry for McFall, he "just as clearly felt his lawsuit was absurd."[12] The court found Shimp's decision "morally indefensible," but wrote that the implication that the government could force Shimp to be a better person "causes revulsion to the judicial mind."[13]

McFall died one month after the court denied his claim.[14] Shimp refused to talk to reporters, except for one interview with the Pittsburgh Press, where he defended his choice: "I'm not the monster many people think I am."[15]

McFall v. Shimp is emblematic of a broader prevailing norm. The law consistently holds that a human being is under no legal obligation to save another person.[16] No man is even required to be a "Minimally Decent Samaritan."[17] Yet, one glaring exception exists: state compelled c-sections.

This note examines the issue of bodily integrity and the pregnant woman's right to make informed medical decisions. In Part I, the note explains the concept of bodily integrity in the historical context of the Fourteenth Amendment. In Part II, it looks at how different courts have handled cases involving forced c-sections while *Roe v. Wade* was controlling law. Some courts have invoked *Roe* in decisions forcing women to undergo invasive surgeries for the betterment of the fetus, while others have declined to create a legal obligation that mothers give up their right to bodily autonomy. In Part III, this note considers how the overturning of *Roe* may change the legal precedent of forced c-sections. Finally, in Part IV, this note observes that in the post-*Roe* era, doctors and hospitals are increasingly turning to the court system for decisions in maternal health care. But, as this note ultimately argues, this gets things exactly backward: doctors should now, more than ever, avoid turning to the court system.

I. FOURTEENTH AMENDMENT BACKGROUND

The Reconstruction Amendments protect against various state-sponsored intrusions into one's body.[18] The Thirteenth and Fourteenth Amendments—including the latter's Due Process Clause, which ensures that no State shall "deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"[19] —

9. *Id.* at 92.

10. *Id.* at 91.

11. *Id.* ("To do so would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn.")

12. DAVID BOONIN, BEYOND ROE: WHY ABORTION SHOULD BE LEGAL—EVEN IF THE FETUS IS A PERSON, 3 (2019).

13. *McFall*, 10 Pa. D. & C.3d at 92.

14. *Anemia Victim McFall Dies of Hemorrhage*, *supra* note 6 at 11.

15. *Id.*

16. *McFall*, 10 Pa. D. & C.3d at 91.

17. Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 63 (1971).

18. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

19. U.S. Const. amend. XIV, § 1.

abolished slavery and "all of its vestiges."[20] The framers of these amendments aimed to end the forced sexual and reproductive servitude of Black women and shield Black women from the rape and forced reproduction that slavery relied on.[21]

These principles have withstood the test of time. In 1990, Justice O'Connor reiterated that physical freedom and self-determination are inextricably intertwined with liberty.[22] Generally, the Due Process Clause protects against state incursions into the body.[23] A determination that a person has a liberty interest under the Due Process Clause, however, does not end the inquiry: a constitutional violation is determined by balancing the liberty interest against the state's relevant interests.[24] People have a constitutionally protected liberty interest in refusing unwanted medical treatment.[25] A Mississippi appellate court summarized this right by saying a competent individual has a right to refuse medical treatment, whether the refusal is grounded on doubt, concern, lack of confidence, religious belief, or "because of a mere whim."[26] When balanced against the state's interest, the individual's right "ordinarily outweighs any state interest" and the unwanted medical treatment will not be forced.[27] In the non-pregnancy medical context, courts weighing a person's constitutional right to be free from unwanted medical intervention will not find that the state's interest in saving a person's life justifies even the slightest intrusion into another.[28]

Roe v. Wade and *Planned Parenthood v. Casey*, the now-overturned cases that recognized the right to abortion, also found support in the Fourteenth Amendment, but using a different reasoning. Before *Roe* and *Casey*, in *Griswold v. Connecticut*, the Court held that the Due Process Clause implicitly includes a right to privacy.[29] The *Roe* and *Casey* decisions construed this right to be broad enough to include the decision to terminate a pregnancy.[30] Both decisions also

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20. *The Impact of the Supreme Court's Dobbs Decision on Abortion Rights and Access Across the United States: Before the H. Comm. on Oversight and Reform,* 117th Cong. 2-3 (2022) (statement of Michele Bratcher Goodwin, Chancellor's Professor of Law, Univ. of Cal., Irvine).

21. *Id.*

22. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 287 (1990) (O'Connor, J., concurring).

23. *Id.*

24. *Id.* at 279 (citing Youngberg v. Romeo, 457 U.S. 307, 321 (1982)).

25. *Id.* at 278.

26. Dodd v. Hines, 299 So. 3d 89, 96 (Miss. Ct. App. 2017).

27. *Cruzan*, 497 U.S. at 273 (quoting *In re Conroy,* 98 N.J. 321, 348, 486 A.2d 1209 (1985)). Limited circumstances exist where the state's interests do outweigh the individuals, such as when the individual is incompetent to make informed medical choices or for the protection of third parties. *Cruzan*, 497 U.S. at 273. Protecting third parties is narrow and usually refers to minor children who rely on the patient for support, not those who have a stake in the procedure. *See In re* Brown, 689 N.E.2d 397, 406 (Ill. App. Ct. 1997).

28. *See* Curran v. Bosze, 566 N.E.2d 1319 (Ill. 1990). *See also McFall*, 10 Pa. D. & C.3d at 91.

29. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

30. Roe v. Wade, 410 U.S. 113, 153 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873 (1992).

acknowledged that the state has an interest in the potentiality of human life.[31] The Supreme Court balanced these competing interests, weighing a woman's right to bodily autonomy against the state's interest in preserving fetal life. This balancing produced a constitutional rule of decision based on the viability of a fetus: before viability, a woman's right to make private decisions about her body outweighs the state's interest in promoting life, but after viability the state's interest becomes stronger, and at that point the state may regulate or prohibit abortion.[32]

In 2022 in *Dobbs v. Jackson Women's Health Organization*,[33] the Supreme Court overturned *Roe*, rejecting *Roe*'s holding that the Constitution confers a right to abortion.[34] Now, because there is no federal constitutional right to abortion, and in the absence of an applicable federal statute, each state has the power to determine how abortion will be regulated.[35] There is no longer a viability framework for states to base their abortion regulation on; instead, states decide when the state's interest in promoting life becomes strong enough to outweigh a woman's choice to terminate a pregnancy, or if a pregnant woman ever has that choice.[36]

II. FORCED C-SECTIONS WHEN *ROE* WAS GOOD LAW

The Introduction covered *McFall,* where a plaintiff requested that a court compel organ donation to save his life. Very few cases involve such a request.[37] Perhaps this should be unsurprising, given that the underlying factual circumstance of a person knowing they are a suitable donor and still refusing is rare.[38] Even when this factual circumstance arises, moreover, people are unlikely to evoke the legal process because doing so goes against the "American insistence on bodily integrity, autonomy, and nonsubordination."[39]

In the few instances in which state courts have been confronted with compelled organ donation requests, they have declined to impose a duty onto the person capable of donating their organ to save another.[40] Although some have remarked on the moral dilemma such requests implicate, courts have uniformly

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31. *Roe*, 410 U.S. at 153; *Casey*, 505 U.S. at 873.

32. *Roe*, 410 U.S. at 164-165.

33. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

34. *Id.*

35. *Id.* at 256. *Cf.* Moyle v. United States, 144 S. Ct. 2015 (2024) (dismissed as improvidently granted) (Kagan, J., concurring) (reiterating that the Emergency Medical Treatment and Labor Act preempts state laws that bar a hospital from performing an abortion needed to prevent serious health harms).

36. *Dobbs*, 597 U.S. at 256. *See also*, Maya Manian, *The Ripple Effects of Dobbs on Health Care Beyond Wanted Abortion,* 76 SMU L. REV. 77, 77. ("Post-Dobbs, abortion policy is largely in the hands of voters, as state legislation and ballot initiatives now dictate the fate of abortion rights.")

37. Nancy K. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans,* 74 . CALIF. L. REV. 1951, 1975 (1986).

38. *Id.* at 1975-76.

39. *Id.* at 1976.

40. *See generally* McFall v. Shimp, 10 Pa. D. & C.3d 90, 91 (Ps.Com.Pl 1978).

held that the legal system cannot compel a person to sacrifice their life or limb to benefit another.[41] Despite the social and moral obligation one has to their family, the court is legally bound to the principles of privacy, autonomy, and bodily integrity, and thus cannot force a person to sacrifice their own body to aid another.[42]

Forced c-sections have been likened to compelled organ donations, as both situations involve people being subjected to unwanted medical procedures solely for the benefit of another person.[43] Yet when it comes to an expectant mother and her fetus, the law appears to be applied somewhat differently: in the c-section context, some courts deviate from the principle that the right to refuse medical treatment to support another is absolute.

A. Courts that Rejected Forced C-Section

When asked to legally compel women into undergoing treatment intended to save a fetus, the Illinois Appellate Court has taken an approach similar to that of decisions involving forced organ donations.[44] In *In re Baby Boy Doe* and *In re Brown,* the court expressed sympathy and noted the apparent ethical duties the expectant mothers are forsaking, but still refused to allow those impulses to trump the woman's constitutional right to be free from forced bodily invasion.[45]

In *In re Baby Boy Doe*, the majority explained that the state may override a competent adult's medical choices only in specific circumstances, none of which includes protecting fetal life.[46] The court refused to engage in the balancing of maternal and fetal rights, holding that "a woman's competent choice in refusing medical treatment as invasive as a cesarean section during her pregnancy must be honored, even in circumstances where the choice may be harmful to her fetus."[47] Although the state has an interest in protecting third parties, the *Baby Boy Doe* court reasoned that it could not consider potential beneficiaries of the medical treatment in its decision, whether fetus or a born person.[48] This reasoning aligns with the principles of bodily autonomy expressed in *McFall*: "For a society which respects the rights of one individual, to sink its teeth into the jugular vein or neck of one of its members and suck from it sustenance for *another* member, is revolting to our hard-wrought concepts of jurisprudence."[49]

The Illinois Appellate Court further discussed this standard in *In re Brown*. There, a woman refused blood transfusions on religious grounds, despite her doctor's assessment that her fetus had only a 5% chance of survival without the

41. Curran v. Bosze, 556 N.E.2d 1319, 1345 (Ill. 1990) ("The sympathy felt by this court,"); *McFall*, 10 Pa. D. & C.3d at 91 (". . .in the view of the court, the refusal of defendant is morally indefensible.").

42. Rhoden, *supra* note 34, at 1976.

43. *Id.* at 1988.

44. *See* In re Brown, 689 N.E.2d 397, 406 (Ill. App. Ct. 1997); In re Baby Boy Doe, 632 N.E.2d 326, 326 (Ill. App. Ct. 1994).

45. *In re Brown*, 689 N.E.2d at 406.

46. *In re Baby Boy Doe*, 632 N.E.2d at 334 (Ill. App. Ct. 1994).

47. *Id.* at 330.

48. *Id.* at 334.

49. McFall v. Shimp, 10 Pa. D. & C.3d 90, 92 (Pa.Com.Pl 1978).

transfusions.[50] At some point, the state became aware of this situation and filed a "petition for adjudication of wardship and a motion for temporary custody" of the fetus.[51] The trial court ordered Mrs. Brown to undergo the blood transfusions, citing an exception that the state can override a competent adult's medical decision to preserve life.[52] But the Appellate Court reversed, clarifying that the state's interest in preserving life extends only to the life of the person refusing the treatment, not to other people who may benefit.[53]

The ultimate issue in *Brown* was the extent of the state's interest in protecting fetal life.[54] The court acknowledged that while the state does have an interest in protecting viable fetuses, this interest only extends to restricting abortion after the point of viability.[55] Since Mrs. Brown was not seeking to terminate her pregnancy, the court concluded that the state could not override her competent medical decisions in an attempt to save the fetus's life.[56]

Similar decisions are found outside Illinois. In *In re AC*, for example, the District of Columbia Court of Appeals upheld a mother's right to refuse a procedure intended to save the fetus.[57] Here, the hospital petitioned for emergency declaratory relief for guidance on treating an expectant mother who was dying of cancer.[58] After the court ordered a c-section to be performed, the baby died hours after the surgery, and the mom died two days later.[59] The appellate court did not go so far as to hold that the state's interests may never outweigh an individual's right to be free from compelled medical invasion, but commented "it would be an extraordinary case indeed in which a court might ever be justified in overriding the patient's wishes and authorizing a major surgical procedure such as a caesarean section."[60]

Decisions like *Baby Boy Doe*, *Brown*, and *AC* showcase how immensely difficult and emotional these issues can be, for both the individuals involved and the courts asked to decide them.[61] In *In re Brown*, the court heard and decided the case after Mrs. Brown submitted to the blood transfusions and delivered a healthy baby, so the court did not have to confront the difficult decision to uphold

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50. *In re Brown*, 689 N.E.2d at 399.
51. *Id.* at 399.
52. *Id.* at 400.
53. *Id.* at 403-04.
54. *Id.* at 404.
55. In re Brown, 689 N.E.2d 397, 404 (Ill. App. Ct. 1997).
56. *Id*. at 405.
57. *In re* A.C.*,* 573 A.2d 1235, 1238 (D.C. 1990).
58. *Id*. at 1239.
59. *Id*. at 1238.
60. *Id*. at 1252.
61. Similar reasoning has been used in Massachusetts and New Jersey. Remy v. MacDonald, 440 Mass. 675, 678, 801 N.E.2d 260 (2004) (refusing to weigh the interests of the fetus against the mothers, stating to weigh those interests "could have profound social implications and far reaching unforeseen legal consequences."); N.J. Div. of Youth and Family Services v. V.M., 974 A.2d 448, 464, 408 N.J. Super. 222 (2009) ("The decision to undergo an invasive procedure such as a c-section belongs uniquely to the prospective mother after consultation with her physicians… Her decision on matters as critical as this invasive procedure must be made without interference or threat.").

