Stanford Law Review

Volume 78 January 2026

ARTICLE

The Origins of Family Rights and Family Regulation: A Dual Legal History

Laura Savarese*

Abstract. The history of the state's intrusions on the rights of marginalized parents has become central to today's critical accounts of American family law and family courts, and rightly so. Missing from the conversation, however, is a full account of how those rights first entered the law, and how the state assumed its now-familiar, though often unfulfilled, obligation to afford due process to the parents and children it separates.

This Article is the first to locate that transformation in a now-forgotten wave of habeas litigation brought by parents seeking their children's return from orphan asylums and juvenile reformatories—the institutions that comprised the nascent child welfare and juvenile justice systems in the late nineteenth century. Those conflicts are visible in archival sources and a set of state court cases that have not received systematic study. Drawing on those sources, this Article argues that modern understandings of the right to family integrity were forged through legal challenges to the state's growing power to remove children from their parents in the name of child welfare from the Civil War through the Progressive Era. Parents, as habeas petitioners, pushed courts to recognize and enforce their rights to notice and an opportunity to be heard, to draw a distinction between child neglect and family poverty, and to affirm parents' right to regain custody after they remedied the reasons for the child's removal—establishing the core legal principles that delimit the state's power today.

Recapturing the story of resistance to the inception of the family regulation system offers insights for today's efforts to transform or dismantle that system and deepens our understanding of the genesis and function of constitutional family rights. Critically, recovering this line of cases provides a more complete account of the history and tradition in which substantive due process protections for family autonomy are rooted. This account also lends support to more ambitious conceptions of the right to family integrity,

* Assistant Professor of Law, Michigan State University College of Law. For helpful conversations and feedback, I thank Anne Dailey, Chris Gottlieb, Marty Guggenheim, Daniel Hulsebosch, Elizabeth Katz, Melissa Murray, Farah Peterson, Claire Priest, Noah Rosenblum, Clare Ryan, Emily Stolzenberg, David Tanenhaus, Sean Williams, John Witt, and participants in the Family Law Scholars and Teachers Conference, the New York Area Family Law Scholars Workshop, the NYU Legal History Colloquium, and the American Society for Legal History Annual Meeting. I am also grateful to Jessica Wang and the editors of the *Stanford Law Review* for their thoughtful suggestions and assistance.

advocated today as a tool for expanding legal protections against family separations and terminations of parental rights, as well as affirmative entitlements to state assistance for childrearing. At the same time, the records of parents' legal challenges offer a warning about the limits of procedural rights and litigation as means of advancing parents' and children's interests absent a more radical redistribution of public resources to meet families' material needs.

Table of Contents

Introduction 66

I. Power and Resistance in the Creation of Family Regulation 75

II. Claiming Family Rights in Court 88
- A. Challenging Children's Removal and Defining Due Process 89
- B. Defending the Right to Reclaim Children in Courts of Equity 102
- C. Indenture, Adoption, and Parents' Residual Rights 108

III. The Future of Family Preservation 120

Conclusion 129

Introduction

Today, the state's authority to intervene in the lives of children and their parents faces a crisis of legitimacy. Beginning well over a century ago, American states and localities built a massive legal apparatus for investigating and adjudicating allegations of child maltreatment, placing children in foster care, and, in some cases, terminating birth parents' rights to those children—the set of laws, practices, and institutions that scholars and advocates describe as the family regulation or family policing system.[1] Now, a growing number of scholars, attorneys, and families call for the system's radical reform or abolition to combat the harms caused by children's unnecessary removal from their parents and the starkly disproportionate infliction of those harms on low-income families of color.[2] That groundswell of criticism has also renewed debate among family law scholars over the doctrine of parental rights: Some argue that strong legal protection for parents' rights is a vital defense against the state's policing of vulnerable families, while others argue that the law's deference to parental authority thwarts the vindication of children's interests and excuses the state from adequately supporting families.[3]

---

1. As critics of the term "child welfare system" have argued, the term "family regulation system" better captures the function and scope of the "regime of public, private, and faith-based agencies and institutions, courts, and individuals authorized by force of law to surveil and intervene in families, remove children from their parents temporarily or permanently, terminate the parent-child relationship, and create new legal families." Nancy D. Polikoff & Jane M. Spinak, *Foreword—Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well Being*, 11 COLUM. J. RACE & L. 427, 432-33 (2021). Consistent with other legal historical scholarship, this Article generally uses the term "juvenile justice" to describe the law and institutions created to govern children accused of crimes and other misbehavior classified as juvenile delinquency, and it applies the term "child welfare" as needed to describe the law and institutions that arose to manage impoverished, abused, or neglected children; those terms imperfectly capture the rough division of responsibility—blurrier in the nineteenth century—between legal institutions empowered to intervene in children's lives. *See* Paul Lerman, *Twentieth-Century Developments in America's Institutional Systems for Youth in Trouble*, *in* A CENTURY OF JUVENILE JUSTICE, *supra* note 1, at 74-75. "Family regulation" also provides an accurate descriptor for those intertwined legal regimes, so this Article uses that term as well.

2. *See* S. Lisa Washington, *Pathology Logics*, 117 NW. U. L. REV. 1523, 1530-31, 1534 (2023); Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1388-90, 1409-13 (2020); *see, e.g.*, DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 277-303 (2022); JANE M. SPINAK, THE END OF FAMILY COURT: HOW ABOLISHING THE COURT BRINGS JUSTICE TO CHILDREN AND FAMILIES 257-59 (2023).

3. *Contrast* Clare Huntington & Elizabeth Scott, *The Enduring Importance of Parental Rights*, 90 FORDHAM L. REV. 2529, 2529-30 (2022) (arguing that the law's deference to parental rights "promote[s] the stability of the parent-child relationship by restricting the state's authority to intervene in families"—which is "especially important for marginalized families"—and places decision-making authority with those best positioned to

footnote continued on next page

But within debates over the law of parenthood, children's rights, and the future of family regulation, a point of near-consensus is that the law should afford the highest safeguards against state action that separates parents from their children—that is, action intruding on parents' and children's "core" interest in preserving their family relationship.[4] Advocates for strengthening that right to family integrity and critics of the modern family regulation system point to empirical findings about the harmful effects of unwarranted family separations and the system's severe racial disparities.[5] In addition, critics draw on history, linking present-day harms to a long pattern of state and federal authorities wrongfully separating Black families through slavery and forced apprenticeship, devastating Native communities by removing children to boarding schools and foster care, and displacing the children of poor, immigrant families through the late nineteenth-century "orphan train" movement.[6] Citing that same history, legal scholars have described a class- and

---

understand and advance children's interests), *with* Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 78-80 (2021) (arguing that "[t]he law's current protection of expansive parental rights" tends to mask "parent-child differences and divisions," confine children "within a parent-dominated private sphere," and isolate children "from broader communities of support and connection").

4. Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127, 148, 153 (2018); *see also* Huntington & Scott, *supra* note 2, at 2536 (noting points on which leading critics and advocates of robust parental rights agree, including that "it is critical to apply a strict standard of review when the state aims to separate children from parents"); Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L. REV. 267, 274 (2021) (observing that even across "seemingly conflicting perspectives" about the nature of children's rights, there is support for children's "constitutional right to family integrity").

5. *See generally* 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 (2020) (analyzing the causes and consequences of racial disparities across multiple levels of the child welfare system); KELLEY FONG, INVESTIGATING FAMILIES: MOTHERHOOD IN THE SHADOW OF CHILD PROTECTIVE SERVICES (2023) (examining how marginalized communities' exposure to Child Protective Services (CPS) interventions shapes their experiences of precarity and injustice); Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 527 (2019) (discussing "the multiple ways a child may be negatively impacted by separation from her family and placement into foster care").

6. *See, e.g.*, LAURA BRIGGS, TAKING CHILDREN: A HISTORY OF AMERICAN TERROR 3-4, 45, 73-74 (2020); ALAN J. DETTLAFF, CONFRONTING THE RACIST LEGACY OF THE AMERICAN CHILD WELFARE SYSTEM: THE CASE FOR ABOLITION 1-5, 38-41 (2023); ROBERTS, *supra* note 2, at 87-88; Chris Gottlieb, *Remembering Who Foster Care Is For: Public Accommodation and Other Misconceptions and Missed Opportunities in* Fulton v. City of Philadelphia, 44 CARDOZO L. REV. 1, 38-42 (2022); Washington, *supra* note 2, at 1541-43; HUM. RTS. WATCH & ACLU, "IF I WASN'T POOR, I WOULDN'T BE UNFIT": THE FAMILY SEPARATION CRISIS IN THE US CHILD WELFARE SYSTEM 23-27, 41-42 (2022). Although the complex intersection of immigration law and family law is beyond the scope of this Article, it is important to recognize that parent-child separation has been and remains a powerful tool not only in the family regulation system, but also in immigration

footnote continued on next page

race-based "divide in the law's treatment of parental relations," past and present, in which only privileged parents have enjoyed the benefit of family-law doctrines of parental autonomy and privacy that ought to be afforded on equal terms.[7] Thus, the story of recurrent violations of impoverished parents' rights to their children has become central to today's critical accounts of American family law, and rightly so. And yet, missing from the conversation is a full accounting of how the law first came to recognize marginalized families' right to remain together—in other words, how those families initially challenged the law's failure to protect them on equal terms, and how the law began to enshrine formal protections, however thin and often ignored, against the state's separation of parents and children.

This Article recovers that history, beginning with the overlooked story of legal conflict within the emergent juvenile justice and child welfare systems of the late nineteenth century: the wave of habeas litigation brought by parents seeking to reclaim their children from juvenile reformatories, orphan asylums, and foster placements, and challenging the laws by which the state removed

---

enforcement. The devastating consequences of family separation and detention captured public attention in 2018, when thousands of migrant children were forcibly separated from their caregivers under President Trump's "Zero Tolerance Prosecution Policy and Family Separation Policy." *See* Mariela Olivares, *The Unpragmatic Family Law of Marginalized Families*, 136 HARV. L. REV. F. 363, 378 (2023) (discussing the 2018 policy and aftermath); Clare Ryan, *Children as Bargaining Chips*, 68 UCLA L. REV. 410, 426-30 (2021) (analyzing "the state's power to use children as leverage" against migrant parents). For reporting on immigration authorities' recent revival of family separation tactics in different forms, see, for example, Hamed Aleaziz, *Inside Trump's New Tactic to Separate Immigrant Families*, N.Y. TIMES (Aug. 5, 2025), https://perma.cc/HR9G-WCG4.

7. Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 372 (2002); *see also* Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status, Part I*, 16 STAN. L. REV. 257, 257-58 (1964) (presenting an influential account of the divergence between "two systems of family law"—one, a "public" and "penal" system of laws "for underprivileged and deprived families," and the other, a "private" body of law "for the more comfortable and fortunate"); KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 101-121 (2017) (analyzing the overrepresentation of poor families in the child protective system as evidence of the law's unequal protection of family privacy rights); Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 117-19 (2013) (detailing "the two-tiered parenthood framework in private and public family law"); ROBERTS, *supra* note 2, at 112 (discussing how "[t]he class divide between coercive public measures for poor families and private disputes for the wealthy families was mirrored by a racial divide between poor white families and poor Black families," in their access to social services). Another rich body of scholarship details how low-income children of color have historically been excluded from the legal protections and resources attached to childhood—in particular, how the juvenile justice system has, since its inception, treated poor and Black children as "unchildlike and thus inappropriate subjects for rehabilitative justice." Chase S. Burton, *Child Savers and Unchildlike Youth: Class, Race, and Juvenile Justice in the Early Twentieth Century*, 44 LAW & SOC. INQUIRY 1251, 1252 (2019) (surveying the historiography).

their children. In this Article's account, modern understandings of the right to family integrity were forged in large part through a backlash to the growing reach of family regulation from the Civil War through the Progressive Era. In the same period that the state extended its power to remove children from their parents in the name of child welfare, the state also assumed statutory and constitutional obligations—now familiar, but hardly ever recognized before—to afford some measure of due process to the parents and children it separated. Parents' legal challenges were a driving force for that change.

Conflicts between parents and juvenile institutions in New York, the focus of this study, exemplified patterns that recurred in many states across the United States in the late nineteenth and early twentieth centuries. New York provides a useful focal point because the enabling statutes of New York's juvenile institutions and child protection societies established a basic model that spread across much of the United States in the nineteenth century and endured in the design of modern delinquency and dependency laws.[8] Moreover, New York accounted for nearly a third of all the nation's children living in institutions by 1900.[9] This Article draws on original archival research to tell New York's story in more detail, but also collects case law and legislation from jurisdictions across the United States to capture broader trends, and relevant variations, in the evolution of child welfare and juvenile justice in the nineteenth and early twentieth centuries. The period covered in my research—roughly, from the Civil War to the 1920s—witnessed important historical changes; however, I have chosen to analyze cases in this period together because of continuities in the legal claims asserted and because these decades mark the era in which institutions constituted states' primary method of managing the care of dependent children.[10]

8. *See infra* Part I; *see generally* MATTHEW A. CRENSON, BUILDING THE INVISIBLE ORPHANAGE: A PREHISTORY OF THE AMERICAN WELFARE SYSTEM 37-60 (1998) (discussing different states' variations on the model).