Mrs. Brown's rights knowing her child would likely not survive.[62] Similarly, in *AC*, the D.C. appellate court upheld the mother's right to decline a procedure intended to save the fetus with the hindsight knowledge that the baby died shortly after the procedure.[63]

The stakes in such cases are incredibly high, yet the ultimate outcome is forcing an expectant mother into bearing a burden that no one else in our society ever endures.[64] Scholars have commented on these high stakes, for example, historian Nancy Rhoden has written that this coercion imposes risks and responsibilities onto expectant mothers that are unimaginable for others, no other patient is subject to such judicial intervention when making private medical decisions.[65] Even when motivated by good intentions, the court compromises the state's integrity by using its authority to "sink its teeth" into the bodies of its people.[66]

B. Courts that Ordered Forced C-Sections

The courts that use *Roe* to weigh the interests of the fetus and the state against those of the expectant mother do not state what about pregnancy makes forced medical intervention different than, for example, forced organ donations. Implicitly, there may be the factor of the pregnant mother's responsibility for the fetus as a pregnant woman nearly to term. British researchers have observed that pregnant women are culturally considered "mothers" from the very beginning of their pregnancy, which in turn brings an expectation to be self-sacrificial for their fetus.[67]

Unlike the courts in *Baby Boy Doe*, *Brown*, and *AC*, other courts have treated a woman's refusal of a c-section as the legal equivalent of a late-term abortion, and thus compelled her to undergo the procedure.[68] These courts applied the *Roe v. Wade* balancing test, when it was still good law, weighing a woman's right to bodily autonomy against the state's interest in preserving fetal life.[69] In these cases, courts have applied this balancing test even when abortion was not at issue.

In 1981, the Supreme Court of Georgia held that the state could force an expectant mother to undergo a c-section against her wishes.[70] In *Jefferson v. Griffin Spalding County Hospital Authority*, Jessie Jefferson refused to consent to a c-section procedure on religious grounds, despite doctors informing her there

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62. Brown, 294 Ill. App. 3d at 164 ("We note that the factual controversy has been resolved. Darlene Brown received the blood transfusions on June 28-29, 1996, and delivered a healthy baby on July 1, 1996.").

63. *In re A.C.*, 573 A.2d 1235, 1238 (D.C. 1990).

64. Rhoden, *supra* note 38, at 2029.

65. *Id.*

66. McFall v. Shimp, 10 Pa. D. & C.3d 90, 92 (C.P. 1978).

67. Zaina Mahmoud & Elizabeth Chloe Romanis, *On Gestation and Motherhood,* 1 MED. L. REV. 109, 128 (2022).

68. See Jefferson v. Griffin Spalding Cnty. Hosp. Auth., 274 S.E.2d 457, 460 (Ga. 1981); Pemberton v. Tallahassee Mem. Regional Med. Ct., Inc. 66 F. Supp. 2d 1247, 1252 (N. D. Fla. 1999).

69. *See supra* note 34.

70. Jefferson v. Griffin Spalding Cnty. Hosp. Auth., 274 S.E.2d 457, 460 (Ga. 1981).

was a 99% chance that the fetus would not survive a vaginal delivery and that she risked a 50% chance of dying herself.[71] The hospital sought court intervention, and the court ultimately granted state authorities the "full authority to make all decisions, including giving consent to the surgical delivery" of the fetus.[72] The court reasoned that the state's duty to protect the fetus outweighed Mrs. Jefferson's right to be free from bodily invasion.[73] Ultimately, Mrs. Jefferson gave birth without need for the c-section.[74]

A similar case unfolded in Florida in 1996. There, Laura Pemberton refused a c-section a year after she experienced a risky c-section delivering her first child.[75] The doctor who performed her first c-section used a vertical incision, which heightened the risk of uterine rupture during any subsequent vaginal births.[76] Mrs. Pemberton was unwilling to have another c-section and decided to birth her child at home with the help of a midwife.[77] While laboring, she went to the hospital because she had concerns about her hydration levels, but she continued to refuse a c-section.[78] The hospital then initiated a legal process to appoint a guardian to the fetus and compel Mrs. Pemberton to have a c-section for the fetus's benefit.[79] Still in labor, Mrs. Pemberton fled the hospital. A short time later, a sheriff forcibly removed her from her home, strapped her legs together, and transported her to the hospital so a judge could hold an emergency hearing. The judge ordered the c-section and eventually a baby boy was delivered by c-section.[80]

Despite the invasive nature of the surgery, the court summarily dismissed her claims of due process violations: "Whatever the scope of Ms. Pemberton's personal constitutional rights in this situation, they clearly did not outweigh the interests of the State of Florida in preserving the life of the unborn child."[81]

In both cases, the courts balanced the women's interests against the interest of the state, and explicitly relied on precedent set in *Roe v. Wade* for the regulation of abortion.[82] Under the *Roe* balancing test and viability framework, once a

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71. *Id*.

72. *Id*. at 459.

73. *Id*. at 460.

74. George J. Annas, *Forced Cesarean Sections: The Most Unkindest Cut of All*, HASTINGS CTR. REP, June 1982, at 16, 16.

75. Pemberton v. Tallahassee Mem. Regional Med. Ct., Inc. 66 F. Supp. 2d 1247, 1249 (N.D. Fla. 1999).

76. *Id*.

77. *Id*.

78. *Id*.

79. *Id*.

80. Emma S. Ketteringham, Allison Korn, & Lynn M. Paltrow, *Proposition 26: The Cost to All Women,* 81 SUPRA 84 (2011).

81. *Pemberton*, 66 F. Supp. 2d at 1251.

82. *Pemberton*, 66 F. Supp. 2d at 1251—52. ("Thus the state's interest here was greater, and the mother's interest less, than during the third trimester situation addressed in *Roe*. Here, as there, the state's interest outweighed the mother's."); Jefferson v. Griffin Spalding Cnty. Hosp. Auth., 274 S.E.2d 457, 458 (Ga. 1981) ("A viable unborn child has the right under the U.S. Constitution to the protection of the State through such statutes prohibiting the arbitrary termination of the life of an unborn fetus.") (citing Roe v. Wade, 410 U.S. 113 (1973)).

fetus is viable, the state's interest in preserving fetal livelihood outweighs a woman's interest in terminating the pregnancy.[83] The *Jefferson* court used this reasoning and emphasized that because the fetus was viable, it was "entitled to the protection of the Juvenile Court Code of Georgia."[84] The *Pemberton* court, for its part, similarly relied on *Roe*'s balancing test and recontextualized it to justify state intervention not just to prevent an abortion, but to force a particular method of birth.[85] Both cases employed reasoning that confuses the rights of a pregnant person to receive an abortion and their rights to refuse medical treatment.

C. Analyzing the Two Approaches

Refusing medical treatment and terminating a pregnancy are fundamentally different factual scenarios. The former involves a decision to *not* have medical treatment; the latter involves an affirmative decision *to* have medical treatment. The *Pemberton* court downplayed these differences and inverted them, asserting in a footnote that a forced c-section is *less* intrusive than prohibiting abortion because a forced surgery merely requires "a mother to give birth by one method rather than another."[86] An abortion is a deliberate and affirmative act to terminate the fetus, whereas refusing a c-section is a decision to decline medical intervention and is not a direct act against the fetus. Equating the two, as the *Jefferson* and *Pemberton* courts did, imposes a duty on women to sacrifice their bodily autonomy for their fetus.

Both *Jefferson* and *Pemberton* justified their decisions by emphasizing the state's duty to protect life, citing to *Roe.* If the state's interest in preserving life extends to fetuses, it presumably extends to preserving the life of people who are already born. Yet no court has ever forced a person to sacrifice life and limb to save another living person. Forced organ donation is frequently cited in scholarly works as "a practice that would unquestionably lie beyond the limits of the law,"[87] but courts have abandoned this principle to force pregnant women to sacrifice life and limb for their fetus.[88]

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83. Roe v. Wade, 410 U.S. 113, 164—65 (1973).

84. *Jefferson*, 274 S.E.2d at 459.

85. *Pemberton*, 66 F. Supp. 2d at 1249 n.9.

86. *Id.*

87. Rhoden, *supra* note 38, at 1978; *see* L. TRIBE, AM. CONST. LAW 918 (1978); Kadish, *Respect for Life and Regard for Rights in the Criminal Law,* in RESPECT FOR LIFE IN MEDICINE, PHILOSOPHY, AND THE LAW 83, 94-95 (1977).

88. The point at which 'life' begins is an unsettled area of law. Ongoing litigation surrounding the constitutionality of fetal personhood laws continues with no clear guidance from the Supreme Court of the United States. *See* Lauren N. Perez, Note, *From Dobbs to Lepage. Exploring the Implications of Fetal Personhood Under the Establishment Clause,* 80 N.Y.U. ANN. SURV. AM. L. 299, 300 (2024). Regardless if the fetus is legally a "person" or not post-*Roe*, the duty a pregnant woman has to her fetus in cases forcing a c-section is unparallel to any other person's duty to sacrifice their body to save another. The *Pemberton* decision touched on this in a footnote, "In *Roe*, the Court held a fetus not a "person" imbued with its own constitutional rights. Whether that conclusion is equally applicable when labor is in progress and birth imminent need not be addressed here, because the state's interest in a viable,

Courts may treat cases involving compelled c-sections differently than compelled organ donations because when a woman refuses the procedure, the potential harm to the fetus is immediate.[89] In contrast, McFall succumbed to his illness slowly and out of sight from Shimp and his doctors.[90] In the context of a forced c-section, the court knows the fetus will immediately face harm without action, and other than the procedure, there are no possible options.[91] These differences may influence the emotional reaction and subsequent response of doctors and judges.[92] For example, the *Jefferson* court highlighted the connectedness of an expectant mother and her fetus, finding that "because the life of the defendant and of the unborn child are, at the moment, inseparable, the Court deems it appropriate to infringe upon the wishes of the mother to the extent it is necessary to give the child an opportunity to live."[93]

Whatever a pregnant woman's moral obligation to her fetus might be, it must be kept distinct from her legal obligation. While the prevailing ideal of a "good mother" includes a pregnant woman sacrificing her own wellbeing for the sake of the fetus, forcing a pregnant woman to be a "good mother" with the threat of law comes with the "cost of embracing an unprecedented and problematic tyranny" of controlling women's bodies and personal choices.[94] The *Pemberton* court even went so far to say it would be absurd to argue that Mrs. Pemberton's right to be free from an unwanted surgery outweighs the fetus's right to survive, concluding that "to argue such a proposition [would] refute it."[95] However, respecting Mrs. Pemberton's right to refuse an invasive surgery, no matter how tragic the outcome may be, is consistent with our constitutional principles of bodily autonomy that protect against forced unwanted medical intervention, as articulated in *Cruzan*.

III. *DOBBS'S* EFFECT ON COMPELLED SURGERY

The reasoning that *Roe* can be used to force a woman to undergo surgery for the sake of the fetus contradicts the Fourteenth Amendment's protections against bodily invasion. *Cruzan* makes clear that people have a strong liberty interest in only receiving wanted medical intervention.[96] Regardless of the situation, the court may never "sink its teeth" into the body of a citizen to save another.[97] The overturning of *Roe* and the elimination of the viability framework has led some state courts to create the very precedent contemplated in *McFall*:

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full-term fetus whose delivery is imminent is sufficient to defeat a claim of the type advanced by Ms. Pemberton, even if such a fetus is not deemed a "person" with his or her own constitutional rights." *Pemberton*, 66 F. Supp. 2d at 1249 n.10.

89. Rhoden, *supra* note 38, at 1978.

90. *Anemia Victim McFall Dies of Hemorrhage*, *supra* note 6, at 11.

91. Rhoden, *supra* note 38, at 1979.

92. *Id.*

93. Jefferson v. Griffin Spaldin Cnty. Hosp. Auth., 274 S.E.2d 457, 459 (Ga. 1981).

94. Rhoden, *supra* note 38, at 2029–2030.

95. Pemberton v. Tallahassee Mem. Regional Med. Ct., Inc. 66 F. Supp. 2d 1247, 1252 (N. D. Fla. 1999).

96. Cruzan v. Dir. Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

97. McFall, 10 Pa. D. & C.3d 90, 92 (C.P. 1978).

rules that "know no limits, and [under which] one could not imagine where the line would be drawn."[98]

Before *Dobbs*, the courts that forced expectant mothers to receive unwanted treatment had at least a modest floor from the viability framework. By their own reasoning, which relied on *Roe*'s viability framework, these courts would be limited and would not order intervention until the fetus reached viability. However, with *Roe*'s viability framework now gone, courts could order unwanted medical intervention earlier in the pregnancy.[99]

Consider recent abortion laws enacted by some states. For example, since *Dobbs*, the Florida legislature passed the "Heartbeat Protection Act," which prohibits abortion when there is a detection of cardiac activity, typically around six weeks of gestation.[100] Georgia enacted a similar heartbeat bill that also bans almost all abortions at approximately six weeks.[101] These laws would have categorically run afoul of *Roe*'s viability framework but are constitutional under *Dobbs*. Whereas in the past, states could have *at most* banned abortion during the final period of pregnancy once the fetus was viable, now they can ban abortion earlier.