9. *See* HOMER FOLKS, THE CARE OF DESTITUTE, NEGLECTED, AND DELINQUENT CHILDREN 131 (1902).

10. For a rough taxonomy of the kinds of claims that petitioners asserted, see Part II. To orient the reader to the world of family regulation in the late nineteenth and early twentieth centuries, I will briefly sketch the institutional landscape. Beginning around the mid-nineteenth century, New York led the way in nationwide reforms to divert children from adult prisons and poorhouses into separate institutions specifically for children. The state relied on a growing array of institutions run by private organizations, incorporated by the legislature, and supported by public funds, including the New York House of Refuge, established in 1824 as the nation's first reformatory for juvenile delinquents; the New York Juvenile Asylum, incorporated in 1851; and the New York Catholic Protectory, chartered in 1863. *See infra* notes 33-34 and accompanying text (detailing relevant historical scholarship and relevant enabling laws). Lawmakers in New York and other states also incorporated and subsidized growing numbers of private, often sectarian, orphan asylums, which received not only "full orphans," but also, more commonly, children with one or more living birth

footnote continued on next page

When parents turned to the courts and the writ of habeas corpus to challenge children's placement in an institution or foster home, judges determined whether the respondent—the reformatory, orphanage, or foster parent—held the child unlawfully. As in custody disputes between two birth parents, judges determined whether it would "be for the interest of the child to take it from the respondent and give it into the keeping of the relator," that is, the petitioning birth parent.[11] However, habeas litigation against children's

---

parent. *See generally* FOLKS, *supra* note 9 (providing an overview of the historical function of orphanages); *id.* at 126; sources cited *infra* note 33 (describing the growing scale of the child welfare system in the nineteenth century). Reformatories and orphanages not only housed children who were committed by courts or surrendered by parents but also exercised statutorily delegated power to place those children in private homes under indenture contracts and, in some cases, by adoption. *See infra* Part II.C (examining the legal arrangements by which institutions placed children in families—the antecedents of modern foster care placements). Given the breadth and flexibility of different institutions' jurisdictions, there was considerable overlap in their populations and in their childcare practices; in this regard, New York's reformatories and orphan asylums typified what legal historian Michael Grossberg has identified as the "characteristic" melding of American juvenile justice and child welfare practices. Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820-1935*, *in* A CENTURY OF JUVENILE JUSTICE 3, 17 (Margaret K. Rosenheim, Franklin E. Zimring, David S. Tanenhaus & Bernardine Dohrn eds., 2002). New York's system also typified the "blurring [of] public and private authority" or "institutional hybridization" that marked the evolution of family regulation in the United States, Michael Grossberg, *"A Protected Childhood": The Emergence of Child Protection in America*, *in* AMERICAN PUBLIC LIFE AND THE HISTORICAL IMAGINATION 213, 222 (Wendy Gamber, Michael Grossberg & Hendrik Hartog eds., 2003) [hereinafter Grossberg, *Protected Childhood*], by delegating the "*public work*" of child saving to quasi-private, quasi-public institutions like the Juvenile Asylum and the Catholic Protectory, N.Y. CATH. PROTECTORY, FORTIETH ANNUAL REPORT 12-13 (1903) (defending the Protectory's entitlement to public subsidies by stressing that it had "always been recognized as doing *public work*," receiving thousands of children as "*public wards* committed . . . by *public* authorities"); *see also* Clare Huntington, *The Institutions of Family Law*, 102 B.U. L. REV. 393, 438 (2022) (discussing how states "deputize[] nonstate institutions to regulate families," in a child welfare system that "privatizes public provisioning"). The New York Society for the Prevention of Cruelty to Children (NYSPCC) also served, in its leader's words, as "part of the legal machinery of the State," responsible for policing child abuse, neglect, and delinquency, and channeling children to custodial institutions on those grounds—a model for similar public-private partnerships in many other states. N.Y. SOC'Y FOR THE PREVENTION OF CRUELTY TO CHILD., TWENTY-FOURTH ANNUAL REPORT TO THE LEGISLATURE OF THE STATE AND TO THE MUNICIPAL ASSEMBLY OF THE CITY OF NEW YORK 10-11 (N.Y., 1898) (on file with N.Y. Soc'y for the Prevention of Cruelty to Child. Archive) [hereinafter NYSPCC 24TH REPORT]. For more on the role of privately run Societies for the Prevention of Cruelty to Children (SPCCs) as arms of law enforcement, see note 47 and accompanying text below, and SUSAN J. PEARSON, THE RIGHTS OF THE DEFENSELESS: PROTECTING ANIMALS AND CHILDREN IN GILDED AGE AMERICA 137-184 (2011).

11. W.L. Hand, *Habeas Corpus Proceedings for the Release of Infants*, 56 CENT. L.J. 385, 386 (1903). The petitioner initiated the proceedings by asking the trial court to issue a writ of habeas corpus, which directed the respondent to appear and make a return, that is, to

footnote continued on next page

institutions differed in important ways from the kinds of custody disputes between rival parents that dominate doctrinal histories of family law. When parents challenged institutions' power to detain their children, or place them in foster homes, parents confronted the authority of the *state*: the power "delegate[d]" to institutions by the legislature under sweeping child endangerment laws to "remov[e] the child from the custody of the parent, and entrust[] his maintenance, protection and education" to one "fit[] for the trust," as the managers of New York's Juvenile Asylum described it.[12] It is in this body of cases, therefore, that incipient understandings of family rights as constraints on the state are to be found.

Several novel insights emerge from the historical evidence gathered here, which includes archival case files, internal records and published reports of children's institutions, newspaper coverage, over fifty published judicial decisions in New York, and dozens more from states across the country. First, in mining those sources, this Article retrieves an important but neglected record of protest and contestation over the new institutions and body of law generated by the nineteenth-century "child-saving" movement[13]—in particular, the reformatories and orphanages whose legal powers mirrored those of modern-day juvenile corrections and child protective services agencies.[14] Interpreting that record does require some caution. The evidence of parents' resistance to their children's removal more than a century ago does not reveal a coordinated political movement like the one burgeoning now among impacted parents, grassroots organizers, family defense attorneys, and legal scholars.[15] Nor is there a clear moral valence to be found in every case

---

produce the child and provide the legal justification for the child's detention. *See* LEWIS HOCHHEIMER, THE LAW RELATING TO THE CUSTODY OF INFANTS §§ 53-59 (3d ed. Balt., Harold B. Scrimger 1899). At that hearing, the judge decided whether to discharge the child into the petitioner's custody or dismiss the writ and leave the child in the respondent's control. *See id.* §§ 70-72.

12. N.Y. JUV. ASYLUM, EIGHTEENTH ANNUAL REPORT OF THE NEW YORK JUVENILE ASYLUM TO THE LEGISLATURE OF THE STATE AND TO THE COMMON COUNCIL OF THE CITY OF NEW YORK 34 (N.Y.C., WM. S. Dorr Book & Job Printer 1870) [hereinafter NYJA 18TH REPORT].

13. For an overview of legal reforms associated with this movement—which nineteenth-century figures sometimes described as "child-saving work," see, for example, WILLIAM PRYOR LETCHWORTH, THE HISTORY OF CHILD-SAVING WORK IN THE STATE OF NEW YORK (Bos., Press of Geo. H. Ellis 1893) (tracing the early roots of child welfare institutions in New York).

14. *See infra* Part I.

15. For a description of the currently burgeoning movement, see, for example, Julia Hernandez & Tarek Z. Ismail, *Radical Early Defense Against Family Policing*, 132 YALE L.J.F. 659, 669-72 (2022).

where a parent contested a child's placement in an institution or foster home.[16] What history does show, however, is that the expansion of state power to police vulnerable families generated legal conflict and judicial scrutiny—contrary to the story of consensus or inevitability that one might otherwise tell about the origins of family regulation.[17] Resistance to that regime, at its inception, points to the beginnings of an oppositional struggle that reverberates in our current era.

Habeas litigation shows that the law's unequal treatment of parenthood did not go unnoticed or unchallenged. These cases drew judicial and public attention to features of the nascent child welfare and juvenile justice systems that remain most criticized today: the vague and expansive criteria for state intervention, the insufficient procedural protections afforded to children and their parents, the wide discretion and leverage exercised by the state's agents, and the invasion of rights and liberties that, litigants argued, belonged equally to poor families.[18] In particular, litigants exposed the tension between the state's growing authority to intervene in impoverished and working-class families, on the one hand, and the common-law doctrines that shielded more privileged families from scrutiny, on the other. Ultimately, controversy around children's confinement in institutions—fueled in part by parents' struggles to reclaim their children—helped build support for new policies,

16. It is worth noting that because this Article centers on conflicts between parents and institutions, children's own perspectives—so often obscure in the legal historical record—necessarily recede from focus. In Part II, I primarily analyze legal challenges to the state's power to separate children from parents or withhold their return—that is, cases in which the interests of parents and children usually appeared *aligned*. Of course, parents' and children's interests were not always so clearly aligned, particularly when it came to parents' voluntary decisions to place children in institutions, which children had little ability to challenge, then as now. *Compare* Rule v. Geddes, 23 App. D.C. 31, 31, 48-50 (1904) (upholding a law that allowed a father to transfer his "incorrigib[le]" daughter to the reformatory, in a proceeding where the girl "had no legal right to be heard . . . on her own behalf," because the confinement was not "imprisonment"), *with* Parham v. J.R., 442 U.S. 584, 604 (1979) (requiring certain procedural safeguards—though not a formal hearing—to constrain parents' "discretion to decide whether to have a child institutionalized" in a mental hospital).

17. *See infra* notes 49-54 and accompanying text.

18. Legal scholars have catalogued many longstanding critiques of the state's approach to child abuse and neglect, including "vague standards of child maltreatment," "misidentifying poverty as neglect," and "widespread due process violations" in the family court system. Polikoff & Spinak, *supra* note 1, at 434-35. My argument is not that Progressive-era habeas petitioners eradicated those problems, but rather, that they used the tools at their disposal to identify, challenge, and publicize those injustices, undercutting the legitimacy of the child-saving regime at its inception and building pressure for reform in ways that merit attention today.

including early state welfare programs, which were designed to keep children in their own homes.[19]

Second, this Article shows that the adjudication of parents' habeas challenges generated new and vital protections against involuntary or permanent separations of parent and child, grounded in common-law rights, statutory rules, and emerging notions of constitutional due process as a shield for family bonds—the core legal principles that delimit the state's power today.[20] In the half-century before the U.S. Supreme Court first recognized constitutional protection for parents' custody rights—a formative yet understudied period for the modern law of parenthood—state courts began to articulate parents' and children's rights to preserve their family relationship against the state's intrusion.[21] Notions of a right to family integrity arose from an amalgam of sources in the late nineteenth century, as litigants and courts invoked common-law and natural-law principles, state constitutional provisions, and the newly ratified Fourteenth Amendment to begin to shift the nature and grounding of the legal interest in the parent-child relationship from a property interest held by fathers to a liberty interest shared by parents and children.

Critically, recovering this line of cases provides a more complete and nuanced account of the "history and tradition" in which substantive due process protections for family autonomy are rooted, and by which the U.S.

19. For overviews of the Progressive-era shift toward family preservation, see generally CRENSON, *supra* note 8, at 7-36; and MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 119, 129 (rev. ed. 1996).

20. *Infra* Part II.

21. Scholars typically identify the U.S. Supreme Court's decisions in *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) and *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925)—which found substantive due process protection for parents' rights to direct their children's education—as "[t]he starting point for the development of the constitutional status" of parental rights. *E.g.*, Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 986 (1988); Huntington & Scott, *supra* note 2, at 1382-83. But some scholars have also proposed deeper grounding for constitutionally protected parenthood, namely, in the history of antislavery and Reconstruction. *See, e.g.*, PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 4-5, 9-10 (1997). Some legal historians have also proposed a longer genealogy of children's constitutional rights, predating the landmark cases—*Brown v. Board of Education*, 347 U.S. 483 (1954) and *In re Gault*, 387 U.S. 1 (1967)—that are typically identified as starting points. *E.g.*, David S. Tanenhaus, *Between Dependency and Liberty: The Conundrum of Children's Rights in the Gilded Age*, 23 LAW & HIST. REV. 351, 384-385 (2005); Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1058-59 (1992). By tracing the history of habeas litigation against juvenile institutions, this Article reveals another crucial yet little-noted arena for the development of constitutional family rights: substantive and procedural due process protections for the parent-child relationship in the family regulation context, which the U.S. Supreme Court articulated more fully in the 1970s-1980s.

Supreme Court today defines the "contours" of family rights.[22] In addition, the history recounted in this Article supports more ambitious visions for asserting constitutional family rights in the present day: as a tool to oppose and appeal removal and termination decisions, as a mandate to strengthen the procedural safeguards and legal standards applicable in such cases, and even as the basis for more robust state assistance for child-rearing and family reunification.[23] Thus, this Article's historical findings have value for two contemporary legal projects: efforts to defend unenumerated rights to family life in the aftermath of *Dobbs v. Jackson Women's Health Organization*,[24] and efforts to extend and deploy those rights in new ways to challenge the existing legal structure of family regulation. At the same time, however, the story of parents' habeas challenges may offer a warning about the limits of litigation and lawyer-driven reform, absent a more radical redistribution of government resources to meet families' material needs.[25]

This Article proceeds in three Parts. Part I sketches how nineteenth-century lawmakers' creation of institutions for children transformed the state's role in family life, but also fueled persistent conflicts in ways that scholarship on family law and family regulation has not fully recognized. Part II investigates those now-forgotten conflicts, uncovering the legal consequences of parents' habeas litigation in New York, as well as important decisions produced by similar litigation around the United States. The adjudication of habeas cases, I argue, produced new, significant, and enduring constraints on

22. Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 845 (1977) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1976)).

23. *See infra* Part III. An "emerging consensus" today links failings of the child protection system to the persistent "focus on crisis intervention rather than on broad-based prevention and family support," Huntington & Scott, *supra* note 2, at 1389—starkly illustrated by the fact that federal "funds for services to prevent the need for foster care . . . are fixed and about ten times lower" than total funding for foster care, Josh Gupta-Kagan, *Toward a Public Health Legal Structure for Child Welfare*, 92 NEB. L. REV. 897, 950-51 (2014). *See also* Caitlyn Garcia & Cynthia Godsoe, *Divest, Invest, & Mutual Aid*, 12 COLUM. J. RACE & L. 601, 607-09 (2022). Scholars have also detailed the inadequacy of parents' procedural rights in the current system. *See, e.g.*, Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Cases Between Disposition and Permanency*, 10 CONN. PUB. INT. L.J. 13, 34-36 (2010); Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 658-59 (2006); Amy Sinden, *"Why Won't Mom Cooperate?": A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 343-55 (1999).

24. 142 S. Ct. 2228 (2022).

25. On the limits of court-based strategies and the need for "a proactive, affirmative approach to establish the structures, policies, and funding necessary to ensure the maximum development of every child," see NANCY E. DOWD, REIMAGINING EQUALITY: A NEW DEAL FOR CHILDREN OF COLOR 136-38 (2018); and Aaron Tang, *The Supreme Court and Children*, 118 NW. U. L. REV. 1331, 1383-85 (2024) (collecting scholarship advancing similar claims).

the modern state's authority to regulate and sever the parent-child relationship—including early articulations of constitutional rights to that relationship. Many of the legal tools and arguments that remain crucial to present-day family defense were first tested in litigation against juvenile institutions, in which parents pushed courts to recognize and enforce their rights to notice and an opportunity to be heard, to draw a distinction between child neglect and family poverty, and to affirm their right to regain custody after they remedied the reasons for children's removal. Part III concludes by tracing the complex legacy of parents' habeas litigation and identifying history's implications for today's efforts to transform or dismantle the family regulation system, including strategies for deploying a revitalized right to family integrity.

I. Power and Resistance in the Creation of Family Regulation

The creation and growth of children's institutions, beginning before the Civil War and accelerating in the decades that followed, inaugurated major, lasting changes in the law governing family life. Some of those changes are well understood, but others remain little recognized. This Part provides a brief overview of the laws establishing the new child-saving regime in the nineteenth century and identifies an omission in scholarly accounts of the period—an omission that has left us with an incomplete account of the development of modern family regulation and the doctrine of parental rights. Conflicts between parents and juvenile institutions—visible in archival records and case law but largely overlooked in family-law histories—reveal a record of protest and contestation over the new powers amassed by the state (and a sprawling network of private organizations) during the late nineteenth-century child-saving movement. That record deepens our understanding of the genesis and function of constitutional family rights, showing how those rights first became a recognized legal defense against the state's separation of parents and children in the early child welfare and juvenile justice systems.

By the end of the nineteenth century, the law of parenthood looked quite different than it had a century earlier. The eighteenth-century common law, as William Blackstone described it, subjected children to the "empire of the father": The law endowed fathers with near-absolute rights to the custody and control of their minor children on the expectation that fathers would, in turn, support and educate their charges.[26] Critically, those rights did not extend equally to all fathers. Poor-law statutes, as Blackstone noted, allowed for

26. 1 WILLIAM BLACKSTONE, COMMENTARIES *453; *see* HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY 261-62 (2005).

children dependent on public support to be "taken out of the hands of their parents" by poor relief authorities, without parental consent or judicial process, and indentured as apprentices.[27] Enslaved African Americans were entirely excluded from the common-law right to control their children's custody and upbringing, and enslavers wielded the power to separate family members with impunity.[28] Nevertheless, the notion that fathers had paramount rights over their children, unless "forfeited by . . . misconduct," was foundational in Anglo-American family law.[29]

During the nineteenth century, however, the "empire of the father" was weakened by two major changes. Initially, common-law courts developed child-centered custody doctrines, including the enduring best-interests-of-the-child standard, which enhanced judges' "discretion" to "withdraw [children] from the custody of the father or mother," as treatises explained,[30] and "make the welfare of the children paramount to the claims of either parent."[31] A further "blow" to traditional family governance came in the legislative reforms of the nineteenth-century child-saving movement, including the creation of institutions for delinquent and neglected children—laws that Florence Kelley, a leader in the movement, described as "the assertion by the State of its power . . . to decide the home of the child."[32] Even before legislation establishing the

27. *See* BLACKSTONE, *supra* note 26, at 451; CHILDREN BOUND TO LABOR: THE PAUPER APPRENTICE SYSTEM IN EARLY AMERICA 3-6 (Ruth Wallis Herndon & John E. Murray eds., 2009) (detailing how pauper apprenticeship functioned in the colonial and early national eras).

28. On the history of slavery's abrogation of family rights, as well as racist narratives of Black parental incompetence used to justify the forcible indenture of Black children after Emancipation, see sources cited in note 74 below.

29. JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS; EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT 339 (Bos., Little, Brown, & Co. 1870).

30. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 205 (O.W. Holmes, Jr. ed., 12th ed. Bos., Little, Brown, & Co. 1873).

31. SCHOULER, *supra* note 29, at 339. The best-interests-of-the-child standard enhanced the rights of mothers and third-party caregivers, as against fathers' custody claims, but above all elevated the discretionary power of judges to adjudicate children's interests and to override the prerogatives of fathers and mothers alike—though it did not license radical intervention into intact, middle-class families. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 283, 289-90 (G. Edward White ed., 1985); Hasday, *supra* note 7, at 311-14.

32. Florence Kelley, *On Some Changes in the Legal Status of the Child Since Blackstone*, 13 INT'L REV. 83, 89 (1882). Based on those doctrinal and legislative changes, scholars generally agree that the "regulatory presence of the state in family law . . . significantly increased by 1900," even as the law retained certain commitments to "family autonomy and private decision making," in tension with the state's new authority. GROSSBERG, *supra* note 31, at 290; *see* Hasday, *supra* note 7, at 328-47; Huntington & Scott, *supra* note 2, at 1381-84; MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE

footnote continued on next page

nation's first juvenile court in 1899, the enabling statutes of juvenile reformatories and orphan asylums created the foundational institutions and substantive law of the American child welfare and juvenile justice systems, with far-reaching consequences for parents' rights.[33]

New York's legislation set an influential model, authorizing magistrates to commit children to institutions for vagrancy, crime, and an expanding array of status offenses.[34] In addition, New York's sweeping child protection law of 1877 mandated children's arrest and confinement in a reformatory or orphan asylum for, among other things, begging, homelessness, being found with "reputed thieves or prostitutes" or in places of entertainment forbidden to children, or lacking "proper guardianship"[35]—the basis for removing many thousands of children from their families over the following decades.[36] When, in the early twentieth century, the legislature transferred delinquency and neglect cases from police courts to newly created juvenile courts, it preserved much of the 1877 law's language in the definition of "neglected" children.[37]

HISTORY OF CHILD CUSTODY IN THE UNITED STATES 86-87 (1994); Woodhouse, *supra* note 21, at 1036-41, 1045-54.

33. Scholars have described nineteenth-century reformatories as the forebears of the modern juvenile justice system, *see, e.g.*, BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 46-57 (1999) (providing an overview of the historiography on reformatories and the origins of juvenile courts), and historians have illuminated how nineteenth-century orphan asylums served as a safety net for families before modern welfare, *see, e.g.*, CRENSON, *supra* note 8, at 37-40; TIMOTHY A. HACSI, SECOND HOME: ORPHAN ASYLUMS AND POOR FAMILIES IN AMERICA 12-13 (1997); SONYA MICHEL, CHILDREN'S INTERESTS/MOTHERS' RIGHTS: THE SHAPING OF AMERICA'S CHILD CARE POLICY 40-46 (1999). Less appreciated, though, is the body of statutory and judge-made law generated through the creation and growth of children's institutions, key features of which endured in public family law long after institutions declined as the state's primary method of managing delinquent, neglected, and impoverished children.

34. *See* Act of Mar. 29, 1824, ch. 126, 1824 N.Y. Laws 110 (governing commitments to the New York House of Refuge); Act of May 8, 1846, ch. 143, 1846 N.Y. Laws 150 (Western House of Refuge); Act of June 30, 1851, ch. 332, 1851 N.Y. Laws 633; Act of May 5, 1863, ch. 448, 1863 N.Y. Laws 767 (New York Catholic Protectory); Act of Apr. 10, 1896, ch. 235, 1896 N.Y. Laws 281 (Brooklyn Disciplinary Training School for Boys); Act of Apr. 28, 1904, ch. 453, 1904 N.Y. Laws 1131. Not infrequently, children came to court on their parents' complaint—for example, under New York's laws authorizing the commitment of "disorderly," Act of Mar. 22, 1865, ch. 172, § 6, 1865 N.Y. Laws 293, 295, "truant," and "disobedient" children—but courts had power to commit children who fell within statutory criteria regardless of parents' wishes, Act of Mar. 30, 1866, ch. 245, sec. 1, § 7(1)-(4), 1866 N.Y. Laws 538, 538-39.

35. Act of June 6, 1877, ch. 428, § 3, 1877 N.Y. Laws 486.

36. SAMUEL J. BARROWS, CHILDREN'S COURTS IN THE UNITED STATES: THEIR ORIGIN, DEVELOPMENT, AND RESULTS, H.R. Doc. No. 58-701, at 191-92 (1904).

37. *Compare* 1877 N.Y. Laws at 486 (allowing confinement of children found "begging," "wandering and not having . . . proper guardianship," or "frequent[ing] the company of reputed thieves or prostitutes"), *with* Act of July 26, 1881, ch. 676, § 291, 1881 N.Y. Laws

footnote continued on next page

Lawmakers in other states adopted language similar or identical to New York's in their own statutory criteria for children's commitment to institutions,[38] and later, in their juvenile court laws.[39] Thus, in the process of creating youth-specific institutions, lawmakers produced new youth-specific legal types, including the "juvenile delinquent" and the "neglected" child.[40]

By empowering courts to commit children to institutions under far-reaching definitions of delinquency and neglect, lawmakers went beyond the state's traditional poor-law authority, expanding the grounds on which children could lose their liberty, and parents, their custody. In addition, lawmakers reinforced a new conception, also emerging in nineteenth-century custody doctrines, that parents did not enjoy absolute, property-like rights over their children. Rather, their power was "in the nature of a trust, reposed in [them] by the State," and subject to its regulation, or even suspension.[41]

The laws governing juvenile institutions departed from the eighteenth-century common law in another respect, too, by enabling parents themselves to "surrender and entrust" their children's custody to the managers of institutions.[42] That innovation provided the model for twentieth-century

---

1, 70 (same), *and* Act of Apr. 10, 1922, ch. 547, § 2(4), 1922 N.Y. Laws 1259, 1261 (giving children's courts jurisdiction over any child "who is in such condition of want or suffering or is under such improper guardianship or control as to injure the morals, or and [sic] health of himself or others"). On the criminal-court origins of juvenile and family courts, see MERRIL SOBIE, THE CREATION OF JUVENILE JUSTICE: A HISTORY OF NEW YORK'S CHILDREN'S LAWS 50-51 (1987); and Elizabeth D. Katz, *Criminal Law in a Civil Guise: The Evolution of Family Courts and Support Laws*, 86 U. CHI. L. REV. 1241, 1250 (2019).

38. *E.g.*, Act of Mar. 30, 1878, ch. 520, §§ 2-3, 1877-1878 Cal. Stat. 812, 812-13; Act of Apr. 5, 1878, ch. 473, secs. 931-32, 1878 Md. Laws 771, 772; Act of July 1, 1879, § 3, 1879 Ill. Laws 309, 309-10; Act of June 26, 1889, No. 189, §§ 12, 1889 Mich. Pub. Acts 219, 219-20.