It can be said that Georgia and Florida have made a legislative determination that at six weeks into pregnancy, the state's interest in preserving fetal life outweighs a mother's interest in making medical decisions. And that has significant implications in other contexts. Now, without *Roe*'s constitutionally-based viability framework, the Heartbeat rule would seem to serve the same purpose in the analysis. Under the reasoning of *Jefferson* and *Pemberton*, courts could conceivably force a woman into a medical procedure against her will as early as six weeks into the pregnancy.

To be sure, the precedential value of the *Jefferson* and *Pemberton* cases are limited. Both cases were decided in lower courts and have not been extensively relied on.[102] These cases also used the legal framework of viability from *Roe*, but in practice only intervened when the fetus was near term. Still, the reasoning

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98. *Id.* at 91 (ordering the bone marrow transplant "would impose a rule which would know no limits and one could not imagine where the line would be drawn.").

99. Both *Pemberton* and *Jefferson* relied on the viability framework. *Pemberton*, 66 F. Supp. 2d at 1251–1252 ("Thus the state's interest here was greater, and the mother's interest less, than during the third trimester situation addressed in *Roe*. Here, as there, the state's interest outweighed the mother's."); *Jefferson v. Griffin Spalding Cnty. Hosp. Auth.*, 274 S.E.2d 457, 458 ("A viable unborn child has the right under the U.S. Constitution to the protection of the State through such statutes prohibiting the arbitrary termination of the life of an unborn fetus.") (*citing* Roe v. Wade, 410 U.S. 113, 153 (1973)).

100. Fla. Stat. §390.0111 (2023). This statute includes exceptions for rape and incest, allowing abortion until 15 weeks of gestation with proper documentation.

101. Ga. Code Ann. § 16-12-141 (2024). This statute includes exceptions for rape and incest, allowing abortion until 20 weeks of gestation with proper documentation. *See also* Press Release, ACLU, Georgia Supreme Court Reinstates Six-Week Abortion Ban (Oct. 7, 2024), https://www.aclu.org/press-releases/georgia-supreme-court-reinstates-six-week-abortion-ban.

102. *Pemberton* has been cited in three subsequent cases. *See* Almerico v. Denney, 378 F. Supp. 3d 920, 927 (D. Idaho 2019); Burton v. State, 49 So. 3d 263, 268 (Fla. Dist. Ct. App. 2010); Thierfelder v. Wolfert, 617 Pa. 295, 52 A.3d 1251, 1290 n.12. (2012). *Jefferson* has been cited 19 times, including in *Pemberton* and *Brown.*

from *Jefferson* and *Pemberton* could provide a legal framework for early forced intervention in Georgia and Florida, as well as other states with abortion bans.

The concern that courts will intervene in pregnant women's medical choices is not unfounded. Since *Dobbs*, doctors in some states are confused about what care is legally permissible: emergency care for pregnant women often includes procedures that, legally, are considered abortions.[103] In order to provide care to pregnant women in states with abortion bans, doctors must consider how far along the pregnancy is and if any expectations to the abortion ban apply.[104] Doctors are forced into the difficult and confusing task of interpreting vaguely written bans on top of treating pregnancy complications that often present in patients that are critically ill or have conditions with the potential to rapidly deteriorate.[105] These post-*Dobbs* abortion bans have resulted in the state automatically being involved in pregnant women's care, even when the courts are not involved in a particular case.

Instead of focusing on patient care, doctors are worried about legal ramifications. In 2023, 61% of OBGYNs in states with abortion bans reported they are concerned about legal risks when making decisions about pregnant women's care.[106] Professors Greer Donley and Jill Wieber Lens emphasize: "[T]his is how some pregnant people will die in a post-*Roe* America. Hospitals will delay care too long and not be able to save the person's life; or her life will be saved, but her uterus will be sacrificed, along with future fertility."[107] When doctors are forced to debate the legality of their decisions or ask the court to intervene before administering care, doctors are distracted from caring for patients.

The American Medical Association advises against judicial intervention when "a woman has made an informed refusal of a medical treatment designed to benefit her fetus."[108] Pregnant women are not getting lifesaving treatment because their doctors are involving the courts, which have no place in the doctor-patient relationship. No other category of patient is subject to such judicial intervention when they are making a private medical decision.[109]

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103. Kimberly Chernoby, *Pregnancy Complications After* Dobbs: *The Role of EMTALA,* W. J. OF EMERGENCY MED., 25(1), 79-85 (2024).

104. *Id.*

105. *Id.*

106. Vanessa Romo, *A Year After* Dobbs *and the End of* Roe v. Wade, *There's Chaos and Confusion,* NPR (June 24, 2023). https://perma.cc/5BYE-TJ7P.

107. Symposium, *The Impact of Dobbs on Health Care Beyond Wanted Abortion Care*, 51 J.L. Med. & Ethics 592 (2023), *citing* Greer Donley & Jill Wieber Lens, Article, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood,* 75 Vand. L. Rev. 1649, 1713 (2022).

108. Legal Interventions During Pregnancy, American Medical Association, H-420.696 (2024), https://perma.cc/S97U-JZME. The policy further states that judicial intervention may be appropriate in "exceptional circumstances" when the treatment poses an insignificant or nonexistent risk to the mother and entails minimal invasion of bodily integrity. Although it is not clear, an example of such procedure may be when a pregnant woman refuses a blood transfusion, like in *Jamaica Hospital*. In the Matter of Jamaica Hosp. 128 Misc. 2d 1006, 491 N.Y.S.2d 898 (Sup. Ct. 1985). Other courts have held that a blood transfusion is too invasive for a court to force above a competent adult's consent. In re Fetus Brown, 294 Ill. App. 3d 159, 171.

109. Rhoden, *supra* note 38, at 2029.

Following the recommendations of the American Medical Association, whenever possible, protects women and their fetuses because the publicity surrounding forced medical treatment prevents women who believe they are at risk of unwanted treatment from seeking medical care.[110] These recommendations also protect the physician-patient relationship, which is fractured when doctors seek forced treatment and become the patient's "adversary rather than advocate."[111]

In 1986, the D.C. Court of Appeals reversed the trial court's decision in *In re A.C.*, forcing Angela Carder to have a c-section against her own wishes and those of her family and doctor.[112] Angela and her baby both died shortly after the court-ordered procedure.[113] Her death certificate listed the forced c-section as a contributing factor.[114] Angela was already dying of cancer, but this court-ordered medical intervention robbed her and her family of the final moments they could have spent together. She and her child were buried together, with the baby bundled in her arms.[115]

In 1990, G.W.U. Medical Center changed their policies so "there will be no more Angela Carders wheeled away for surgery that they didn't choose and that their families were helpless to prevent."[116] The revised policy stated that the hospital will follow the pregnant patient's treatment decisions, aligning with the American Medical Association's current policy standards.[117] Post *Roe*, womens' bodies are increasingly policed and the state is increasingly asserting itself in personal medical decisions.[118] Doctors are stuck between a rock and a hard place. New abortion bans are forcing hospitals and doctors to consider abortion laws despite knowing from history that medical-legal intervention is frequently unsuccessful.

Now, in 2024, hospitals should follow the AMA's recommendations and avoid judicial intervention in personal medical decisions wherever possible. This is particularly important in jurisdictions that can rely on cases like *Pemberton* and *Jefferson* to force expectant mothers to undergo procedures early in their pregnancy. Clear guidance from the courts is still essential to ensure that pregnant women are treated like anyone else. No matter how dire the situation, the state should not thrust itself into private medical decisions and force a person to sacrifice their own body for the benefit of another.

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110. American Medical Association Board of Trustees, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, *JAMA*, 264, 2666.

111. Ann Dudley Goldblatt, Commentary, *No More Jurisdiction Over Jehovah*, 27 J.L. & Med, Ethics 190, 191 (1999).

112. *In re* A.C., 573 A.2d 1235 (D.C. 1990).

113. Anonymous Author, Opinion, *The Fruit of Angela Carder's Agony,* N.Y. TIMES, Dec. 8, 1990.

114. Jodie Tillman, *A Dying Woman's Forced C-Section Launched a Fight over Fetal Rights,* WASH. POST, Aug. 21, 2022.

115. *Id.*

116. *The Fruit of Angela Carder's Agony*, *supra* note 106.

117. *Id.*

118. Purvaja S. Kavattur, *The Rise of Pregnancy Criminalization: A Pregnancy Justice Report,* PREGNANCY JUSTICE, Sept. 2023, 5.

CONCLUSION

Whatever social and moral obligations an expectant mother has to her fetus, courts are bound to enforce legal principles of privacy, autonomy, and bodily integrity.[119] The Fourteenth Amendment was intended to, and does, safeguard a woman's right to bodily autonomy. Across time and jurisdictions, some courts have recognized that this right as absolute, while others have downplayed it in the face of state claims to interests in protecting fetal life. As this note has explained, state courts have diverged in their approach to compelling c-sections. Some of those courts mistakenly used *Roe*, when it was controlling law, to justify the state interfering into a women's private medical decisions and her body.

Dobbs has significant implications for compelled medical decision cases. With the removal of the viability framework, states now have more leeway to regulate women's bodies, potentially using precedent from compelled c-section cases to force unwanted medical procedures on pregnant women early in their pregnancies.

Considering these developments, correctly framing compelled c-sections as an unconstitutional intrusion into a woman's body is crucial to safeguarding pregnant women's rights. Doctors also have a responsibility to protect their patients and should avoid judicial intervention, especially in jurisdictions where courts have unconstitutionally forced women to undergo unwanted procedures.

119. U.S. Const. amend. XIV, § 2; *see* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).

LGBTQ+ HOUSING INSTABILITY: RETHINKING SECTION 8 THROUGH AN EQUITABLE LENS

Devin Paoni†

"Equality means more than passing laws. The struggle is really won in the hearts and minds of the community, where it really counts."
– Barbara Gittings (LGBTQ+ activist)[1]

INTRODUCTION

The legal definitions in Section 8's eligibility requirements must be updated to equitably serve the LGBTQ+ population, taking into account "nontraditional"

†J.D. Candidate, 2025, University of Wisconsin Law School. This work is dedicated to my parents Melissa and Michael Paoni who have supported my law school journey and inspire me to lead with kindness and advocacy. Thank you to Sophie Crispin and the Eviction Defense Clinic for inspiring this piece on housing justice and for providing feedback and edits. To the editors and staff of the *Wisconsin Journal of Law, Gender & Society*, thank you for your time and feedback.

1. Barbara Gittings, member of the Daughters of Bilitis, "the first female homophile group in the U.S., dedicated to improving the lives of lesbians," is known as the "mother of [the] lesbian and gay liberation" movement. Victor Salvo, *Barbara Gittings – Inductee*, THE LEGACY PROJECT, https://legacyprojectchicago.org/person/barbara-gittings [https://perma.cc/7U6F-3E8P] (last visited Oct. 23, 2024).

households.[2] Housing insecurity is extremely common among LGBTQ+ youth: a 2021 Trevor Project Survey reported that **"**14% of LGBTQ youth reported that they had slept away from parents or caregivers because they were kicked out or abandoned, with 40% reporting that they were kicked out or abandoned due to their LGBTQ identity."[3] One of the ways that local communities can help alleviate housing insecurity is to provide local housing resources, which often take the form of Section 8 and Section 42 housing.[4] Section 8 housing either takes the form of a subsidy funded by Housing and Urban Development (HUD) for assisted units of a property[5] or a Housing Choice Voucher, which low-income families can use to get rental assistance in the private market.[6] This article will discuss Section 8 Housing Choice Vouchers due to the high significance that vouchers[7] have as a popular renter resource and the additional eligibility requirements, such as being a "family," that may affect LGBTQ+ individuals' access to this crucial resource.[8]

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2. A "nontraditional family" is defined as "a family that is not made up of one mother, one father, and a child or children." *Nontraditional Family*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/nontraditional%20family [https://perma.cc/M4C2-B6XA] (last visited Oct. 23, 2024).

3. *Homelessness and Housing Instability Among LGBTQ Youth*, THE TREVOR PROJECT (Feb. 3, 2022), https://www.thetrevorproject.org/research-briefs/homelessness-and-housing-instability-among-lgbtq-youth-feb-2022/.

4. Section 42 is a low-income housing tax credit administered by the Internal Revenue Service given to property owners or investors, rather than a subsidy for renters. 26 U.S.C.S. 42. Eligibility for Section 42 is purely based on median income. 26 U.S.C.S. 42(g)(1)(C)(ii)(I) (2024) ("[t]he taxpayer shall designate the imputed income limitation of each unit taken into account…"). 26 U.S.C.S. 42(g)(1)(C)(ii)(III) (2024) ("[t]he designated imputed income limitation of any unit under subclause (I) shall be 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, or 80 percent of area median gross income.") The income limit is dependent on the median income in the county you live in. Basically, if your median income matches the county's requirements, (i.e., $33, 960 for a 1 Person Household), you are eligible to rent housing that is "typically a little nicer than you'd find for the same price in your area."). *See* Tenant Resource Center*, Searching for Housing*, YOUR RIGHTS (Apr 20, 2022). *See* HUD User, *FY 2024 Multifamily Tax Subsidy Project Income Limits Summary*, https://www.huduser.gov/portal/datasets/il/il2024/2024sum_mtsp_exp.odn [https://perma.cc/79QJ-2JY6] (last accessed Nov. 4, 2024) (stating Dane County, Wisconsin's income limits which apply to Section 42 tenants). Because Section 42 is purely based on median income, it is beyond the scope of this comment.

5. *Section 8 Program Background Information*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/housing/mfh/rfp/s8bkinfo#:~:text=The%20Section%208%20Program%20was,rental%20and%20cooperative%20apartment%20projects [https://perma.cc/G6YB-AWZN] (last visited Nov. 5, 2023).

6. *Section 8*, CTY. OF MADISON DPCED HOUS. AUTH., https://www.cityofmadison.com/dpced/housing/section-8/318/#:~:text=The%20CDA%20pays%20a%20portion,landlords%20participate%20in%20the%20program [https://perma.cc/6KKB-79NS] (last visited Oct. 23, 2024).

7. *See Applicants*, CTY. OF MADISON DPCED HOUS. AUTH., https://www.cityofmadison.com/dpced/housing/applicants/1652/ [https://perma.cc/CUZ5-WJJC] (last visited Nov. 5, 2023) (stating wait lists and lottery-style selection for vouchers due to the high volume of applicants in Madison, Wisconsin).

8. *See* 24 C.F.R. § 982.201 (2024).

These resources are not equitable towards LGBTQ+ individuals. Eligibility requirements for Section 8 can become barriers to accessing crucial housing assistance for LGBTQ+ individuals because they often do not factor in the characteristics of the LGBTQ+ community. For instance, LGBTQ+ households may look different from the heteronormative family structures contemplated by laws like these. One example is the phenomenon of LGBTQ+ chosen families: support systems rooted in functional characteristics, such as sharing financial and household burdens, rather than blood or marriage.[9] Many laws emphasize a heteronormative family archetype which includes dependents and the existence of blood or legal relation to those in the household to qualify for assistance.[10] Because LGBTQ+ individuals disproportionately experience housing instability,[11] we must examine local housing resources for this demographic to understand how current regulations do not adequately address the unique position of LGBTQ+ individuals. The distinctive archetype of LGBTQ+ family dynamics,[12] for instance, yields important questions of equity in these existing resources. LGBTQ+ chosen families have existed out of necessity due to displacement and familial rejection for decades, yet local housing laws, like Section 8's Housing Choice Voucher requirement, do not fully account for these chosen families. Thus, to equitably serve LGBTQ+ members of our community, we must radically rethink local low-income housing policy to eliminate existing barriers for displaced LGBTQ+ individuals, namely reframing the legal definition of "family" to be inclusive to LGBTQ+ chosen families.

This comment will examine how localities should mitigate barriers to Section 8 housing for LGBTQ+ households by redefining the "family" requirement to become more inclusive, using Madison, Wisconsin as a case study. Part I will define LGBTQ+ chosen families. Part II will define Section 8 and its eligibility requirements. Part III will discuss potential solutions, including policies that other localities have enacted to address these inequalities.

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9. Frank J. Bewkes, *Expanding Definitions of Family in Federal Laws*, CTR. FOR AM. PROGRESS 1 (May 26, 2020), https://www.americanprogress.org/article/expanding-definitions-family-federal-laws/ [https://perma.cc/5BF2-DB5V]. *See also* Nina Jackson Levin et al., *"We Just Take Care of Each Other": Navigating 'Chosen Family' in the Context of Health, Illness, and the Mutual Provision of Care Amongst Queer and Transgender Young Adults*, 17 INT'L J. ENV'T RSCH. & PUB. HEALTH 1, 9 (2020). Listing other chosen family members in a household as an emergency contact is a recurring theme which highlights the inherent familial reliance in LGBTQ+ chosen families.

10. Bewkes, *supra* note 9, at 5-9. *See also* 2 U.S.C. § 1881 (defining family as "spouses, parents, siblings, children of the deceased or people to whom the deceased stood in loco parentis, and any other people related to the individual by blood or marriage").

11. *Homelessness and Housing Instability Among LGBTQ Youth*, *supra* note 3; Brodie Fraser et al., *LGBTIQ+ Homelessness: A Review of the Literature*, 16 INT'L J. ENV'T RSCH PUB. HEALTH 1 (2019).

12. LGBTQ+ family dynamics may heavily deviate from a traditional, nuclear family. Specifically, "chosen families" are a significant phenomenon in the LGBTQ+ community, built out of necessity due to circumstances like familial rejection: "unrelated loved ones with whom one develop[s] a deep significant personal bond akin to the bond that often exists between family members related by blood or legal ties, such as marriage or adoption." Bewkes, *supra* note 9, at 1-2.

I. THE CHOSEN FAMILY PHENOMENON

LGBTQ+ individuals experience housing insecurity at high rates due to circumstances like familial rejection and mistreatment. According to a National Survey on LGBTQ Youth Mental Health in 2021, "28% of LGBTQ youth reported experiencing homelessness or housing instability at some point in their lives," with "55% [of LGBTQ+ youth who reported sleeping away from caregivers or parents] reporting that they ran away from home because of mistreatment or fear of mistreatment due to their LGBTQ identity."[13] With this rejection comes a unique need for community, which has led to the chosen family phenomenon.

A. Chosen Family Defined

"Chosen Family," defined as "unrelated loved ones with whom one develop[s] a deep and significant personal bond akin to the bond that often exists between family members related by blood or legal ties, such as marriage or adoption," is a significant phenomenon in the LGBTQ+ community.[14] Studies have shown that LGBTQ+ respondents "rely more on functional characteristics than structural characteristics when defining family."[15] This phenomenon exists due to frequent biological familial rejection: "LGBTQ youth are 120 percent more likely than their non-LGBTQ counterparts to experience homelessness" due to being kicked out of their family home because of their identity.[16] In a 2017-18 data analysis published in the International Journal of Environmental Research and Public Health, "LGBTIQ+ discrimination and stigma" and "family" were both listed as proximate causes of LGBTQ+ homelessness, with the report stating that "often the first LGBTIQ+ related discrimination people face is from within their own families."[17] Thus, chosen families are often created out of the very issue behind LGBTQ+ housing instability and displacement: "the family of choice ma[kes] it possible to survive."[18]

The following first-hand accounts, from Nathan Smith and Chrissy, two participants in respective studies, one written by Jason Vermes for Cross Country Checkup and one written by Nina Levin et. al. published in the International Journal of Environmental Research and Public Health, illustrate the formation

13. *Homelessness and Housing Instability Among LGBTQ Youth*, *supra* note 3.

14. Bewkes, *supra* note 9, at 1.

15. Fraser, *supra* note 11.

16. *Id.* at 2.

17. *Id.* at 6. "Castellanos reported three main pathways into homelessness amongst LGBTIQ+ youth. The first was disclosure of LGBTIQ+ identity exacerbating existing family conflicts, resulting in the young person being kicked out of the home, or choosing to leave. The second was that the youth left home, or were forced to leave, over their LGBTIQ+ identity. The third emerged where young people had been released from state supervision back into the care of their family, and family conflict became intolerable due to disclosure of their LGBTIQ+ identity." *Id.*

18. Jason Vermes, *'A place for you': Why chosen family can be a lifesaver for LGBTQ people over the holidays*, CBC RADIO (Dec. 23, 2018, 3:00 AM), https://www.cbc.ca/radio/checkup/a-place-for-you-why-chosen-family-can-be-a-lifesaver-for-lgbtq-people-over-the-holidays-1.4954350 [https://perma.cc/YV42-HWSU].

and structure of chosen family. After Nathan Smith's family severed ties with him at eighteen for being gay, he described his chosen family as welcoming him with open arms.[19] Smith's biological family completely banned communication with him and closed his bank account after learning that he was gay.[20] Smith had no choice but to drop out of college and quickly find a job.[21] While he saved up to afford a place to live, he stayed at the homes of drag queens and older gay men who "surrounded him like family."[22] The relationship between Smith and those he lived with demonstrates an elevated relationship that is uniquely familial due to the exercise of care and reliance on one another. Stories like Smith's are the reality for many LGBTQ+ individuals. "[C]hosen family…are 'the ones who love you and who support you and have a place for you…[they're] the people that get you through…holidays that are, frankly, set up around very normative family structures.'"[23] Chrissy described her chosen family as being "comprised of six women who also identity as lesbian or bisexual…formed over the course of fifteen years."[24] Similar to Smith, Chrissy's chosen family was comprised of people with similar lived experiences regarding gender and sexuality. Over the years, each member of Chrissy's chosen family listed each other as an emergency contact.[25] Like so many others, this chosen family formed due to each member's tenuous or nonexistent relationship with their biological family.[26] In circumstances like Chrissy's, chosen family provided stability and a group structure to rely on for support.

Chosen family members often share the burden of care, especially when taking care of each other.[27] Clive, another individual with a chosen family, stated: "We're all feeding each other. We've all paid for each other's meals at some point."[28] Additionally, a recurring theme in LGBTQ+ chosen families is sharing and exchanging material resources, including cohabitation, transportation, and finances.[29] This shared duty elevates this bond from friends or roommates to a functional family. Beyond shared financial responsibility is an overarching burden of care for one another, such as listing household members as emergency contacts or sharing cars.[30] Chosen families, thus, demonstrate the care and function seen in traditional families such as feeding each other, housing each other, and listing each other as emergency contacts.[31] Therefore, LGBTQ+

19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. Levin, *supra* note 9, at 9.
25. *Id.*
26. *Id.*
27. *Id.* at 12.
28. *Id.* at 13. "I think 'who do I cook for' is a good easy way to tell if somebody's part of my chosen family or just a friend." *Id.*
29. Levin, *supra* note 9, at 13.
30. *Id*.
31. *Id*.

chosen families demonstrate a functional family structure that must be recognized accordingly by the law.

Examples of how chosen families are treated in the law include the recent update to the Family and Medical Insurance Leave Act which now includes "any other individual who is related by blood or affinity and whose association with the employee is equivalent of a family relationship" as a family member covered for caregiving leave.[32] Many laws, such as tax codes, define family based on marriage, blood, or legal ties.[33] However, there is a strong movement toward inclusive definitions of "family" which embrace those who do not fit into those non inclusive definitions.[34] For instance, many states allow hospital visitation rights to those "not legally related by blood or marriage" whom the patient considers immediate family.[35]

B. Historical Background

Harm to LGBTQ+ individuals due to legal definitions of family was especially prominent during the AIDS epidemic as "same-sex partners and close friends," the patient's chosen family, "were frequently barred from hospital visits."[36] When biological families neglected to care for LGBTQ+ individuals who became terminally ill with HIV, "gay and lesbian patients were cared for primarily by friends," which "elevated the relationship from friendship to family."[37] Long before *Obergefell v. Hodges* legalized same-sex marriage federally in 2013, queer families had already existed, just not in a way cognizable under the law.[38] Prior to the Supreme Court's ruling in *Obergefell,* two married men were still not considered family in the eyes of the law in some states:

> [Obergefell's partner,] Arthur[,] was diagnosed with amyotrophic lateral sclerosis, or ALS…Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal…Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on

32. Molly Weston Williamson, *Getting to Know the New FAMILY Act*, CTR. FOR AM. PROGRESS, July 12, 2023, https://www.americanprogress.org/article/getting-to-know-the-new-family-act/. H.R. 3481, 118th Cong. (2023).

33. 26 C.F.R. § 1.45R-1 (2024).

34. *See, e.g*, HUM. RTS. CAMPAIGN, https://www.thehrcfoundation.org/professional-resources/lgbtq—inclusive-definitions-of-family [https://perma.cc/K4SA-TXZ7] (last visited Dec. 27, 2023) (stating that there should be an inclusive definition of "family" for hospital visitation rights due to the "unique nature" of LGBTQ+ families).

35. *See* R.I. GEN. LAWS § 23-17-19.3 (2024).

36. Vermes, *supra* note 18.

37. Levin, *supra* note 9, at 2.

38. Bewkes, *supra* note 9, at 2 (stating that "[m]any parent-child relationships in the LGBTQ community [] are not based on blood or legal ties."); Obergefell v. Hodges*,* 576 U.S. 644, 644 (2015).

> Arthur's death certificate. By statute, they remain strangers even in death…[39]

Because the law has historically deemed queer couples as "strangers even in death,"[40] LGBTQ+ communities have operated under a different definition of family, ranging from same-sex relationships and partnerships to LGBTQ+ friendships and chosen families. These LGBTQ+ families have existed for centuries despite a lack of legal recognition.