39. *E.g.*, Act of July 1, 1899, § 1, 1899 Ill. Laws 83, 83; Act of Feb. 26, 1903, ch. 43, § 1, 1903 Cal. Stat. 44, 44; Act of June 17, 1905, No. 312, § 1, 1905 Mich. Pub. Acts 485, 485-86; Act of Mar. 21, 1906, ch. 64, § 1, 1906 Ky. Acts 322, 322-23.

40. *See, e.g.*, sources cited *supra* notes 38-39.

41. CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES: CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT § 165 (St. Louis, F.H. Thomas Law Book Co., 1886); *see also* ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS § 260 (1904); Kelley, *supra* note 32, at 87-89.

42. 1851 N.Y. Laws at 635; 1863 N.Y. Laws at 769; Act of May 31, 1884, ch. 438, § 1, 1884 N.Y. Laws 511, 511. For similar legislation beyond New York, see, for example, Act of Apr. 15, 1858, ch. 209, § 6, 1858 Cal. Stat. 166, 168; Act of Mar. 3, 1860, ch. 205, § 2, 1860 Md. Laws 289, 290; and HOCHHEIMER, *supra* note 11, § 103. Those surrender laws departed from common-law restraints on transfers of parental authority: Historically, courts declined to enforce "contracts" for the "transfer of the natural rights of a parent," with the "exception" of statutorily prescribed indenture agreements, and, starting in the mid-nineteenth century, legal adoption. SCHOULER, *supra* note 29, at 343; *accord* GROSSBERG, *supra* note 31, at 268-80. To clarify, children's transfers to institutions—by involuntary commitment or voluntary surrender—did not extinguish parents' rights

footnote continued on next page

statutes governing children's transfer to social services agencies for foster care placement.[43] More immediately, it fueled the growth of children's institutions as poor and working-class parents—in particular, mothers working outside the home and widowed fathers—seized on surrender agreements as a way to access publicly subsidized care and basic schooling for children whom they struggled to feed, supervise, or discipline.[44] However, the law conditioned that access on the transfer of parental authority to the institutions' managers, who asserted power to withhold children's release and to place children in new homes through indenture or, in some cases, by adoption.[45]

Although most children were ultimately released to their parents or relatives, return of one's child was not assured, and no parent, as reformatory managers insisted, could expect a child's "return on demand."[46] Rather, alongside officers of New York's Society for the Prevention of Cruelty to

---

to regain custody in the way that adoption or the modern termination-of-parental-rights procedure does; rather, parents retained certain "residual" rights, including, generally, the right to consent to adoption. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH, EDUC., & WELFARE, PUB. NO. 394-1961, LEGISLATIVE GUIDES FOR THE TERMINATION OF PARENTAL RIGHTS AND RESPONSIBILITIES AND THE ADOPTION OF CHILDREN 3-4 (1961).

43. On that lineage, see *In re Anonymous*, 351 N.E.2d 707, 709-711 (N.Y. 1976).

44. The New York Juvenile Asylum, for example, received nearly 15,000 children by surrender from 1854 to 1900. N.Y. JUV. ASYLUM, FORTY-NINTH ANNUAL REPORT OF THE NEW YORK JUVENILE ASYLUM TO THE LEGISLATURE OF THE STATE, AND TO THE MUNICIPAL ASSEMBLY OF THE CITY OF NEW YORK 84 tbl.2 (1900) [hereinafter NYJA 49TH REPORT]. On parents' use of orphanages for childcare in the nineteenth century, see sources cited note 33 above; on parents' use of reformatories to discipline children and young women, see, for example, MARY E. ODEM, DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885-1920, at 158, 179 (1995); and CHERYL D. HICKS, TALK WITH YOU LIKE A WOMAN: AFRICAN AMERICAN WOMEN, JUSTICE, AND REFORM IN NEW YORK, 1890-1935, at 183 (2010).

45. On institutions' statutory power to place children by indenture and adoption, see Part II.C below. Indeed, nineteenth-century laws governing children's admission and release from institutions should be understood as part of a long and still-enduring tradition of "government programs that condition the provision of aid to poor families on the surrender of legal and constitutional rights to privacy and autonomy." Hasday, *supra* note 7, at 303; Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485, 1505 (2007); Dorothy E. Roberts, *Child Welfare's Paradox*, 49 WM. & MARY L. REV. 881, 893 (2007). However, as this Article shows, habeas litigation began to draw judicial and public scrutiny to the notion that poverty and reliance on state aid abrogated parents' rights.

46. N.Y. JUV. ASYLUM, THIRTEENTH ANNUAL REPORT OF THE NEW YORK JUVENILE ASYLUM TO THE LEGISLATURE OF THE STATE, AND TO THE COMMON COUNCIL OF THE CITY OF NEW YORK 14-15 (N.Y.C., WM. S. Dorr, Book and Job Printer, 1865); *see also* Catherine J. Ross, Society's Children: The Care of Indigent Youngsters in New York City, 1875-1903, at 210 (Dec. 1977) (Ph.D. dissertation, Yale University) (ProQuest) (finding, based on sample groups of New York asylum inmates, that most children were discharged to family).

Children (SPCC), the managers of institutions enforced a particular middle-class vision of responsible parenthood by withholding children from parents who fell short of that standard: namely, fathers who failed to earn wages sufficient to support their wives and children and mothers who failed to keep an orderly home or relied on children's illicit earnings for the family's subsistence.[47] Forging a path for the state child protection agencies that succeeded them, institutions wielded their control over children's custody to regulate the behavior of children's parents.[48]

Simultaneously, however, parents put institutions' power to the test when they applied to the managers for children's release, and in particular, when they sought children's return in court, by petitioning for writs of habeas corpus after managers refused their requests. Those petitions gave rise to a substantial body of cases—including the illustrative examples analyzed in Part II—and evidence to support a revised account of the rise of family regulation and family rights.

Recapturing the story of habeas litigation against children's institutions reveals the deep roots of resistance and court conflict over the modern state's power to police marginalized families. Legal scholars and historians have noted that juvenile reformatories and asylums faced litigation in the nineteenth century—for example, on the legality of children's confinement without jury trial—but they have typically emphasized the rarity and low success of legal challenges, for understandable reasons.[49] To be sure, beginning with the

47. *See* Hasday, *supra* note 7, at 336 nn.135-138. In addition to SPCC officers' well-known role in arresting delinquent and dependent children, *see id.* at 307, the managers of institutions wielded significant legal power over parents in their decisions about whether and when to release children. An officer of the New York Juvenile Asylum put it frankly: "These children, when committed properly to us, are ours, and we can hold or discharge them—so that we have the means of reaching the parents; and not merely these parents who come directly before us, but others who have learned of the existence of this institution, and know what it can do." PROCEEDINGS OF THE SECOND CONVENTION OF MANAGERS AND SUPERINTENDENTS OF HOUSES OF REFUGE, SCHOOLS OF REFORM, AND INSTITUTIONS FOR THE PREVENTION AND CORRECTION OF JUVENILE DESTITUTION, DELINQUENCY AND CRIME, IN THE UNITED STATES OF AMERICA 31 (N.Y., 1860).

48. *See* Ryan, *supra* note 6, at 444 (analyzing how child protection laws today allow state actors to "wield the powerful tool of child removal with scant judicial oversight," to regulate "[f]amilies that fail to conform to a certain model of behavior").

49. *See, e.g.*, FELD, *supra* note 33, at 53, 77 (stating that "legal challenges to state intervention" were "futil[e]" and "uncritically rejected" by courts until *Gault*); DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 232 (1980) (noting the apparent low success of facial constitutional challenges); Peter W. Bardaglio, *Challenging Parental Custody Rights: The Legal Reconstruction of Parenthood in the Nineteenth-Century American South*, 4 CONTINUITY & CHANGE 259, 277 (1989) (writing that "[p]arents rarely contested" commitment laws, and when they did, "southern courts commonly supported the custodial authority of child-care institutions" with "little regard for legal procedure");
footnote continued on next page

Pennsylvania Supreme Court's ruling in *Ex parte Crouse*,[50] appellate courts generally upheld laws authorizing the removal of delinquent and neglected children from their parents and into the custody of juvenile institutions.[51] A well-known exception was the Illinois Supreme Court's decision in *People ex rel. O'Connell v. Turner*, where the court struck down the state law by which children were committed to the Chicago Reform School without jury trials or criminal convictions—or as the court put it, a law that "imprisoned [children] for misfortune . . . without 'due process of law[.]'"[52] Soon after, however, the Illinois high court upheld the state's new Industrial School law as a valid "provision for the needed control and care" of dependent children, and made clear that the "constitutional provision [for] 'the right of trial by jury' . . . d[id] not apply."[53] Focusing only on those prominent cases, one might view the nineteenth and early twentieth centuries as a period of virtually unopposed judicial consensus about the state's broad power to remove wayward and neglected children from working-class parents. Indeed, the prevailing narrative suggests that—at least until the U.S. Supreme Court's twentieth-century pronouncements—states expanded their regulatory reach over families and entrenched the class-based divide in family law by an almost inexorable process.[54]

Vivek S. Sankaran, Parens Patriae *Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents*, 82 TEMP. L. REV. 55, 63-64 (2009) (pointing to unsuccessful challenges to juvenile court laws in the early twentieth century as indications that "[a]ppeals by parents based on the core concepts underlying due process—notice and a meaningful opportunity to be heard—were largely rejected," and "[a]ssertions of a parental right to custody . . . were ignored").

50. 4 Whart. 9, 11 (Pa. 1839) (per curiam).

51. The court upheld the law authorizing children's commitment to the Philadelphia House of Refuge without trial under the state's *parens patriae* authority, *id.*, in a case that became one of the most-cited precedents to support the constitutionality of juvenile reformatory and juvenile court laws enacted around the United States. *See* David S. Tanenhaus, *The Elusive Juvenile Court: Its Origins, Practices, and Re-Inventions*, *in* THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 418, 422-23 (Donna M. Bishop & Barry C. Feld eds., 2011).

52. 55 Ill. 280, 287 (1870); *see* Tanenhaus, *supra* note 21, at 355-70.

53. *In re* Ferrier, 103 Ill. 367, 372, 374 (1882); *see* County of McLean v. Humphreys, 104 Ill. 378, 382, 384 (1882). California's high court made a similar reversal in its rulings on the jury trial rights of accused juvenile delinquents. *Contrast Ex parte* Becknell, 51 P. 692, 693 (Cal. 1897) (holding that a child could not be "imprisoned" in the state reform school "without a trial by jury," nor could his parents "be deprived of their right to his care" without a hearing on their fitness), *with Ex parte* Daedler, 228 P. 467, 472 (Cal. 1924) (holding that minors could claim "no inherent right to a trial by jury" in juvenile court proceedings).

54. My analysis of parents' habeas litigation complements, and is indebted to, scholarly accounts of family law's class-based divide, *see* sources cited *supra* note 7; however, my account challenges the perception that the dual system of family law arose without "acknowledge[ment]," Hasday, *supra* note 7, at 309, 371, or "without question," Douglas

footnote continued on next page

Underneath that perceived consensus, however, was a legal counter-movement that scholars have not yet examined systematically, because it is not fully visible in the traditional record of published decisions.[55] In spite of *Crouse*, a surprisingly large volume of habeas challenges put the new child-saving regime to the test and raised striking, often winning, claims that due process and rights to family autonomy should extend equally to poor parents and their children. Over the late nineteenth and early twentieth centuries, the judges of New York's Supreme Court—county-level trial courts of law and equity—heard hundreds, if not more, petitions for writs of habeas corpus, brought by parents or guardians seeking the return of children held in the custody of institutions or foster homes where institutions had placed them.[56] Notably, similar habeas litigation arose in state courts around the country during the same period.[57] My estimate of the volume of court challenges in New York and

R. Rendleman, Parens Patriae *From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205, 250 (1971). Furthermore, my analysis does not discount the significance of *Meyer* and *Pierce* in the 1920s, *see* Huntington & Scott, *supra* note 2, at 1382-83, 85, nor the importance of *Stanley v. Illinois*, 405 U.S. 645 (1972), and other cases that applied the principles of those *Lochner*-era parental rights cases to the modern state, *see* Josh Gupta-Kagan, Stanley v. Illinois*'s Untold Story*, 24 WM. & MARY BILL RTS. J. 773, 776 (2016). Rather, my aim is to document the different and deeper roots of due process protections for family relationships.

55. David Tanenhaus's analysis of Progressive-era litigation over Illinois' juvenile commitment laws complicates the standard account, showing that arguments about children's due process rights "did not simply vanish" after *Turner*; rather, the case influenced later critics of children's treatment in juvenile court. Tanenhaus, *supra* note 21, at 383. This Article builds on Tanenhaus's insight and suggests that habeas litigation like *Turner* had important legacies not just for children's rights in the juvenile justice context, but also for parents' rights and procedural protections within the family regulation system.