Beyond non-inclusive civil laws, the deep history of the criminalization of LGBTQ+ relations and communities is important to discuss leading up to today's legal definition of "family".[41] Due to the heavy stigmatization and criminalization of LGBTQ+ individuals, support and relief from LGBTQ+ chosen families are relied upon for not only emotional support but for safety and survival. Even in the Diagnostic and Statistical Manual of Mental Disorders, homosexuality was a listed mental disorder from 1952-1973, illuminating the unfavorable disposition of LGBTQ+ individuals.[42] Ranging from sodomy laws[43] to "cross dressing" bans,[44] police would perform sweeps of "gay gathering places," arresting "gay and bisexual men for solicitation, loitering, and vagrancy" under the guise of police discretion.[45] Many LGBTQ+ individuals have thus "suffered horrific violence, police misconduct, unremedied discrimination, and poverty."[46] It is important to note that this violence is not suffered equally: minoritized and marginalized groups, including "Black,

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39. *Obergefell*, 576 U.S. at 658 (2015).

40. *Id.*

41. *See* Steve Sanders, *Article: Dignity and Social meaning: Obergefell, Winsdor, and Lawrence as Constitutional Dialogue*, 87 FORDHAM L. REV. 2069, 2073 (2019) (stating that "criminal sodomy laws and federal and state marriage restrictions" were "once assumed by most people to be legitimate and necessary for protecting tradition and public morality," speaking to the evolution of American social attitudes towards LGBTQ+ individuals, including a deeply embedded stigma toward LGBTQ+ families). Because "expressive harm" (such as the exclusion of LGBTQ+ people) "results from the ideas or attitudes expressed through a governmental action," it is important to update our laws to be in accordance with modern, inclusive social ideals regarding LGBTQ+ families. *Id*. at 2099.

42. *Id.* at 661 (citing to *Position Statement on Homosexuality and Civil Rights*, 131 AM. J. PSYCHIATRY 497 (1974)).

43. Bowers v. Hardwick, 478 U.S. 186 (1986). *Bowers* upheld homosexual sodomy laws in 25 states (including GA. CODE ANN. § 16-6-2), stating that there is no fundamental right of gay people to "engage in acts of consensual sodomy." Same-sex sexual acts were characterized as "the infamous crime against nature," "an offense of 'deeper malignity' than rape," and "a disgrace to human nature." The *Bowers* decision was explicitly overturned. Lawrence v. Texas, 539 U.S. 558, 562, (2003).

44. People v. Archibald, 58 Misc. 2d 862, 862, 296 N.Y.S.2d 834, 835 (N.Y. App. Div. 1968) (citing to a violation of N.Y. CRIM. PROC. LAW § 887, subd. 7–impersonating a female.)

45. Jon W. Davidson, *A Brief History of the Path to Securing LGBTQ Rights*, HUM. RTS. MAG. (July 05, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/a-brief-history-of-the-path-to-securing-lgbtq-rights/. *See also* LIBRARY OF CONGRESS, *1969: The Stonewall Uprising*, https://guides.loc.gov/lgbtq-studies/stonewall-era (for perhaps the most famous police sweep).

46. Davidson, *supra* note 45.

Indigenous, and people of color; disabled; noncitizen; and low-income LGBTQ people," are more likely to face these injustices.[47] Modern laws, such as the 2022 wave of anti-transgender legislation,[48] evoke similar state sanctioned hate and violence.[49] The chair of the California Legislative LGBTQ Caucus describes the history of the LGBTQ community as "a history of criminalization: Society trying to erase us [and] then punishing us if we refuse to be erased, whether by death, incarceration, beatings, lobotomies/electric shock, etc."[50] These laws "were the foundation for treatment of LGBTQ people as criminals, unfit to hold certain jobs or be custodial parents."[51] This history of discrimination, codified into our laws, solidified a notion that LGBTQ+ families were less legitimate and unworthy of recognition compared to traditional families.

Investigating modern legal definitions of "family," many are still rooted in heteronormative, nuclear family structures.[52] However, current laws are beginning to reflect a modern understanding of "family."[53] Previously, a nuclear family was defined by anthropologists as a husband, a wife, and one or more children.[54] The idea of a traditional, nuclear family has shifted in definition throughout the 20th century. Similarly, the definition of "family" has shifted; now, the word "family" is surrounded by a lack of clarity and many anthropologists even reject "the family" as a theoretical model and rather look to

47. *Id.* It is important to note the inherent intersectionality of LGBTQ+ housing displacement and discrimination in general. "Nearly half (44%) of Native/Indigenous LGBTQ youth have experienced homelessness or housing instability at some point in their life, compared to 16% of Asian American/Pacific Islander youth, 27% of White LGBTQ youth, 27% of Latinx LGBTQ youth, 26% of Black LGBTQ youth, and 36% of multiracial LGBTQ youth." *Homelessness and Housing Instability Among LGBTQ Youth*, *supra* note 3. Also important to note is the specific intersection of being transgender and Black, Indigenous, People(s) of Color. Transgender and nonbinary youth have rates of housing instability ranging from 35%-39% compared to 23% for cisgender queer youth. *Id.* Thus, these specific populations would benefit the most from local housing action such as making Section 8's requirements more inclusive.

48. *See, e.g.*, 2022 Bill Text AL S.B. 184. ("…the decision to pursue a course of hormonal and surgical interventions to address a discordance between the individual's sex and sense of identity should not be presented to or determined for minors…") It is a Class C felony for healthcare workers to provide gender affirming care in violation of this Bill. *Id.*

49. Kiara Alfonseca, *At least 19 states to offer refuge to trans youth and families amid anti-LGBTQ legislation wave*, ABC NEWS (May 3, 2022, 1:15 PM), https://abcnews.go.com/US/19-states-offer-refuge-trans-youth-families-amid/story?id=84472645 [https://perma.cc/VQP7-ET6E].

50. *Id.*

51. *Id.* Davidson, *supra* note 45. *See* N.Y. CRIM. PROC. LAW § 887(7) (the vagrancy law cited in People v. Luechini, 136 N.Y.S. 319 (Erie Cnty. Ct. 1912) which was used against a defendant wearing "women's clothes[and] a wig"). *See also 1996: The Stonewall Uprising*, *supra* note 46. For custodial rights, *see* Constant A. v. Paul C.A., 344 Pa. Super. 49, 496 A.2d 1 (Pa. Super. 1985) (overruled).

52. *See, e.g.*, 20 U.S.C. § 2142 (2024) ("For purposes of subsection (a), the term 'immediate family member' means a parent, spouse, sibling, or child").

53. *See, e.g.*, Williamson, *supra* note 32; H.R. 3481, 118th Cong. (2023).

54. J.S. La Fontaine, *Family, Anthropology of*, INT'L ENCYC. SOC. & BEHAV. SCI. (2001), https://www.sciencedirect.com/topics/computer-science/nuclear-family.

interpersonal relationships and kindred.[55] Therefore, when analyzing current laws regarding "family," it is important to recognize the history that influences the laws today.

Dovetailing with criminalization and legal discrimination is the difficulty to know the prevalence of chosen families due to continued delegitimization. For instance, the U.S. Census Bureau does not collect data on chosen families.[56] However, the U.S. Census does indicate that "more than 13 million households contain individuals who do not share biological ties, many of whom are likely chosen families."[57] Given the prevalence of LGBTQ+ chosen families,[58] a legal redefinition of "family" is necessary in order to force equity where society has not caught up—particularly in Section 8 housing.[59]

II. AN INTRODUCTION TO SECTION 8 HOUSING

With high rates of displacement[60] and poverty[61] for LGBTQ+ individuals, there is a large need for accessible housing resources. However, stringent requirements on housing resources, which require applicants to fit into the definition of "family"[62] to qualify for assistance, may bar many LGBTQ+ chosen families from accessing crucial housing assistance like Section 8.

Section 8 is a significant low-income housing resource that operates via a subsidy for renters.[63] In Madison, Wisconsin, the locality analyzed in this

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55. *Id*.

56. Bewkes, *supra* note 9, at 5 (citing U.S. Census 2022 ACS 1-Year Estimates Detailed Tables).

57. *Id*.

58. Although it is difficult to obtain an exact estimate of the number of chosen families, 82.2% of American households reported that they deviated from a traditional, nuclear family structure according to the U.S. Census Bureau. Caroline Medina & Molly Weston Williamson, *Paid Leave Policies Must Include Chosen Family*, CTR. FOR AM. PROGRESS, March 1, 2023, https://www.americanprogress.org/article/paid-leave-policies-must-include-chosen-family/#:~:text=More%20than%20half%20of%20LGBTQI%2B,had%20a%20health%2Drelated%20need. Further, according to a 2022 Center for American Progress survey, 28% of LGBTQ+ respondents reported that they would rely on chosen family networks for health-related needs, compared to 14% of non-LGBTQ+ respondents. This number was higher for transgender adults (35%) and LGBTQ+ people of color (30%). *Id.*

59. For historical examples of laws changing with an evolving society on LGBTQ+ issues, *see* Davidson, *supra* note 45.

60. *See Homelessness and Housing Instability Among LGBTQ Youth*, *supra* note 3.

61. *See* Judith Siers-Poisson, *The Complexity Of LGBT Poverty In The United States*, INST. FOR RSCH. ON POVERTY (June 2021), https://www.irp.wisc.edu/resource/the-complexity-of-lgbt-poverty-in-the-united-states/ [https://perma.cc/3MEX-MREP] ("People who identify as lesbian, gay, bisexual, or transgender (LGBT) have higher rates of poverty compared to cisgender (cis) heterosexual people, about 22% to 16% respectively").

62. *See* 24 C.F.R. § 982.201 (2024) ("To be eligible, an applicant must be a "family"); Madison, Wis., Drafter's Analysis for ORD-23-00022, https://madison.legistar.com/View.ashx?M=F&ID=11672882&GUID=1987B87C-6BE0-4266-9093-E341054FB5CC (Legistar File No. 74885 Body-Amended.) (defining "family" to emphasize dependents and relation by blood, marriage, or domestic partnership).

63. 42 U.S.C.S. § 1437f (2024). The Section 8 program is so named "because it was [originally] authorized under Section 8 of the U.S. Housing Act of 1937." *Policy Basics:*

comment, about 1,600 households rely on Housing Choice Vouchers.[64] Federally, the 2023 Housing and Urban Development (HUD) budget funded an estimated 200,000 Section 8 Housing Choice Vouchers.[65] The program was established during the Great Depression to provide those struggling with rent a resource "to acquire rental housing from private actors."[66] The original text of the 1937 Act states:

> "The dwellings in low-renting housing as defined in this Act shall be available solely for families whose net income does not exceed five times the rental…of the dwellings to be furnished such families, except that in the case of families with three or more dependents, such ratio shall not exceed six to one."[67]

For purposes of this article, it is important to note the focus on "children" and "minor dependents" in the original Act.[68] In 1974, Congress passed an updated Section 8 Program developed by HUD for either single persons or families (42 U.S.C. § 1437f).[69] This program set out the Housing Choice Voucher program to "provide assistance to public housing agencies for tenant-based assistance using a payment standard…"[70] Section 8 continues to be an important resource in assisting low-income families via the voucher program.[71]

Section 8 Project-Based Rental Assistance, CTR. ON BUDGET & POL'Y PRIORITIES (January 10, 2022), https://www.cbpp.org/research/policy-basics-section-8-project-based-rental-assistance. It is important to note the difference between Project-Based Section 8 and a Housing Choice Voucher; Project-Based Section 8 involves a specific unit and landlord that the locality has a contract with while vouchers certify people to "rent [with] any private apartment that meets program guidelines." *Policy Basics: Project-Based Vouchers*, CTR. ON BUDGET & POL'Y PRIORITIES (July 11, 2023), https://www.cbpp.org/research/housing/policy-basics-project-based-vouchers.

64. *Section 8*, *supra* note 6 ("The CDA pays a portion of the rent for about 1,600 households through the federally funded Housing Choice Voucher program; also known as Section 8. The CDA pays over $11 million each year to Madison housing providers on behalf of their low-income tenants. About 500 Madison landlords participate in the program").

65. Roger Valdez, *Series: A Brief History Of The Section 8 Housing Voucher Program*, FORBES, Feb 9, 2023, 09:30am EST, https://www.forbes.com/sites/rogervaldez/2023/02/09/series-a-brief-history-of-the-section-8-housing-voucher-program/?sh=40440a4e511f [https://perma.cc/VBL5-CD6H].

66. *Id. See also 75th Anniversary of the Wagner-Steagall Housing Act of 1937*, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBR. & MUSEUM, https://www.fdrlibrary.org/housing#:~:text=President%20Roosevelt%20signed%20the%20Wagner,housing%20projects%20across%20the%20country [https://perma.cc/AU63-P3FJ] (codified in 42 U.S.C. 1437 (2024)).

67. United States Housing Act of 1937, Pub. L. No. 412 Stat. 888 (accessed via https://li-proquest-com.ezproxy.library.wisc.edu/legislativeinsight/docview?id=PL75-412&index=2&rsid=1923AA20F3A&docType=LEG_HIST&resultsClick=true).

68. *Id*.

69. *Section 8*, *supra* note 6. *See* 12 U.S. C. 1706e (2024).

70. *Id.* 42 U.S. Code § 1437f(o) (2024) (including also project-based contractual agreements with landlords for subsidized housing).

71. 42 U.S.C. § 1437f (2024).

A. Section 8 Defined

Section 8 is regulated through HUD, but it is administered at the local level through Public Housing Authorities (PHAs).[72] HUD is the Federal agency responsible for national housing policy and programs, with the goal of "improv[ing] and develop[ing] the Nation's communities."[73] HUD administers numerous crucial programs; of note is Section 8 rental assistance for low-income households, which is either in the form of certificates or vouchers.[74] Section 8 housing authorizes the Secretary of HUD to contract with public housing agencies for "not more than 60 months," noting that "rent shall not exceed by more than 10 per centum the fair market rental established by the Secretary."[75] Fair Market Value is determined by HUD for the specific area.[76] To be eligible for Section 8 in Madison, Wisconsin, the household income must be less than 50% of the area's median income.[77]

PHAs, such as Madison, Wisconsin's PHA, receive funding for housing programs through Community Development Authorities (CDAs), which in turn receive their funding through HUD.[78] According to Wisconsin Statute § 66.1335, the CDA is "a separate body politic for the purpose of carrying out blight elimination, slum clearance, urban renewal programs and projects and housing projects."[79] Therefore, the CDA works as the lead public entity providing housing in Madison, "offering HUD low-income subsidized housing within the City."[80] Essentially, the CDA assists with a portion of rent for tenants participating in the Housing Choice Voucher program.[81] The City of Madison's Housing Authority, using the standard definition of Section 8 across

72. *Id.* (stating PHA's are to keep records, administer programs and report to HUD). 24 C.F.R. 905.316 (2024) (stating PHAs must comply with HUD instructions and use forms proscribed by HUD). 24 C.F.R. 982.51 (2024) (giving PHAs authority to administer Housing Choice Voucher programs).

73. *Questions and Answers About HUD*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/about/qaintro [https://perma.cc/JMX3-PBZT] (last visited Dec. 27, 2023).

74. *Id.*

75. 42 U.S.C. § 1437f(b)(2)-(c)(1)(A) (2024); *Applicants*, *supra* note 7.

76. *Id*. Carol Bianchi, *Wisconsin Section 8 Housing*, AFFORDABLE HOUS. HUB (January 01, 2024), https://affordablehousinghub.org/state-section-8-guides/wisconsin-section-8-housing [https://perma.cc/Z3T9-MHWD]. *See* HUD User, *FY 2024 Income Limits Documentation System* (2024).

77. *Id.*; U.S. DEP'T OF HOUS. & URB. DEV., *Housing Choice Vouchers Fact Sheet*, https://www.hud.gov/topics/housing_choice_voucher_program_section_8 [https://perma.cc/HVP4-GUTA]. 42 U.S.C. 1437f.

78. *Section 8 Housing Choice Voucher Program Administrative Plan*, Community Development Authority Board of Commissioners, CTY. OF MADISON (established February 10, 2011 via Res. No. 3000), https://www.cityofmadison.com/dpced/housing/documents/CDA%20S8%20Admin%20Plan%2006132023.pdf [https://perma.cc/W74X-DNGK].

79. WIS. STAT. § 66.1335(1) (2021-22).

80. *Housing*, CTY. OF MADISON DPCED HOUS. AUTH. (Apr. 18, 2023), https://www.cityofmadison.com/dpced/housing/housing/478/ [https://perma.cc/5Q2E-AESE].

81. *Section 8*, *supra* note 6.

municipalities, provides rental subsidies or Housing Choice Vouchers funded by the CDA to eligible individuals and families, allowing them to rent with a private landlord.[82] This is a standard, universal definition of Section 8 used across municipalities.

Section 8's Housing Choice Voucher program requires the tenant to pay about thirty percent of their income as rent to the landlord, while the local PHA, with funding from HUD, finances the rest.[83] After meeting with a housing worker and going through an initial screening to assure the tenant qualifies for Section 8, the tenant receives a housing voucher form.[84] The voucher specifies the size of the unit that the tenant can rent, the HUD rules, and the voucher's expiration date.[85] The tenant then must find a place to live and submit a tenancy approval form within 60 days.[86] Tenants typically must live in the rented space for at least a year.[87] The law provides assistance "to eligible families," and local "agenc[ies] may establish preferences or criteria for selection for a unit."[88] Amongst a host of other qualifications,[89] Section 8 is only available to those that are at least

82. *Applicants*, *supra* note 7.

83. *Section 8 Housing Choice Voucher Program Administrative Plan*, *supra* note 78. *See Section 8: Info for Tenants*, TENANT RESOURCE CTR. (May 4, 2022), https://www.tenantresourcecenter.org/section_8_tenants.

84. *Id.*

85. *Id. See* 24 CFR § 982.4 (2024).

86. 24 CFR § 982.201 (2024).

87. 24 CFR § 982.309 (2024).

88. 42 U.S.C. § 1437f(o)(6)(A)(i) (2024).

89. 42 U.S.C. § 1437f; 24 C.F.R. § 982.201; *Applicants*, *supra* note 7 (stating that Section 8 also requires applicants to fit within the HUD limits for income, have at least one family member with citizenship or eligible immigration status, provide social security numbers for family members, and consent to the CDA's collection and use of information).

eighteen years of age[90] and those who qualify as a "family."[91] Since Section 8 is not designed for those under eighteen, youth, including LGBTQ+ youth, must seek other resources. Therefore, many displaced LGBTQ+ individuals are left to couch hop on sympathetic sofas.[92] Additionally, federal laws and regulations give a great deal of deference to local authorities to define requirements.[93] Thus, the specific requirements for eligibility depend on state localities, such as Madison, Wisconsin, as examined here.

It is also important to note that there are enormous waiting lists for Section 8 vouchers.[94] These waiting lists are one of the biggest obstacles to receiving Section 8 housing benefits. Specifically, Dane County, Wisconsin—where Madison is located—has record-breaking low vacancy rates, especially for affordable housing.[95] According to a 2019 Housing Assessment by Dr. Kurt Paulsen, Associate Professor of Urban Planning at the University of Wisconsin-Madison, this low vacancy rate is due to a shortage of affordable housing.[96] The report states, "[d]espite producing over 25,000 net new housing units" between

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90. For those under the age of eighteen, the issue of minors and access to affordable housing depends on the locality. In Wisconsin, "minors cannot declare themselves independent. They remain subject to the state's custody and placement laws until they are eighteen. This means if they do not have a competent adult to care for them, a guardian will be appointed or the state will become their custodian through the foster care system." *Emancipation in Wisconsin*, KARP & IANCU (March 26, 2021), https://www.karplawfirm.com/resource/pre-divorce/emancipation/#:~:text=Wisconsin%20minors%20cannot%20declare%20themselves,through%20the%20foster%20care%20system [https://perma.cc/5QXC-WDYH]. Additionally, those under eighteen cannot legally emancipate themselves unless in rare circumstances such as marriage, giving birth, or entering the Armed Forces. *Id*. Wis. Stat. § 48.375(2)(e) (2021-22). "To emancipate means to free or release a child from the parental power, making the person released sui juris." Wadoz v. United Nat'l Indem. Co., 274 Wis. 383, 386, 80 N.W.2d 262, 263 (1957). "Sui juris" means "of one's own right; independent" *Sui Juris*, BLACK'S LAW DICTIONARY (11th ed. 2019). There is an option to terminate parental rights, but another adult must adopt the child. *Emancipation in Wisconsin*, *supra* note 90. Therefore, while LGBTQ+ minors disproportionately experience housing instability, there is an incredibly limited scope for application of this comment for those under 18. *See Homelessness and Housing Instability Among LGBTQ Youth*, *supra* note 3. According to 2022 HUD data, 30% of Section 8 Project-Based Rental Assistance were under the age of 18. *Policy Basics: Section 8 Project-Based Rental Assistance*, *supra* note 63. As a proposal, it would benefit those under 18 who happen to fit into circumstances warranting emancipation to eliminate the age of 18 requirement.

91. 42 U.S.C. § 1437f(x)(2) (2024); *Applicants*, *supra* note 7. (requiring applicants to also fit within the HUD limits for income, have at least one family member with citizenship or eligible immigration status, provide social security numbers for family members, and consent to the CDA's collection and use of information).

92. Vermes, *supra* note 18; Levin, *supra* note 9.

93. *See* 24 C.F.R. § 982 (2024) ("The [voucher] program is generally administered by State or local government entities called public housing agencies"). 24 C.F.R. § 982.1(a)(1) (2024).

94. *Section 8: Info for Tenants*, *supra* note 83.

95. *Id.*

96. Kurt Paulsen, *Housing Needs Assessment Report*, CNTY. OF DANE (July 2019), https://danehousing.countyofdane.com/documents/assessmentReport/2019/Dane-County-Housing-Needs-Assessment-2019.pdf.

2006 and 2017, "Dane County underproduced more than 11,000 housing units relative to household growth" (with household growth referring to net new households in the area).[97]

Specifically, there is a large "housing gap" in Dane County, which is measured in two ways: (1) the difference of renters with incomes thirty percent below the Area Median Income compared to "the number of units whose rent would be affordable to households at thirty percent of [Area Median Income] income levels," and (2) "the number of lower-income households who currently pay more than half of their income in rent."[98] Under these two measures, Dane County has a Housing Gap of 13,300 affordable housing units with about 40% of "cost burdened"[99] households spending more than half of their income on housing (as of April 2024).[100] This gap emphasizes the need for affordable housing in our community. Due to the extraordinary homelessness rates of LGBTQ+ individuals, it is even more pressing to make affordable housing resources readily available for the LGBTQ+ community.[101]

B. Eligibility for Section 8 in Madison, WI

The CDA of Madison, Wisconsin "gives priority to applicants who live, work, or attend school in the City of Madison" for Section 8 eligibility.[102] Although many displaced LGBTQ+ individuals do live, work, or attend school in the City of Madison, other stringent restrictions on Section 8 eligibility may nonetheless exclude many in this population from accessing this crucial resource. The City of Madison lists the following eligibility requirements to obtain Section 8 housing:

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97. *Id.* ("Household income, number of households, and population in Dane County have all grown at an average rate of 1.3 percent per year from 2010-2017 [but] [j]obs in Dane County have grown 1.7 percent per year").

98. *Id.*

99. "Cost burden" refers to households whose rent is more than 30% of their income. DANE CNTY., A ROAD MAP TO SOLVING DANE COUNTY'S HOUSING CRISIS: STRATEGIC ACTION PLAN 2024 11 (2024), https://rhs.danecounty.gov/documents/pdf/DCRHS-SAPReport-FNL-web.pdf [https://perma.cc/P3DM-BQFZ].

100. *Id*.

101. *Homelessness and Housing Instability Among LGBTQ Youth*, *supra* note 3. "LGBTIQ+ people comprise an estimated 20-40% of homelessness populations, whilst only comprising 5-10% of the wider population." Fraser, *supra* note 11, at 1-2. While it is crucial to ensure that there is an adequate number of affordable housing units while adjusting requirements for applicants, increasing the number of units is beyond the scope of this comment.

102. *Applicants: Section 8 Housing Choice Voucher (HCV) Lottery*, CITY OF MADISON DPCED HOUSING AUTHORITY, https://www.cityofmadison.com/dpced/housing/applicants/1652/ [https://perma.cc/92AR-GX4A] (last visited Nov. 5, 2023). *See also* 24 C.F.R. § 982.201 (2024).

> Have a head-of-household, spouse, or co-head who is at least 18 years of age. Qualify as a family as defined by HUD[103] and the CDA.[104] Have income at or below HUD-specified income limits. Have at least one family member who is a citizen, national, or noncitizen with eligible immigration status…Provide social security number information for family members as required. Consent to the CDA's collection and use of information.[105]

These rigid regulations bar many LGBTQ+ individuals from accessing Section 8 housing due to their inherent nontraditional status in society and may incidentally bar other nontraditional households. The potential for discretionary abuse in each locality is also at issue here—some localities may purposefully emphasize traditional, heteronormative family structures via language such as "blood or legal ties," intentionally excluding untraditional LGBTQ+ families from "family" requirements.[106] Thus, it is imperative that localities intentionally set inclusive precedents and norms for the sake of inclusive municipal codes. For instance, the Dane County Fair Housing Ordinance states "it is the declared policy of the County of Dane that all persons shall have an equal opportunity for housing regardless of…gender…marital status…[or] sexual orientation."[107] While Dane County's policy may be inclusive on its face, the current barriers that come with Section 8's eligibility requirements are not in alignment with the Ordinance's stated intent. Therefore, it is crucial to amend Madison's Section 8's eligibility requirements.

C. Section 8's "Family" Requirement

How "family" is defined under Section 8 plays a critical role in the inclusion or exclusion of LGBTQ+ applicants. LGBTQ+ households and families are unique due to the frequent need for solace and support from those who are not biologically or legally related and due to inherent non-conformity with heteronormative structures. Due to the phenomenon of LGBTQ+ chosen families, something that exists due to experiences like familial rejection, localities must update existing definitions of "family" to allow nontraditional LGBTQ+ families to receive critical housing assistance.

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103. *See* DEP'T OF HOUS. & URB. DEV., NONCITIZENS RULE 812.2, 950.0, 912.1, https://www.hud.gov/sites/documents/74657GC2GUID.PDF (stating the HUD definition).