56. Published judicial decisions—including the set of decisions issued in New York from the 1860s to 1920s that are the focus of this Article—together with the annual reports of juvenile institutions and the NYSPCC, indicate that New York's large institutions, such as the Juvenile Asylum, Catholic Protectory, and House of Refuge, typically each faced a handful of habeas cases every year over the second half of the nineteenth century and early twentieth century. *See infra* notes 67-71 and accompanying text.

57. My references to published appellate court decisions from states beyond New York capture a subset, not the total volume of habeas litigation in those states. In an 1867 survey of reformatory managers around the United States, most reported that "children or their parents may test the legality of their commitment by *habeas corpus*," and they reported facing habeas cases—rarely, in some jurisdictions, and "often," in others. E. C. WINES & THEODORE W. DWIGHT, REPORT ON THE PRISONS AND REFORMATORIES OF THE UNITED STATES AND CANADA, MADE TO THE LEGISLATURE OF NEW YORK 423-24 (Albany, Van Benthuysen & Sons' Steam Printing House 1867). Valuable evidence of habeas litigation in the Western plains states during the nineteenth and early twentieth centuries—including suits challenging children's placement in institutions and foster homes—also appears in a new online database compiled by Katrina Jagodinsky. Katrina Jagodinsky et al., *Petitioning for Freedom: Habeas Corpus in the American West, 1812-1924*, UNIV. OF NEB. LINCOLN, https://perma.cc/

footnote continued on next page

elsewhere is necessarily tentative and incomplete, since only some habeas petitions produced published decisions, and only some juvenile institutions provided statistics on habeas cases in their annual reports to the legislature—though newspaper reports provide additional evidence of such cases' regularity.[58] Indeed, history confirms legal scholars' insight that, with only a fraction of trial and appellate cases reported, "family regulation law" has been and remains "strikingly underdocumented."[59] But the apparent extent and persistence of habeas litigation are noteworthy given the legal obstacles and many losses that petitioners faced. It is particularly striking that parents of children in institutions—a number of whom may have been European immigrants with limited English proficiency[60]—managed to mount cases in a

9NMJ-9HKD (archived Oct. 1, 2025); *see* Katrina Jagodinsky, *The Many Faces of Habeas Corpus in the American West*, 56 W. HIST. Q. 87, 88 (2025) (discussing the ongoing project to catalog habeas petitions by "marginalized actors" challenging different forms of illegal restraint in Western states and territories). When the task of committing children to institutions shifted from police courts to juvenile courts in the early twentieth century, habeas remained a device for parents to attack the legality of children's out-of-home placement. *See, e.g.*, People *ex rel.* Riesner v. N.Y. Nursery & Child's Hosp., 129 N.E. 341, 342-43 (N.Y. 1920). The landmark *Gault* litigation arose on a habeas petition in 1964 because Arizona law still barred appeals in juvenile court cases. *In re* Gault, 387 U.S. 1, 8, 58 (1967); DAVID S. TANENHAUS, THE CONSTITUTIONAL RIGHTS OF CHILDREN: *IN RE GAULT* AND JUVENILE JUSTICE 35 (2011). Though habeas remains a device for adjudicating custody disputes between parents, it is not the dominant method today for parents to challenge the state's removal of their children, nor for minors to challenge their detention, because the writ is generally "unwarranted where full relief may be obtained by way of a direct appeal or collateral motion"—remedies provided by contemporary family court statutes. *See* People *ex rel.* Karen FF. v. Ulster Cnty. Dep't of Soc. Servs., 911 N.Y.S.2d 679, 680 (App. Div. 2010).

58. For examples of newspaper coverage of unpublished cases in New York, drawn from a search of the *New York Times* digital archive, see *A Distinction with a Difference—Release of a Juvenile Thief on Habeas Corpus*, N.Y. TIMES, Aug. 22, 1871, at 3; *The New-York Juvenile Asylum*, N.Y. TIMES, May 5, 1874, at 2; *Wants Her Son Back: Mrs. Felipe Regrets Sending Her Boy to the Asylum*, N.Y. TIMES, Oct. 11, 1888, at 9; *May Let John Gormley Go Home: Justice Stover Doubts the Juvenile Asylum's Claim*, N.Y. TIMES, July 7, 1896, at 9; *New York Boy A Fugitive: The Juvenile Asylum Sent John Neese to an Illinois Farm—He is Arrested in Chicago*, N.Y. TIMES, Apr. 1, 1898, at 1.

59. Washington, *supra* note 2, at 1569.

60. Though it is difficult to ascertain with confidence, based on petitioners' names, the facts given in reported decisions and case files, and demographic statistics reported by institutions, I can infer that the parents in many of these cases were working-class immigrants from Ireland, or Eastern or Southern Europe—groups who occupied a shifting place in the nineteenth-century category of "white" Americans. *See generally* IRA ROSENWAIKE, POPULATION HISTORY OF NEW YORK CITY 72 tbl.25, 73 tbl. 26 (1972) (summarizing late nineteenth-century census data on the different European countries of origin for New Yorkers of "foreign and mixed parentage," who together constituted over 80% the city's population); LINDA GORDON, THE GREAT ARIZONA ORPHAN ABDUCTION 12 (1999) (discussing New York's "complex and changing" racial system in the late nineteenth century). Though I have not found definite evidence of Black parents challenging children's institutionalization through habeas petitions in New

footnote continued on next page

period when legal aid for indigent civil litigants was not widely available.[61]

Since state courts, unlike federal courts, had well-established authority to decide child-custody matters through the writ of habeas corpus, state courts became an important venue for parents to contest their children's removal and, in some cases, to challenge the constitutionality of the child protection laws under which their children were sent to institutions and foster homes.[62] Thus, habeas litigation against juvenile institutions formed an important branch in the nineteenth-century development of child custody law, producing case law cited by treatises on the topic at the end of the century.[63] However, unlike custody disputes between rival parents—which dominate doctrinal histories of family law—litigation over children in institutional care centered on the authority of state actors and the growing thicket of statutory law governing children. Unsurprisingly, then, habeas litigation over delinquent and neglected children garnered citations not only in treatises on child custody, but also in the leading authorities on state police power published in the post-Civil War era.[64] Late nineteenth-century treatises did not canvass the full extent of habeas litigation; rather, they drew from a selection of published appellate court decisions regarding children's "commitment to reform institutions" in relation to the "[p]arental right of custody."[65] These treatises reveal jurists'

York—a state in which, from 1860-1920, African Americans never constituted more than 2% of the population, and in which most, though not all, juvenile institutions excluded Black children—further research on other jurisdictions may provide such evidence. *See* CARLETON MABEE, BLACK EDUCATION IN NEW YORK STATE: FROM COLONIAL TO MODERN TIMES 285 tbl.1 (1979) (summarizing New York census data); Robin Lee Elizabeth Hemenway, "The Efforts of Their True Friends:" African Americans and Child Welfare in New York, 1836-1930, at 2-3 (March 2007) (Ph.D. dissertation, University of Minnesota) (ProQuest) (analyzing Black parents' use of segregated institutions for childcare in the urban North). Another question that merits further study concerns Native families' recourse to habeas to contest children's forcible removal to boarding schools in the late nineteenth century. Recently, the historian Matthew Villeneuve has documented and analyzed multiple successful habeas petitions by Native people in the American West as "a strategy of resistance to boarding schooling not yet fully appreciated by historians." Matthew Villeneuve, *Habeas Corpus and American Indian Boarding Schools: Indigenous Self-Determination in Body and Mind, 1880-1900*, 56 W. HIST. Q. 93, 114 (2025).

61. Some petitioners were aided by Catholic charitable groups that mobilized volunteer lawyers. *See infra* note 199.

62. On the unavailability of the federal habeas statute to challenge "parental rights or child custody" decisions, see *Lehman ex. rel. Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 511-12 (1982).

63. *E.g.*, HOCHHEIMER, *supra* note 11, at 105-09.

64. *See, e.g.*, TIEDEMAN, *supra* note 41, §§ 50, 165-66; FREUND, *supra* note 41, §§ 257-63.

65. *See, e.g.*, FREUND, *supra* note 41, § 260. Citations included several significant New York Court of Appeals precedents—for instance, *In re Knowack*, 53 N.E. 676 (N.Y. 1899). FREUND, *supra* note 41, § 263 n.47; HOCHHEIMER, *supra* note 11, § 101 n.1. For a full discussion of *In re Knowack*, see Part II.B below.

awareness of at least a subset of legal challenges involving children's institutions, but deeper research and the vantage of history provide a more complete picture of the volume, varieties, and importance of habeas litigation. Viewed in hindsight, these cases illuminate the intersection of private family law and the newer public law of child protection and juvenile delinquency at the end of the nineteenth century.[66]

Another indication of habeas cases' significance in their time was the efforts expended by the leaders of children's institutions and SPCCs to quash parents' habeas litigation. For parents, court challenges were a pragmatic strategy, perhaps a last resort when other efforts to reclaim children had failed. From the perspective of the managers of New York's reformatories and orphanages, habeas cases were not simply an inconvenience, but a threat to their jealously guarded authority over children's release. New York's House of Refuge and Juvenile Asylum recorded the handful of habeas petitions they faced each year in their reports to the legislature, citing those statistics to argue, as early as the 1860s, that too many "boys ha[d] been abruptly and prematurely taken from under [their] custody by the courts upon a writ of habeas corpus."[67] Those complaints likely motivated the passage of legislation that allowed magistrates to cure any technically "defective" commitment by making a new one,[68] and secured the defeat of bills that proposed to expand the scope of habeas review—bills that, in the NYSPCC president's view, threatened "to overturn the whole legal system of commitments of children to institutions, under the pretext of establishing a right to review the facts,"

66. What I refer to as the "public law" of delinquency and neglect also falls within the field of "family law," under the broad definition that many scholars advocate. *See* Huntington, *supra* note 10, at 419-20 (observing that "[t]he field of family law arguably includes all aspects of legal regulation that influence intimate relationships and family functioning," subject to certain "reasonable boundaries," and citing scholarship on family law's broad reach). By highlighting points of convergence and conflict between private custody law and public child welfare law in the nineteenth century, this Article adds new support for the insight that "the private and public family law systems share intertwined historical trajectories." Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 83 (2016). Understanding those intertwined trajectories is valuable as scholars today examine whether the "differing legal rules in the public and private realms" of family law are defensible. Chris Gottlieb & Martin Guggenheim, *New York's Unconstitutional Treatment of Unwed Fathers of Children in Foster Care*, 46 N.Y.U. REV. L. & SOC. CHANGE 309, 312 n.1 (2022).

67. FORTY-THIRD ANNUAL REPORT OF THE MANAGERS OF THE SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, TO THE LEGISLATURE OF THE STATE, AND THE CORPORATION OF THE CITY OF NEW YORK 34 (N.Y.C., Press of Wynkoop & Hallenbeck 1868). Reformatory managers in other states lodged similar complaints about habeas discharges. *See* WINES & DWIGHT, *supra* note 57, at 423-24; Tanenhaus, *supra* note 21, at 358.

68. Act of Apr. 30, 1873, ch. 359, § 4, 1873 N.Y. Laws 539, 540; Act of Apr. 18, 1888, ch. 145, sec. 6, § 291(5), 1888 N.Y. Laws 201, 202-03.

thereby "depriv[ing]" institutions "of all power" and allowing judges to "re-try the case and discharge the child whenever sympathy for the parents may prompt such a course."[69] The NYSPCC closely monitored habeas petitions and regularly dispatched its attorneys, including its powerful president, Elbridge Gerry, to defend institutions against parents' legal challenges and litigate appeals at the Society's own expense.[70] The reaction of juvenile institutions and their allies suggests that they understood parents' habeas litigation as a challenge to the potency and legitimacy of the new child protection regime.

As a result, parents' mixed record of wins and losses against those well-resourced adversaries should not be interpreted as proof that their claims had no influence on the law or popular legal consciousness.[71] Rather, there is value

69. *See* N.Y. SOC'Y FOR THE PREVENTION OF CRUELTY TO CHILD., FOURTEENTH ANNUAL REPORT 8-9 (N.Y.C. 1889) (on file with N.Y. Soc'y for the Prevention of Cruelty to Child. Archive). Juvenile institutions secured rulings that limited trial courts' power to review the factual basis on which magistrates committed children to institutions: Where commitments appeared "regular on their face," an intermediate court held, the "only question presented" was "the jurisdiction of the magistrate making the commitment," not the "correctness of his decisions." *In re* Moses, 13 Abb. N. Cas. 189, 196 (N.Y. Sup. Ct. 1883); *see* People *ex rel.* Roddy v. N.Y. Juv. Asylum, 12 Abb. Pr. 92, 96 (N.Y. Sup. Ct. 1860). Though statutes and caselaw made it difficult to challenge the evidentiary basis for a child's commitment, as the next Part discusses, habeas litigants could attack commitments made in violation of statutory (or constitutional) requirements as jurisdictionally defective.

70. In addition to published cases, the NYSPCC's annual reports listed many more unpublished habeas cases in which the Society's attorney "appeared" in court and frequently touted the Society's work "defend[ing] the custody of children committed to institutions through its instrumentality, when assailed upon habeas corpus." NYSPCC 24TH REPORT, *supra* note 10, at 10, 65-66.

71. Published decisions, including those discussed below in Part II, disclose a fairly low—but importantly, non-zero—rate of success for habeas petitions. It is very difficult to quantify the average success rate of habeas petitions during the period under study because of the uncertain total volume of cases—that is, the proper denominator—and the mix of cases with reported outcomes and those in which the final legal outcome is unknown, as well as cases in which institutions settled outside of court. *See supra* notes 56-58 and accompanying text; *see also* N.Y. SOC'Y FOR THE PREVENTION OF CRUELTY TO CHILD., TWELFTH ANNUAL REPORT 53 (N.Y.C. 1887) (on file with N.Y. Soc'y for the Prevention of Cruelty to Child. Archive) (noting instances of pending habeas cases in which children were "discharged on consent" of the respondent institutions). The NYSPCC's reports provide snapshots: In 1886, for example, the Society's attorney represented juvenile institutions in twenty-three habeas cases that were "decided favorably" (that is, adversely to the petitioners), five that were decided "adversely" to institutions, and thirteen that were still "pending." N.Y. SOC'Y FOR THE PREVENTION OF CRUELTY TO CHILD., ELEVENTH ANNUAL REPORT 58 (N.Y.C. 1886) (on file with N.Y. Soc'y for the Prevention of Cruelty to Child. Archive). Those snapshots are illuminating, though not necessarily representative of the total volume or outcomes of habeas litigation in any given year; indeed, assuming that the Society's involvement increased the chances of defeating petitions, it is possible that habeas petitioners had greater success in suits in which the Society's attorneys did not appear on behalf of the respondents.

in recovering the arguments that parents and their attorneys advanced, even those that did not uniformly succeed, because they reveal what legal historian Karen Tani describes as "incremental changes in what some people (and their lawyers) found imaginable—a precondition for more dramatic social and legal change."[72] Likewise, there is a cost associated with overlooking this history: a false appearance of inevitability or consensus about the emerging law and institutions of family regulation and an incomplete account of the origins of family rights.[73]

Finally, the importance of legal conflicts between parents and juvenile institutions also becomes apparent in a broader, comparative context. The cases chronicled here were not the only ones that raised questions about the authority of the state, and the institutions it empowered, to keep children from their parents. Courts in the post-Civil War South had confronted those questions in a different guise when freedpeople mounted legal challenges against white Southerners' use of court-ordered apprenticeship to re-enslave Black children.[74] Black parents' habeas challenges did not eradicate that practice, but they produced important rulings striking down racially discriminatory indenture laws and voiding indenture orders where parents were denied notice and an opportunity to be heard on their fitness to retain custody.[75] The legal campaign against the re-enslavement of Black children in the rural South differed in important ways from the litigation over juvenile

72. KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972, at 116 (2016) (describing novel welfare rights claims of the mid-twentieth century).

73. This point reinforces legal historians' insights about the potential dangers of "claims of tradition [that] offer an official story of the past," for purposes of legal interpretation—namely, the tendency to "suppress the history of resistance and nonconforming practices by people and communities with less prestige, authority, and status." JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 202 (2024); *see also* Mary Ziegler, *The History of Neutrality:* Dobbs *and the Social-Movement Politics of History and Tradition*, 133 YALE L.J.F. 161, 170 (2023) (discussing how "a pluralist view of history and tradition" recognizes that, "[a]s different (even marginalized) communities advance their own ideas about the nation's defining values, their understandings may gain acceptance").

74. As scholars have recounted, the court-ordered apprenticeship of Black youth preserved key features of slavery: the extraction of unfree labor, the nullification of family bonds and parental rights, and the reliance on racist narratives of Black parents' unfitness to justify the practice. *See, e.g.*, Margaret A. Burnham, *Property, Parenthood, and Peonage: Reflections on the Return to Status Quo Antebellum*, 18 CARDOZO L. REV. 433, 438-439 (1996). On freedpeople's resistance to the forcible indenture of their children, see generally, Peggy Cooper Davis, *"So Tall Within"—The Legacy of Sojourner Truth*, 18 CARDOZO L. REV. 451 (1996); and MARY FARMER-KAISER, FREEDWOMEN AND THE FREEDMEN'S BUREAU: RACE, GENDER, AND PUBLIC POLICY IN THE AGE OF EMANCIPATION 96-140 (2010).

75. *See, e.g.*, *In re* Turner, 24 F. Cas. 337, 339-40 (C.C.D. Md. 1867) (No. 14,247); *In re* Ambrose, 61 N.C. (Phil.) 91, 93 (1867); Ballenger v. McLain, 54 Ga. 159, 160-61 (1875); Norris v. Stephens, 68 Tenn. 433, 436-37 (1877).

institutions' authority to indenture the children of working-class European immigrants in the urban North, but they shared common threads: Both sets of habeas cases tested the scope of the state's power to deprive parents of their children and the legitimacy of the state's claim to act in the name of child welfare.[76] And in both sets of cases, some litigants and judges began to articulate limits on the state's power grounded in constitutional protections for family life, in particular, the due process guarantee of the recently ratified Fourteenth Amendment.[77] Together, these cases undermined the validity of state action that had been entirely lawful under poor-law statutes and the law of slavery—namely, the involuntary separation of parents and children, without judicial process, solely because of the family's status as paupers or slaves.

II. Claiming Family Rights in Court

This Part uncovers the legal consequences of habeas cases in New York and similar litigation across the country in the late nineteenth and early twentieth centuries: Courts affirmed the state's power to intervene in family life in the name of child welfare but also enshrined new and important legal defenses to those interventions—including nascent understandings of a right to family

76. One of the important differences is that in many of the habeas cases challenging the indenture of asylum children, the children's parents had initially transferred their children to institutions under (nominally) voluntary surrender agreements before the children were indentured. *See infra* Part II.C. Ultimately, it is difficult to assess how much Black parents' legal arguments against forced apprenticeship in the Reconstruction-era South directly influenced legal challenges to juvenile institutions' practices over the next decades; the latter cases did not refer specifically to the former as precedent, with a few exceptions. *See, e.g.*, State *ex rel.* Bethell v. Kilvington, 45 S.W. 433, 435 (Tenn. 1898) (in ruling on a mother's habeas petition to free her daughter from the Tennessee Industrial School, citing other cases regarding children's institutions, as well as a Georgia apprenticeship case, *Ballenger*, for the point that "[d]ue regard must . . . be paid to the rights of parents and of the child, but this rule must be enforced and construed . . . for the benefit of the child"). But in any case, as scholars including Peggy Cooper Davis and Dorothy Roberts have argued, "contemporary notions of family liberty can trace their roots," in no small part, to "Black people's resistance" to the separation of families under slavery and forced apprenticeship. ROBERTS, *supra* note 2, at 96. *See generally* PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 81-166 (1997) (analyzing how the Reconstruction Amendments aimed to secure rights to family autonomy that were violated under slavery); Lyle Cherneff, Note, *Remembering* In re Turner*: Popular Constitutionalism in the Reconstruction Era*, 133 YALE L.J. 2443 (2024) (rooting popular conceptions of constitutional family rights in freedpeople's anti-apprenticeship campaign). This Article argues that habeas litigation over juvenile institutions formed another important, as yet unrecognized branch in the roots of constitutional rights to family integrity: in particular, the affirmance of those rights in the context of the child welfare and juvenile justice systems.

77. *See* sources and cases cited *supra* note 52 and *infra* notes 103, 105, 106, 109, 111, 217.

integrity. Conflicts arose in multiple ways, but habeas litigation against reformatories and orphanages generally fell into three types of claims, discussed in the three Subparts that follow.

First, parents disputed the lawfulness of their child's commitment to an institution, typically by arguing that they were denied notice of the charges in violation of the statutes governing the commitment of delinquent and neglected children, or that the charges did not meet statutory requirements. Those cases prompted courts to recognize and enforce parents' rights to notice and an opportunity to be heard, to reject vague allegations of delinquency and neglect, and to scrutinize the use of child protection laws to punish families for poverty.

Second, parents argued that, even if their child entered an institution's custody lawfully, the court should now discharge the child because the parents' "disability or default ha[d] been removed," the "object of the commitment ha[d] been accomplished," and "the child [could] properly be restored" to the petitioning parents.[78] Here, judges exercised their equitable powers to vindicate parents' residual rights to reclaim custody and to check the otherwise unconstrained discretion of institution managers.

Third, parents challenged the legality of their child's placement in a new home, usually by arguing that the institution's managers failed to secure their consent for the placement. Petitioners insisted that they retained the right to consent to children's indenture or adoption, and that, as birth parents, their rights superseded the claims of foster parents.[79] Cases of each type began to define, for the modern era, the rights of parents and children enmeshed in the emergent family regulation system.

A. Challenging Children's Removal and Defining Due Process

Habeas cases challenging the legality of children's commitment to an institution, as this Subpart shows, left a crucial, durable imprint on the law by

78. WILLIAM S. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS § 444c (San Francisco, Bancroft-Whitney Co., 2d ed., rev. & enlarged 1893).

79. As habeas litigation illustrated, the respective legal rights of birth parents, adoptive parents, and parties to indenture contracts were ill-defined and in flux in the late nineteenth century; accordingly, I use the term "foster parents" loosely, not to describe a formal system of state-funded foster parenting in the modern sense, but rather as a catch-all term for the kinds of relationships created when juvenile institutions placed children in new homes, temporarily, through indentures or paid boarding arrangements—the nineteenth-century antecedents of modern foster care. On the blurry and "confused" definitions of "adopted," "placed out," and "indentured" in the nineteenth-century United States, see Catherine J. Ross, *Families Without Paradigms: Child Poverty and Out-of-Home Placement in Historical Perspective*, 60 OHIO ST. L.J. 1249, 1260-62 (1999); and MEGAN BIRK, FOSTERING ON THE FARM: CHILD PLACEMENT IN THE RURAL MIDWEST 8-11 (2015).

imposing procedural and substantive limitations on the state's power to separate parents and children. The adjudication of those cases generated enduring principles of child welfare law, including the recognition of parents' right to due process when the state removes children from home, as well as children's shared interest in avoiding unwarranted removals; the recognition of the state's burden to rebut parents' presumed fitness to have custody; and a suspicion of child neglect charges that are premised on parents' poverty or mere failure to supervise children. Habeas petitioners and judges advanced new conceptions of a constitutionally protected parent-child relationship in an era when Blackstone's "empire of the father" no longer held sway, but "[t]he exact relation of the State to its minor wards" and to their parents was "yet to be defined."[80] Litigants argued, and many courts agreed, that the right to preserve one's family relationships was not forfeited merely because of poverty or reliance on state aid, nor could it be extinguished without due process—not novel propositions today, but far from settled in the nineteenth century.[81]

When challenging children's removal, parents demanded that courts enforce a core procedural right contained in statutes governing juvenile commitments, and, as some courts ultimately decided, required as a matter of constitutional due process: parents' right to notice and an opportunity to be heard before their child could be removed from home and confined in an institution.[82] To understand how those claims arose, it is important to flag certain features of the commitment procedure, as laid out by statute. New York's nineteenth-century commitment laws, like those of most states, afforded minimal procedural protections for children: Magistrates had power to institutionalize children, on a wide range of grounds, upon "examination"—that is, upon whatever proof of delinquency or neglect that police, NYSPCC officers, parents, or other complainants presented at a brief hearing, without a jury trial, and without legal counsel for children or their parents.[83] Though governed by the Penal Code, proceedings to commit children to institutions were "not . . . criminal proceeding[s]," in the courts' view—unlike prosecutions of parents on criminal neglect charges.[84] But although children were granted

80. PROCEEDINGS OF THE CONFERENCE OF CHARITIES, HELD IN CONNECTION WITH THE GENERAL MEETING OF THE AMERICAN SOCIAL SCIENCE ASSOCIATION 81 (Bos., Tolman & White 1875) (statement of Hon. C. I. Walker).

81. *See infra* notes 102, 106 and accompanying text.

82. *See infra* notes 102-111 and accompanying text.

83. Act of June 6, 1877, ch. 428, § 3, 1877 N.Y. Laws 486. Children's commitment "by summary proceeding" was generally the norm in jurisdictions across the United States. HOCHHEIMER, *supra* note 11, § 99.