104. *See* Madison, Wis., Drafter's Analysis for ORD-23-00022, https://madison.legistar.com/View.ashx?M=F&ID=11672882&GUID=1987B87C-6BE0-4266-9093-E341054FB5CC. (Legistar File No. 74885 Body-Amended.) (stating the CDA definition).

105. *Applicants*, *supra* note 7.

106. *See* 20 U.S.C. § 2142 (2024) ("'immediate family member' means a parent, spouse, sibling, or child"). *See* 37 U.S.C. § 481h (2024) ("family" includes a spouse, children, parents, siblings, and persons acting in loco parentis). *See* Bewkes, *supra* note 9, at 1.

107. MADISON, WIS. ADMIN. CODE § 31.02 (1988) (also known as the Dane County Fair Housing Ordinance).

Although there are federal guidelines for Section 8's definition of "family," it is ultimately up to each municipality to define "family" via ordinances.[108] 24 C.F.R. 982.201, which lays out federal eligibility guidelines for Section 8, states that to be eligible, an applicant must be a "family," which is defined in 24 C.F.R. 5.403.[109] 24 C.F.R. 5.403 broadly states that a "family" includes:

(1) A single person…
(2) [a] group of persons residing together, and such group includes, but is not limited to:
(i) A family with or without children (a child who is temporarily away from the home because of placement in foster care is considered a member of the family);
(ii) An elderly family;
(iii) A near-elderly family;
(iv) A disabled family;
(v) A displaced family [by government action]; and
(vi) The remaining member of a tenant family.[110]

C.F.R. 5.403 further states that a family includes people "regardless of actual or perceived sexual orientation, gender identity, or marital status."[111] However, courts have allowed PHAs to excuse unmarried couples without children from the "family" requirement of Section 8 as long as the PHA's requirements are "reasonably related to the objectives of the Section 8 program" and "HUD ha[s] not disapproved" of the requirements.[112]

For Section 8 Housing Choice Vouchers, guidelines are made and codified by City General Ordinances. Madison's General Ordinances provide the local definition of "family."[113] In order to pass one of these local ordinances, the City Attorney drafts a proposed agenda item (e.g., "Chapter 28 Family Definition"), comes forth with a sponsor, then the proposal undergoes drafts and amendments, and finally the Common Council, made up of twenty-one members, votes on the proposed Ordinance at a public meeting.[114] Council action is determined by a simple majority of all the members, or eleven votes, with the [elected] Mayor retaining the right to veto (however, the Common Council may override a veto through a motion for reconsideration).[115] Members of the community can send

108. *See* 24 CFR 982 (2024) ("The voucher program is administered by State or local government entities called public housing agencies").
109. 24 C.F.R. § 982.201 (2024).
110. 24 C.F.R. § 5.403 (2024).
111. *Id*.
112. Freeman v. Sullivan, 954 F. Supp. 2d 730, 734 (W.D. Tenn. 2013).
113. Matt Tucker & Katie Bannon, PLANNING DIVISION STAFF REPORT 1 (2023), https://madison.legistar.com/View.ashx?M=F&ID=11639600&GUID=20B0513A-FABE-4BC2-B0AE-C289731E612D. Dating back to the 1960s, the first definitions of "family" made appearances in Madison General Ordinances (i.e., MGO 28.03, 1969). *Id.*
114. *Id.*
115. MADISON, WIS. ADMIN. CODE § 2.18, § 2.21(2) (2024).

proposals directly to the City Attorney via a form which is then sent to the City Clerk's Office.[116]

The City of Madison currently bases eligibility for Section 8 Housing Choice Vouchers off of both the HUD and CDA definitions of "family."[117] HUD defines "family" as "a household of one member or more," stating that "it may be defined in other regulations."[118] As for other HUD regulations, the term "familial status," as defined in the Fair Housing Act, one of the most prominent HUD pieces of legislation, means:

> …one or more individuals (who have not attained the age of 18 years) being domiciled with—
> 1. A parent or another person having legal custody of such individual or individuals; or
> 2. The designee of such parent or other person having custody, with the written permission of such parent or other person.[119]

Madison's CDA defines "family" as one of the following:

> (1) an individual; or
> (2) two…or more people related by blood, marriage, domestic partnership, or legal adoption, living together as a single household in a dwelling unit, including foster children; up to four…roomers, and their dependents; or
> (3) up to five…unrelated adults and the dependents of each, living together as a single household in a dwelling unit; or
> (4) up to six…unrelated people who have disabilities under the Fair Housing Amendment Act (FHAA) or the Americans with Disabilities Act (ADA), who are living as a single household because of their disability and requiring assistance from a caregiver.[120]

The CDA definition above is the product of an update in 2023 to the definition of "family" via Ordinance 23-00022[121] to be more inclusive,

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116. MADISON, WIS. ADMIN. CODE § 2.05(9) (2024).

117. *Applicants: Section 8 Housing Choice Voucher (HCV) Lottery*, *supra* note 102.

118. U.S. DEP'T OF HOUS. & URB. DEV., RESTRICTIONS ON ASSISTANCE TO NON-CITIZENS (7465.7G), https://www.hud.gov/sites/documents/74657GC2GUID.PDF.

119. 42 U.S.C. § 3602(k) (2024).

120. COMMON COUNCIL OF THE CTY. OF MADISON, DRAFTER'S ANALYSIS FOR ORD-23-00022, Legistar File No. 74885 Body-Amended, at 3, https://madison.legistar.com/View.ashx?M=F&ID=11672882&GUID=1987B87C-6BE0-4266-9093-E341054FB5CC.

121. CTY. OF MADISON, LEGISLATION DETAILS: AMENDING SUPPLEMENTAL REGULATIONS OF THE MADISON GENERAL ORDINANCES TO UPDATE DEFINITIONS OF "FAMILY,"

recognizing that the old definition of "family" "restrict[ed] the number of people who [could] live together in a house or apartment in Madison based on…whether they were all related to one another."[122] Such changes are examples of progressive steps towards inclusivity for Section 8 eligibility. This update mainly concerned the addition of Section (3),[123] quoted above, because "occupancy limits [were] based on an outdated ideal of two-parent household with children" and did not "allow for alternative ways of living," referring to unconventional families with dependents.[124] Community advocates for the legal update argued that the old policy was discriminatory against low-income people, unrelated immigrant households, and queer people: "Whether three adults are living together out of friendship, in a committed relationship or are just trying to get by in an expensive housing market, that is none of the government's business."[125]

However, the Madison CDA update to the definition of "family" did not go far enough, and it is important to examine inclusive "family" definition frameworks going forward, namely, the "functional family" framework. The "functional family" framework defines "family" as a group of people who share living expenses and who are in a stable and permanently living situation together.[126] According to Katie Bannon, Madison's Zoning Administrator, the update to "family" "change[d] the number of unrelated renter occupants allowed in one unit but [did not] do away with single-family zoning altogether."[127] Essentially, the update "keeps the existing definition for 'related' so zoning can continue to allow a housing unit's maximum capacity of people to live together if they are related by blood, marriage, domestic partnership, legal adoption or the foster system."[128] Effectively, to be a "family," an unrelated household still must have legal or biological dependents. The proposal for the 2023 CDA definition of "family" also noted that "some cities use a functional family model instead of a blood or marriage family model or allow a functional family as an exception, such as through a Conditional Use or Special Use Permit."[129] Although the City of Madison did not ultimately adopt the "functional family" model and only

ORD-23-00022, at 1 (2023), https://madison.legistar.com/LegislationDetail.aspx?ID=5950461&GUID=4FEF97E5-09F5-4F96-954F-6871605829B9 [https://perma.cc/Y2SC-PZ2E].

122. PLAN COMMISSION, REVISING THE FAMILY DEFINITION 3 (2023), https://madison.legistar.com/View.ashx?M=F&ID=11637708&GUID=43973C2B-CAA4-49E1-A1C0-521D4D949668.

123. Section (3) states: "up to five (5) unrelated adults and the dependents of each, living together as a single household in a dwelling unit." Legistar File No. 74885 Body-Amended, at 3.

124. Tucker & Bannon, *supra* note 113, at 15.

125. Allison Garfield, *Madison Looks to Change 'Family' Definition in Zoning Code*, THE CAP TIMES (Jan 27, 2023), https://captimes.com/news/government/madison-looks-to-change-family-definition-in-zoning-code/article_3331c851-f1e1-5ac1-a3b1-19b3c79392e0.html.

126. *See, e.g.*, Mansfield, CT Zoning Regulations, Article 4. B; Lexington-Fayette County, Kentucky Zoning Ordinance Sec. 1-11; Moorland Township (Muskegon Co.); Michigan Compilation-General and Zoning Sec. 300.201.

127. *Garfield*, *supra* note 125.

128. *Id.*

129. Tucker & Bannon, *supra* note 113, at 17.

added Section (3) to the CDA's definition of "family," it is an important framework to examine going forward (and one that other states increasingly utilize).[130] The proposal's example of "functional family" cited a zoning regulation from Mansfield, Connecticut:

> To qualify as a functional family, the following criteria shall be met:
> A. The occupants must share the entire dwelling unit and live and cook together as a single housekeeping unit. A unit in which the various occupants act as separate roomers may not be deemed to be occupied by a functional family.
> B. The group shares expenses for food, rent or ownership costs, utilities and other household expenses;
> C. The group is permanent and stable and not temporary or transient in nature. Evidence of such permanency and stability may include:
> (1) The presence of minor dependent children regularly residing in the household who are enrolled in local schools;
> (2) Members of the household have the same address for purposes of voter's registration, driver's license, motor vehicle registration and filing of taxes;
> (3) Members of the household are employed in the area;
> (4) The household has been living together as a unit for a year or more whether in the current dwelling unit or other dwelling units;
> (5) There is common ownership of furniture and appliances among the members of the household; and
> (6) Any other factor reasonably related to whether or not the group is the functional equivalent of a family.[131]

While Madison's CDA did not implement this "functional family" model, it is a great guiding framework for municipalities to utilize in the pursuit of

130. *See* New York's example of increasing use of the functional family doctrine: N.Y. DEP'T OF STATE, *Legal Memorandum LU05: Definition of "Family" in Zoning Law and Building Codes*, https://dos.ny.gov/legal-memorandum-lu05-definition-family-zoning-law-and-building-codes [https://perma.cc/ZDF8-J5S4] (last visited Feb. 23, 2025].

131. *Id.* (quoting Mansfield, CT Zoning Regulations, Article 4. B).

equity, and one that Madison should adopt in the future (see footnotes 132-133 for "functional family" definitions).[132-133]

However, the "functional family" model does not resolve all common obstacles faced by those seeking affordable housing, especially displaced LGBTQ+ individuals. For instance, Section (A) of the Connecticut regulation example states, "a unit in which the various occupants act as separate roomers may not be deemed to be occupied by a functional family."[134] A "roomer" typically refers to somebody unrelated who lives in the same household subject to other requirements depending on the state.[135] This "roomer" designation is common in "functional family" regulations, and it often explicitly excludes chosen family situations. Including "roomer" clauses in housing regulations may inherently exclude LGBTQ+ chosen families, which are comprised of unrelated people living together. While chosen families meet the rest of the criteria for a functional family (i.e., sharing financial burdens), "roomer" language in a housing ordinance may be used to restrict LGBTQ+ chosen families from receiving assistance. Thus, the basic idea of the functional family model is a great starting point for legal inclusivity, but it must be further adapted for the sake of LGBTQ+ chosen families.

Section (C) of the Connecticut regulation example is also a requirement of interest that frequently appears in "functional family" definitions: "permanency and stability." This could exclude many LGBTQ+ unhoused persons from accessing housing, because such displacement is often inherently unstable.

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132. Lexington-Fayette County, Kentucky Zoning Ordinance Sec. 1-11

> *"Family, functional,* means a group of five (5) or more persons, not otherwise meeting the definition of "family," who desire to live as a stable and permanent single housekeeping unit and who have received a conditional use permit from the board of adjustment. The term "functional family" does not include:
>
> (a) Residents of a boarding or lodging house;
>
> (b) Fraternity, sorority or dormitory;
>
> (c) Any lodge, combine, federation, coterie or like organization;
>
> (d) Any group of individuals whose association is temporary or seasonal in nature;
>
> (e) Any group of individuals who are in a group living arrangement as a result of criminal offenses."

133. Moorland Township (Muskegon Co.), Michigan Compilation-General and Zoning Sec. 300.201

> "Family, functional: A group of persons which does not meet the definition of "Family" herein defined, living in a dwelling unit as a single housekeeping unit and intending to live together for an indefinite period. This definition shall not include a fraternity, sorority, club, hotel, or other group of persons whose association is temporary or commercial in nature."

134. Mansfield, CT Zoning Regulations, Article 4. B.

135. U.S. DEP'T OF HOUS. & URB. DEV., INSIGHTS INTO HOUSING AND COMMUNITY DEVELOPMENT POLICY, p. 10 (2021), https://www.huduser.gov/portal/sites/default/files/pdf/Insights-of-Housing.pdf. *See also* these state definitions: MD. CODE REGS. 07.03.21.02(B)(22) (2016); VA. CODE ANN. § 55.1-1200 (2024); COLORADO, CO., CODE § 9-16-1.