84. *In re* Knowack, 53 N.E. 676, 677 (N.Y. 1899); People v. Lewis, 183 N.E. 353, 355 (N.Y. 1932). In addition to laws authorizing the commitment of wayward and neglected children, New York, like most states, enacted laws imposing criminal penalties on adults who "[w]illfully . . . permit[ted]" a child's life, health, or "morals" to be

footnote continued on next page

few rights in the commitment procedure, the legislature did specify certain rights for their parents. When a police officer arrested a child for delinquency, improper guardianship, or other grounds, and a magistrate determined that the child was a "'proper object' for commitment," then the magistrate had to direct the officer to serve the child's father, mother, or "lawful guardian" with a "notice in writing" of the child's commitment.[85] The law gave parents ten days—later amended to twenty days—to reclaim the child by proving to the committing magistrate that the child's circumstances were "not . . . occasioned by the habitual neglect or misconduct of the parents or lawful guardian."[86] If they failed to do so, then the magistrate must make a "final" commitment order, meaning the magistrate "thereafter ha[d] no power to discharge [the] child," and parents would have to apply to the managers for the child's release or challenge the child's detention by petitioning for habeas.[87]

Thus, the rules governing New York's juvenile institutions introduced two basic, enduring precepts of family regulation law: First, the state must notify parents of the charges against them or their children and provide an opportunity to contest the grounds for children's removal; and second, at least in neglect cases, the state must show that parents were responsible for their children's condition—that is, children's endangerment was "occasioned by" their parents.[88] Parents seized on both of those protections, challenging the

"endangered." N.Y. PENAL LAW § 289 (1882). This Article does not focus on parents' criminal abuse and neglect prosecutions, but rather the much larger volume of (ostensibly non-criminal) proceedings against children who were alleged to be endangered—the primary arena in which the modern law of child neglect began to take shape. For a snapshot of relative numbers of cases, see N.Y. SOC'Y FOR THE PREVENTION OF CRUELTY TO CHILD., TWENTY-FIFTH ANNUAL REPORT 52-54 (1900) (on file with N.Y. Soc'y for the Prevention of Cruelty to Child. Archive).

85. Act of June 30, 1851, ch. 332, §§ 9-11, 1851 N.Y. Laws 633, 636-37 (specifying the procedure for commitments to the Juvenile Asylum); Act of May 5, 1863, ch. 448, §§ 8-11, 1863 N.Y. Laws 767, 770-72 (same for the Catholic Protectory); *see also* New York City Consolidation Act of 1882, ch. 410, tit. 13, 1882 N.Y. Laws 1, 536-552 (same for various children's institutions in New York).

86. *Contrast* 1851 N.Y. Laws at 637 (ten days), *with* Act of Mar. 30, 1866, ch. 245, § 11, 1866 N.Y. Laws 538, 539 (twenty days).

87. 1866 N.Y. Laws at 540. The initial warrant of commitment directed police to take the child to the Asylum's "house of reception," and the final commitment order sent the child to the Asylum proper. *Id.*

88. The requirement applicable to New York City's juvenile reformatories—namely, that a child be deemed "a proper object" for commitment "*by reason of* the neglect, habitual drunkenness or other vicious habits of the [child's] parents or lawful guardian"—echoed commitment laws in other states. 1851 N.Y. Laws at 636 (emphasis added); 1882 N.Y. Laws at 541 (codifying the same rule); Act of Mar. 4, 1826, ch. 182, § 3, 1826 Mass. Acts 326-27 (authorizing commitment of children whose parents, "from drunkenness, or other vices, neglect to . . . exercise any salutary control over said children"); Act of Mar. 23, 1826, No. 92, § 1, 1835 Pa. Laws 133, 134 (permitting commitment of children whose guardians were "incapable or unwilling to exercise the proper care and

footnote continued on next page

validity of commitments where they were denied notice or where there was no showing of parental fault, and they succeeded in multiple reported cases.[89]

At first glance, both kinds of claims appeared to be grounded only in parents' rights, not the rights of children. In fact, petitioners and judges recognized that the state's power to remove delinquent and neglected children from their homes implicated *both* the parent's "right to his child" *and* the child's interest in "liberty."[90] The alignment of parents' and children's interests was a striking feature of cases challenging the court-ordered confinement of children. The defenders of juvenile commitment laws argued that they aimed to "place the rights of the State and child first, and the parents last,"[91] but challengers insisted that parents and children both required protection from the state's overreach. As litigants and courts across the United States made clear, the effect of a commitment order was not only to deprive the child's parent of "the right to the care, custody and assistance of his child," but also to deprive the child "of home, and parents, and friends," for an indefinite period of time.[92] Long before the U.S. Supreme Court's landmark decision in *In re Gault*

---

discipline," because of "moral depravity or otherwise"); Act of Apr. 15, 1858, ch. 209, § 10, 1858 Cal. Stat. 166, 169-70 (allowing commitment of children whose parents, "from drunkenness, or other vices or causes, neglect to . . . exercise any salutary control over such child[ren]"); Act of Apr. 8, 1887, ch. 353, § 1, 1887 Wis. Stat. 389, 389 (empowering courts to order children "removed from the custody of [their] parents" if the children's welfare was "seriously endangered by the neglect, abuse, or the vicious or immoral habits or associations of [their] parents"). Modern child neglect law, though different in important ways, preserves the basic limiting principle that the state must establish a causal link between the child's condition and the parent's failure to exercise a minimum degree of care. *See* Nicholson v. Scoppetta, 820 N.E.2d 840, 845 (N.Y. 2004).

89. *See* cases cited *infra* notes 107-08, 120.

90. *See, e.g.*, People *ex rel.* James v. N.Y. Soc'y for Prevention of Cruelty to Child., 44 N.Y.S. 1098, 1099-1100 (Sup. Ct. 1897); People *ex rel.* Van Heck v. N.Y. Cath. Protectory, 4 N.E. 177, 180 (N.Y. 1886) (stating that challenges to children's commitment "involve[] questions of personal liberty and parental control"); People *ex rel.* Van Riper v. N.Y. Cath. Protectory, 13 N.E. 435, 439 (N.Y. 1887) (recognizing that a child's commitment "directly affects [the] right of parental control and custody," as well as the "rights of the child").

91. C. D. Randall, *Report of the Committee on Child-Saving Work*, *in* PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION AT THE TWENTIETH ANNUAL SESSION HELD IN CHICAGO, ILL. 131, 135 (Isabel C. Barrows ed., Bos., Press of Geo. H. Ellis 1893). Randall's statement expresses a recurrent theme in nineteenth-century child-savers' rhetoric: "[c]hildren's rights" as inherently at odds with parental rights and as "limitations on parental power." Woodhouse, *supra* note 21, at 1052. On the history of children's rights discourse, see generally Michael Grossberg, *Children's Legal Rights?: A Historical Look at a Legal Paradox*, *in* CHILDREN AT RISK IN AMERICA: HISTORY, CONCEPTS, AND PUBLIC POLICY 111-140 (Roberta Wollons ed., 1993).

92. People *ex rel.* O'Connell v. Turner, 55 Ill. 280, 283-84 (1870); *see also* State *ex rel.* Neider v. Reuff, 2 S.E. 801, 806 (W. Va. 1887) (invoking both the "natural right of the parent" and the child's "natural right to the care and nurture of its parents"); People v. Fowler, 148 N.Y.S. 741, 744 (Bronx Cnty. Ct. 1914) (recognizing that "the parent is deprived of the

footnote continued on next page

made it a black-letter rule, nineteenth-century habeas petitioners urged courts to hold that "[d]ue process of law . . . does not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice" of the charges, among other procedural protections.[93] And by emphasizing the alignment of parents' and children's interests in commitment proceedings, sympathetic jurists began to articulate the idea—endorsed more fully decades later—that parents and children have "reciprocal rights" to remain together, free from unwarranted state intrusion.[94]

Two successful habeas cases against the New York Catholic Protectory in the 1880s enshrined the right to notice and an "opportunity to be heard" before parents could be "depriv[ed] . . . of their children," and children deprived of their liberty.[95] First, after nine-year-old John Van Heck was committed to the Catholic Protectory for "begging in the streets," his father argued that "no notice, as required by law, was given," and that the child's actions were "not due to [the father's] neglect or misconduct," meaning that the commitment failed to meet statutory requirements.[96] Next, the mother of fourteen-year-old Florence Van Riper challenged her daughter's commitment on similar grounds: lack of notice and failure to show that Florence was "improperly exposed and neglected"—the charge she faced for being in a public park without supervision—because of her parents' misconduct.[97] SPCC president Elbridge Gerry, representing the Catholic Protectory in both cases,[98] claimed that magistrates could lawfully commit children without notice to their parents and warned that a victory for parents would establish a "dangerous

society of the child and the child of its home and the society of its parent . . . [and] its liberty"); *In re* Alley, 182 N.W. 360, 362 (Wis. 1921) (describing a child's commitment as a "depriv[ation], not only of freedom, [but also] the love of friends and relatives").

93. 387 U.S. 1, 33-34 (1967).

94. Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977); *see also* Santosky v. Kramer, 455 U.S. 745, 760 (1982) ("[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."); Bennett v. Jeffreys, 356 N.E.2d 277, 281 (N.Y. 1976) ("The parent has a 'right' to rear its child, and the child has a 'right' to be reared by its parent."). Still, children's independent right to family integrity has as yet unmet potential as a tool for protecting children's interests and effecting change in the family regulation system. *See infra* Part III.

95. *Van Heck*, 4 N.E. at 179.

96. *Id.* at 177-78.

97. People *ex rel.* Van Riper v. N.Y. Cath. Protectory, 13 N.E. 435, 435-38 (N.Y. 1887) (internal quotation marks omitted).

98. *See id.* at 435; *Van Heck*, 4 N.E. at 177.

precedent"[99] by which "a large number of children" could "be returned to those anxious to secure their possession."[100]

In both cases, the New York Court of Appeals affirmed the trial court orders discharging the children and declared that their confinement violated the statute governing commitments to juvenile institutions—a statute that, if obeyed, "avoided" the "injustice" of summarily cutting off parents' "natural right" to the "care and custody" of their children by providing parents notice and an "opportunity to be heard."[101] The Court in *Van Heck* acknowledged that, in the era before the creation of institutions like the Catholic Protectory, under poor-law statutes, indigent and vagrant children were "sent to . . . the almshouse . . . without notice to the parent," but it rejected the notion that the same could be done "now," given the procedures the legislature enacted for juvenile institutions.[102] Though not explicitly grounded in the Fourteenth Amendment, the Court's decision was consistent with the constitutional claims pressed by Van Heck's attorney. The latter cited the U.S. Supreme Court's recent rulings on the Fourteenth Amendment's Due Process Clause to argue that the Constitution protected from state infringement parents' rights "to bring up, educate, provide for, and enjoy the comfort and consolation of one's own children"[103]—one of the earliest articulations of a doctrine endorsed by the U.S. Supreme Court four decades later in *Meyer v. Nebraska*.[104] But Van Heck's lawyer was not alone. A decade earlier, another habeas petitioner's attorney invoked both federal and state constitutions as sources of protection

99. Statement and Points for Appellant at 7, *Van Heck*, 4 N.E. 177 (on file with N.Y. St. Libr., New York Court of Appeals Records).

100. Affidavit on Motion for Reargument at 24b, 24d, *Van Heck*, 4 N.E. 177 (on file with N.Y. St. Libr., New York Court of Appeals Records).

101. *Van Heck*, 4 N.E. at 179; *Van Riper*, 13 N.E. at 439.

102. *Van Heck*, 4 N.E. at 181. In some respects, laws authorizing the commitment of delinquent, neglected, and destitute children followed in the tradition of the poor laws, but, as habeas cases like *Van Heck* show, the new legal regime also differed in important ways from the earlier system, in which poor relief officials faced "little supervision by the legislatures or the courts." MASON, *supra* note 32, at 50. Lawmakers afforded parents and children new procedural rights, which habeas petitioners pressed the courts to enforce, and which the courts understood as having been "enacted to secure an important object," namely, "to prevent parents . . . from being summarily deprived of their children without affording them an opportunity to be heard." People *ex rel.* Van Heck v. N.Y. Cath. Protectory, 45 N.Y. Sup. Ct. 127, 136-37 (1885).

103. Respondents' Brief at 13, *Van Heck*, 4 N.E. 177 (on file with N.Y. St. Libr., New York Court of Appeals Records) (also invoking "the constitutional principle which allows to all the citizens the 'enjoyment of life, liberty and pursuit of happiness'").

104. 262 U.S. 390, 399 (1923) (stating that the Fourteenth Amendment's liberty guarantee "denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children, . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men").

for the parent-child relationship: He argued that the New York Juvenile Asylum's separation of mother and son "deprive[d] th[e] child of his liberty, in disregard of" the U.S. Constitution, and was "opposed to the rights and privileges of both mother and child, mentioned in . . . the [New York] State Constitution"—namely, the state's Due Process Clause.[105]

When confronted with similar claims, high courts in multiple other states echoed *Van Heck* and made clear that the constitutional validity of juvenile commitment statutes depended on their parental notice and hearing requirements.[106] Elbridge Gerry was not wrong about the practical consequences of that principle: Over the next decades in New York, trial courts enforced *Van Heck* and *Van Riper*'s basic rule by discharging children who were confined without notice to a living parent or guardian.[107] Courts in multiple other states followed the same approach, granting habeas petitions when children were committed to institutions for delinquency or neglect without their parents receiving notice or an opportunity to be heard in violation of statutory requirements.[108]

---

105. Points for Plaintiff in Error at 10, People *ex rel.* Splain v. N.Y. Juv. Asylum, 2 N.Y. Sup. Ct. 475 (1874) (on file with N.Y. St. Libr., New York Court of Appeals Records).