While chosen families functionally act as family units (sharing expenses and household burdens), some members may not live permanently with the group. At the root of chosen families is an offering of support and solace in times of hardship for LGBTQ+ individuals;[136] this bond may create a permanent familial living arrangement, but the living arrangement also may also be inherently transient in nature.

The current Madison CDA "family" definition does not include language pertaining to permanency or transience; thus, it does not seem appropriate to add that burden on functional families. It is also important to note that often chosen families are indeed stable and do reside together for years, sharing costs of living. Another point of concern for "permanency and stability" requirements is that chosen families typically do not have dependents to show enrollment in a local school to prove permanency. Section (C) of the Connecticut example and Section (3) of Madison's CDA's definition, two progressive updates to legislation, both unfortunately continue to emphasize dependents. Updating these regulations to be more inclusive means radically changing our conception of what a family is, because for LGBTQ+ individuals, it is not uncommon to lack dependents in a family unit.[137] Reliance on dependents for housing assistance prioritizes heteronormative family structures and is thus exclusionary to LGBTQ+ people (although many LGBTQ+ individuals do have dependents). The LGBTQ+ community faces great challenges in having children,[138] and often, dependents simply do not exist in LGBTQ+ family structures. Therefore, language pertaining to dependents in laws creates an enormous barrier for LGBTQ+ households in need of housing assistance.

III. COMPARATIVE LEGAL UPDATES TO "FAMILY" AND PROPOSED DEFINITION

To align with the stated intent of the Dane County Fair Housing Ordinance ("it is the declared policy of the County of Dane that all persons shall have an equal opportunity for housing regardless of…gender…marital status…[or] sexual orientation"),[139] Madison's City Council (and other localities) must reform the legal definition of "family" to improve LGBTQ+ access to local housing resources.

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136. Vermes, *supra* note 18.

137. Chosen families, the pertinent LGBTQ+ household type here which forms out of housing displacement, is not based on "blood or legal ties, such as marriage or adoption." Bewkes, *supra* note 9, at 1-3. Important, however, to mention that same-sex couples are more likely to adopt or foster children. *Id.* at 6.

138. For adoption, there exists "no explicit protections against discrimination" for LGBTQ+ people in 18 states and 4 territories (including Wisconsin). *Child Welfare Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT (11/29/2023), https://www.lgbtmap.org/equality-maps/foster_and_adoption_laws/ [https://perma.cc/N8PK-7LUR]. For foster care, this is the case in sixteen states and four territories. Thirteen states permit refusal of service to LGBTQ+ people due to religion for both adoption and foster care. *Id.*

139. MADISON, WIS., CODE § 31.02 (1988), https://www.countyofdane.com/documents/pdf/ordinances/ord031.pdf (also known as the Dane County Fair Housing Ordinance).

A. Examples of Legal Updates to "Family"

There are examples of legislation that one can look to when updating the definition of "family" to be inclusive. One example of equitable change to "family" definitions is found in a study of U.S. Codes conducted by Frank J. Bewkes, an adjunct professor at Georgetown's School of Public Policy and George Washington Law School.[140] This study found that the use of "household" instead of "family" likely "allow[ed] for the broadest definition of family, as it could potentially include both related and unrelated individuals."[141] Examples of legislation utilizing "household" definitions include benefit programs such as Supplemental Nutrition Assistance Program (SNAP), which defines a "household" as a group of individuals who live and purchase food together.[142] The use of "household" when defining family is one of the most inclusive and broad options, as it encompasses not only "chosen families" but also any person who has offered housing to and acts as a functional household with a displaced LGBTQ+ individual.

Other prominent examples of inclusive "family" definitions are found in family-leave legislation in the employment context. Broad definitions of "family" in this context, like housing, allow chosen family members to access crucial resources. A legislative example of a municipality reforming their laws to be more inclusive is the expansion of "family" under the California Family Rights Act in 2021. This bill expanded the definition of "family member," for whom an employee may take leave to care for, to include a "designated person," meaning somebody "equivalent of a family relationship."[143] The legislature found that "many LGBTQI adults…do not have accessible relationships with biological relatives. As a result, they are less likely to have biological family or partner support when they need care and often rely on chosen family."[144] The American Civil Liberties Union, in support of the bill, stated that "due to cultural, economic, and social forces, many households today depart from the nuclear family model of married couple and their biological children. Instead, they increasingly include close loved ones who are not biologically or legally related."[145]

California is not alone in making this change; there is an increasing amount of laws which extend familial protections and benefits to those "'like' or 'equivalent to' a family relationship."[146] For instance, Oregon passed HB 2005 in 2019, which allowed sick and family leave to be used for "any individual related by blood or affinity whose close association with a covered individual is

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140. Bewkes, *supra* note 9.

141. *Id.* (citing 16 U.S.C. § 3198 (2024)).

142. *Id.* (citing 7 U.S.C. § 2012 (2024)).

143. 2021 Bill Text CA A.B. 1041 (accessed via https://www.documentcloud.org/documents/23560247-202120220ab1041_assembly-floor-analysis#document/p1/a2190417). (last visited Feb. 25, 2025).

144. *Id.*

145. *Id.*

146. Deborah A. Widiss, *Chosen Family, Care, and the Workplace*, 131 YALE L.J. 215, 217 (2021).

the equivalent of a family relationship."[147] This language, especially the specification of "affinity," targeted increased recognition of LGBTQ+ chosen families. The U.S. Office of Personnel Management has stated that the legislative intent of "blood or affinity" in regulations like 75 Fed. Reg. 33,492 is to include "close friend[s]," not related by blood or legal ties, but rather someone with a "significant enough," close relationship with the individual.[148]

Another example containing "affinity" language is the introduced update to the federal Family and Medical Insurance Leave (FAMILY) Act.[149] The family members covered under safe leave include one's child, parent, spouse or domestic partner, or "any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship."[150] Many other employment-leave laws like the FAMILY Act have now employed this functional approach, which emphasizes individuals depending on somebody else for care.[151] For instance, a Colorado family-leave statute encompasses leave for those with a "significant personal bond that is or is like a family relationship."[152] Other statutes include similar language about a "close association" which makes the bond the "equivalent of a family relationship."[153] These family-leave laws illustrate the use of an inclusive "family" definition that should also be considered in the affordable housing realm for Section 8 families.

Another example of inclusive language when defining "family" is found with the Human Rights Campaign. The Human Rights Campaign established a model definition for "family" for healthcare professionals that is based on functional characteristics due to the unique position of LGBTQ+ people in society; per their definition, "'[f]amily' means any person(s) who plays a significant role in an individual's life. This may include a person(s) not legally related to the individual."[154] The Human Rights Campaign definition goes on to define family as including significant others, a liberal interpretation of parents, and, most importantly, "other persons operating in caretaker roles."[155] This definition is based on research regarding concern for the hospital visitation rights of LGBTQ+ chosen families.[156] This broad definition allows non-traditional LGBTQ+ chosen families to be legally recognized in the hospital visitation

147. Or. H.R. 2005 (2019). *See Oregon Enacts Paid Family and Medical Leave Law,* LAWLEY, https://www.lawleyinsurance.com/wp-content/uploads/2019/09/OR-PFML-Overview.pdf [https://perma.cc/8Y8J-EMVT] (last accessed Feb. 25, 2025).

148. 75 Fed. Reg. 33,492 (2010).

149. Williamson, *supra* note 32.

150. *Id.*

151. Widiss, *supra* note 146, at 234.

152. COLO. REV. STAT. § 8-13.3-503(11)(e) (2024).

153. N.J. STAT. ANN. § 43:21-27(n) (2024); N.M. STAT. ANN. § 50-17-2(G)(7) (2024).

154. *LGBTQ+ Inclusive Definitions of Family*, HUM. RTS. CAMPAIGN, https://www.thehrcfoundation.org/professional-resources/lgbtq—inclusive-definitions-of-family [https://perma.cc/P8HM-WZ7N] (last visited Feb. 25, 2025).

155. *Id.*

156. *Id.* (citing also to *Equal Vistiation*, HUM. RTS. CAMPAIGN, https://www.thehrcfoundation.org/professional-resources/equal-visitation?_ga=2.117515726.670679971.1701289139-2106112246.1698004806 [https://perma.cc/A8F2-7NJ7] (last visited Feb. 19, 2025)).

context, and it should also be contemplated in other areas of law where LGBTQ+ families lack recognition, such as housing eligibility requirements.

Statutory definitions of "family" that are broader than the nuclear family unit are widely prevalent across U.S. Codes, often including a variety of relationship types: 33% of statutes include "first cousins," 55% include step-relations, and 60% include in-laws.[157] Given the prevalence of non-traditional LGBTQ+ families, it follows that the inclusion of chosen families is relevant and applicable here as well, in order to equitably apply the law. The U.S. continues to see inclusive "family" definitions in our laws in accordance with societal conceptions of is family.[158] This inclusive view of the family is seen in courts as well: In *Baker v. Kuffner*, the Kentucky Court of Appeals sided with the Defendants that "sometimes family is a chosen family," affirming a child's continued custody with friends, rather than blood relatives, of recently deceased mothers who were in a same-sex relationship.[159] Thus, an inclusive definition of "family" should also be reflected in Section 8 housing eligibility requirements for the sake of LGBTQ+ chosen families.

B. Proposed "Family" Definition

To align with the reasoning of Madison's own updated definition of "family" via Section (3) of the official CDA definition ("occupancy limits [were] based on an outdated ideal of two-parent household with children" and did not "allow for alternative ways of living"),[160] it is imperative that the definition of "family" is further adapted to include a functional family framework. LGBTQ+ chosen families fit precisely within the definition of "functional family." For instance, chosen families share financial burdens and list one another as emergency medical contacts.[161] Further, as the *Obergefell* decision recognized, "choices concerning…family relationships," specifically LGBTQ+ family structures, are protected and meant to be respected under the law.[162] The family relationship structure of chosen family is a legitimate designation, and one that should be cognizable under the law. Thus, a potential policy solution to Madison, Wisconsin's Section 8 "family" requirement could entail updating the CDA's definition of family in Section (2) of § 28.211.[163] Currently, the definition of family is:

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157. Bewkes, *supra* note 9, at 6.

158. *Id*.

159. Baker v. Kuffner, No. 2020-CA-1247-MR, 2022 Ky. App. Unpub. LEXIS 274 (Ct. App. May 13, 2022) ("The Kuffners believe that the child is best off in their home as she is like one of their children…").

160. Tucker & Bannon, *supra* note 113, at 16.

161. Levin, *supra* note 9, at 9.

162. Obergefell v. Hodges, 576 U.S. 644, 666 (2015).

163. MADISON, WIS. ORDINANCE CH. 28, § 28.211 (2023). Madison, Wis., Drafter's Analysis for ORD-23-00022, https://madison.legistar.com/View.ashx?M=F&ID=11672882&GUID=1987B87C-6BE0-4266-9093-E341054FB5CC (Legistar File No. 74885 Body-Amended).

> "two…or more people related by blood, marriage, domestic partnership, or legal adoption, living together as a single household in a dwelling unit, including foster children; up to four…roomers, and their dependents"[164]

A revised definition could be:

> "two or more people living as a functional household either related by blood, a legal relationship, or affinity whose close, significant relationship is the equivalent of a family relationship. This may include persons not legally or biologically related. Equivalence of a familial relationship may include dependance on one another for care and/or finances."

This proposal combines elements from analogous statutes reviewed above and the Human Rights Campaign's "family" definition, drawing from the use of "household" and "functional family" for broadness and inclusivity. The use of "affinity," "closeness," "significant relationship," and dependence on another person for care and finances, demonstrates the unique and functional aspect of chosen families. The inclusion of those not related by blood or legal ties, also seen in the Human Rights Campaign's definition, makes it clear that chosen family members are unequivocally included in this legal definition of "family." Thus, this update to Section 8's "family" definition would not only include LGBTQ+ chosen families, but it would also voice support and progress in our community towards greater acceptance of LGBTQ+ people beyond Section 8 housing and set a wider precedent for inclusivity and equity in municipal codes.

CONCLUSION

Chosen families are families, and they deserve to be treated with the same respect and dignity afforded to traditional, heteronormative, nuclear family archetypes under the law. It follows that we as a legal community should continue to work towards an equitable, autonomous definition of "family" for the sake of LGBTQ+ inclusion and well-being. With an understanding of the rich history of chosen families, which are often formed out of necessity and are inextricably linked to LGBTQ+ displacement, it is time for local housing laws to transform. Therefore, PHAs, such as the CDA in Madison, Wisconsin, must adapt their Section 8 eligibility requirements to include a functional chosen family model to equitably serve displaced LGBTQ+ individuals.[165] This means radically transforming our construction of what a "family" is in the context of municipal law, for it is action in our communities that truly shape a better tomorrow for displaced individuals. Chosen families should no longer be

164. *Id.*

165. An update to Section 8's "family" requirement in section (2) of the CDA definition could be: "two or more people living as a functional household either related by blood, a legal relationship, or affinity whose close, significant relationship is the equivalent of a family relationship. This may include persons not legally or biologically related. Equivalence of a familial relationship may include dependance on one another for care and/or finances."

"strangers even in death" in the eyes of both society and the law. Local housing is a crucial place to start.