106. *See, e.g.*, Kennedy v. Meara, 56 S.E. 243, 247-48 (Ga. 1906) (holding that Georgia's juvenile commitment law, which copied New York law almost verbatim, avoided a "due process" violation by giving parents notice and "a reasonable opportunity to be heard on the question as to whether . . . the state should deprive him . . . of his [child's] custody"); Van Walters v. Bd. of Child.'s Guardians, 32 N.E. 568, 569 (Ind. 1892) (holding that Indiana's juvenile commitment law "violates no constitutional principle, inasmuch as it guards the interests and rights of parents by requiring that their children shall not be taken from them without a hearing, upon due notice, in the courts"); State *ex rel.* Cunningham v. Ray, 63 N.H. 406, 409 (1885) (holding that New Hampshire's commitment law violated the state constitution, insofar as it allowed a parent to be "deprived of [his children's] care, nurture, education, and custody, against his consent, and without any trial or hearing to which he was a party").

107. *See, e.g.*, People *ex rel.* Slatzkata v. Baker, 3 N.Y.S. 536, 537-38, 539 (Buffalo Super. Ct. 1888); *In re* Maloney, 4 N.Y.S. 428, 428-29 (Gen. Term 1889); People *ex rel.* Cronin v. Carpenter, 55 N.Y.S. 521, 521-22 (Sup. Ct. 1898); *In re* Remske, 160 N.Y.S. 715, 715-16 (Sup. Ct. 1916).

108. *See, e.g.*, Fitzgerald v. Commonwealth, 85 Mass. (5 Allen) 509, 510 (1862); Goodchild v. Foster, 17 N.W. 74, 74 (Mich. 1883); *In re* Hunt, 37 P. 206, 206 (Cal. 1894) (en banc) (per curiam) (citing CAL. CIV. CODE § 203 (Hart 1885), which authorized proceedings to remove children from parents in cases of "abuse of parental authority"); *see also Ex parte* Miller, 42 P. 428, 429 (Cal. 1895) (noting that *In re Hunt* interpreted CAL. CIV. CODE § 203 to require notice and a hearing). In the juvenile court era, some state courts held that statutory notice and due process were satisfied if the record showed that parents appeared at the commitment hearing. *See, e.g.*, De Kay v. Oliver, 143 N.W. 508, 509 (Iowa 1913); Juv. Ct. of Shelby Cnty. v. State *ex rel.* Humphrey, 201 S.W. 771, 772 (Tenn. 1918); *Ex parte* Lamson, 195 P. 735, 735 (Cal. Dist. Ct. App. 1920). In other cases, however, courts refused to find that parents' appearance waived the jurisdictional requirement of pre-hearing notice given the significant rights at stake. *See, e.g.*, Jensen v. Hinckley, 185 P. 716, 716-18 (Utah 1919); Karrib v. Bailey, 180 N.W. 386, 386-

footnote continued on next page

In some cases, courts either strongly implied or expressly stated that the statutory requirement of parental notice was also a constitutional requirement. In 1900, for example, a trial court upheld the commitment of thirteen-year-old Roy Aikins for truancy, but made clear that, if the boy could be

> "taken from [his] parents and committed to [an] institution . . . without giving [his parents] an opportunity of being heard in defense of their child and their right to its custody, then the law [would be] in conflict with the fundamental principles of the constitution, which provides that no person shall be deprived of life, liberty or property without due process of law."[109]

However, there was not yet a clear consensus on whether statutes that allowed children's removal without parental notice violated parents' constitutional rights. Some state high courts, like Ohio's, concluded that the legislature could authorize courts to commit children to institutions before giving notice to their parents, so long as parents could then challenge the commitment collaterally through the writ of habeas corpus, thereby ensuring that no parent would be "divested . . . of his legal right, without an opportunity of being heard."[110] There was no denial of due process, courts reasoned, so long as the commitment proceeding did not "finally adjudicate [parents'] legal rights," nor make any binding judgment about their fitness to have custody.[111] The problem for parents, of course, was that, even if parents were not "precluded . . . from asserting any right to the custody and care of [their] child" by petitioning

87 (Mich. 1920); State *ex rel.* Miller v. Super. Ct. of Lewis Cnty., 227 P. 849, 849-50 (Wash. 1924).

109. People *ex rel.* Aikins v. Superintendent, 67 N.Y.S. 674, 675, 679-80 (Sup. Ct. 1900). The court rejected the argument that New York's statute allowed magistrates to dispense with parental notice, because the law "should not receive a construction inconsistent with one of the dearest rights of humanity." *Id.* at 679. However, the magistrate's failure to recite that notice was given was not a "fatal omission," because the docket showed that the parents were notified. *Id.* at 676-77.

110. Cincinnati House of Refuge v. Ryan, 37 Ohio St. 197, 203-04 (1881).

111. *See id.* Multiple state courts followed *Ryan* in holding that, when statutes did not make parents parties to the initial commitment proceeding, parents were not denied due process so long as they had a habeas remedy or other opportunity for a hearing. *See, e.g.*, Milwaukee Indus. Sch. v. Supervisors of Milwaukee Cnty., 40 Wis. 328, 337, 339 (1876); Farnham v. Pierce, 6 N.E. 830, 831-32 (Mass. 1886); State *ex rel.* Bethell v. Kilvington, 45 S.W. 433, 435 (Tenn. 1898); *In re* Lundberg, 77 P. 156, 158-59 (Cal. 1904); Mill v. Brown, 88 P. 609, 614 (Utah 1907); *Ex parte* Sharp, 96 P. 563, 565 (Idaho 1908). But we should not read such cases as evidence of a consensus against parents' procedural rights. Courts endorsed the "principle . . . that a man cannot be deprived of his rights without a hearing," but disagreed on whether pre-deprivation notice was essential. *See Homeless Children: The Power of the S.P.C.A. to Place Children in the House of Refuge Without Parents' Knowledge*, CINCINNATI DAILY ENQUIRER, Jan. 11, 1881, at 8 (discussing the trial court's recent decision in *Ryan*).

for habeas, they still faced plenty of practical obstacles in reclaiming children committed to institutions' custody.[112]

But when parents challenged those commitments through habeas petitions, they compelled courts to consider, again and again, what rights were at stake when the state removed children from their parents, even temporarily, and what process was required to protect those rights. Thus, long before the U.S. Supreme Court affirmed parents' constitutional rights to notice and an opportunity to be heard in family court proceedings, judges in habeas cases laid the groundwork for those rulings, and began to enshrine legal limits on the state's newly expanded power to separate parents and children.[113] In the early twentieth century, to head off further constitutional challenges, many state legislatures codified parents' procedural rights in dependency proceedings by specifying that "parents [were] made parties to the proceedings, and that they [were] given an opportunity to be heard therein in defense of their parental rights" before children were removed from their care.[114]

---

112. *See Milwaukee Indus. Sch.*, 40 Wis. at 339. *Contrast Farnham*, 6 N.E. at 831-32 (reasoning that a child's commitment was not "a final adjudication upon the rights of the father"—rights which could "be protected on habeas corpus"), *and Milwaukee Indus. Sch.*, 40 Wis. at 339 (reasoning that the parent is "not precluded . . . from asserting any right to the custody and care" of their child due to the availability of habeas), *with* People *ex rel.* Van Riper v. N.Y. Cath. Protectory, 13 N.E. 435, 438-39 (N.Y. 1887) (reasoning that the commitment proceeding "directly affect[ed]" the "right of parental control and custody").

113. Ultimately, in a later wave of cases challenging the constitutionality of juvenile court procedures for delinquency and dependency cases, the U.S. Supreme Court made clear that the Due Process Clause generally requires the state to provide parents with timely notice and an opportunity to be heard on delinquency or neglect allegations before removing their children and placing them in juvenile detention or foster care. *See In re* Gault, 387 U.S. 1, 33-34 (1967); Stanley v. Illinois, 405 U.S. 645, 657-58 (1972). There remain (controversial) exceptions to the general requirement of notice and a hearing; for example, some courts have approved of statutes allowing officials to remove children from parents temporarily in emergency circumstances, without parental consent or judicial process, so long as parents can be heard after the fact. *See, e.g.*, Nicholson v. Scoppetta, 344 F.3d 154, 171-72 (2d Cir. 2003).

114. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 112 (1909) (noting that then-recent juvenile court laws included those requirements, "as was not done in the earlier acts," and linking the shift to habeas cases requiring parental notice); *see also* SOPHONISBA P. BRECKINRIDGE & HELEN R. JETER, U.S. DEP'T OF LAB., PUB. NO. 70, A SUMMARY OF JUVENILE-COURT LEGISLATION IN THE UNITED STATES 25-27 (1920) (surveying early-twentieth-century juvenile court laws); *In re* Hill, 247 P. 591, 592-93 (Cal. Dist. Ct. App. 1926) (explaining that California's 1915 Juvenile Court Act "unmistakably recognize[d] that the parents have rights and are interested parties" in dependency proceedings by, among other things, securing parents' "right . . . to be present"); *In re* Allmon, 294 P. 528, 528 (Idaho 1930) (stating that a 1927 amendment to the state's neglect law—"which provide[d] for notice to the parent . . . and a complete hearing . . . thus affording the parent due process"—was designed to "remedy" the earlier commitment law, which did not require notice and faced repeated constitutional challenges by habeas petitioners). The full evolution of family court procedure is

footnote continued on next page

In addition to the parental notice rule, New York's high court articulated in *Van Riper* another important constraint on the state's removal power which endures in contemporary law: the requirement of showing "that the child was abandoned and neglected, *by the fault of* [*its*] *parents* or custodians, [in order] to justify taking the child from their custody on the ground of abandonment, or improper exposure or neglect."[115] That ruling did not eliminate the problem of vagueness and overbreadth in statutory definitions of child maltreatment, which remains a target of criticism to this day, but it construed the relevant statutes with an eye to that danger.[116] When courts enforced it, the requirement of proving parental fault—that is, a causal link between the child's condition and the parent's failure to provide proper care—did limit the state's power to commit children for begging, peddling, playing or walking around the streets unsupervised, and other behavior that was typical of children in urban working-class communities, but which police and SPCC officers viewed as grounds for taking children from their parents.[117] Parents could successfully challenge children's commitment in such cases, so long as judges took care to "carefully scrutinize[]"[118] whether the child's condition arose from the "gross neglect" and "culpable negligence of the parents," or "from accident, the child having temporarily strayed away from its home without fault of its custodian."[119]

That rule also recalled a core principle of common-law custody doctrine, namely, the "presumption" that birth parents were fit guardians who acted in their children's best interest, and should not be "deprive[d] . . . of the custody of [their] children" unless the "presumption [was] removed" by proof of parents' misconduct.[120] That presumption of parental fitness had never truly applied to parents enmeshed in the poor relief system, since poor-law officials could

---

beyond the scope of this Article, but the history excavated here helps explain an important shift in the adjudication of child abuse and neglect (though not delinquency) cases: from proceedings initiated by way of a complaint against a child—as under nineteenth-century laws—to proceedings commenced through a petition against a respondent parent or guardian, where notice is statutorily required, and of course essential to secure personal jurisdiction over the respondent. *See, e.g.*, N.Y. FAM. CT. ACT § 1041 (McKinney 2024).

115. *Van Riper*, 13 N.E. at 436 (emphasis added).

116. *See supra* note 18 and accompanying text.

117. On the SPCC's perspective, see Hasday, note 7 above, at 335-340; on the law's constraining effect, see note 120 and accompanying text below.

118. *Van Riper*, 13 N.E. at 436.

119. *In re* Maloney, 4 N.Y.S. 428, 428 (Gen. Term 1889); *see* People *ex rel.* James v. N.Y. Soc'y for Prevention of Cruelty to Child., 44 N.Y.S. 1098, 1099 (Sup. Ct. 1897); People *ex rel.* Aikins v. Superintendent, 67 N.Y.S, 674, 679-80 (Sup. Ct. 1900).

120. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 1341 (Bos., Little, Brown, & Co. 10th ed. 1870).

remove children from impoverished parents without any claim of wrongdoing.[121] But in the emerging child welfare and juvenile justice systems, petitioners across the country argued, and some courts agreed, a presumption of fitness should apply—both to protect parents' own custody rights and to protect their children from unwarranted separation and confinement.[122] Through habeas litigation, parents advanced the important and now-familiar principle that the state must bear the initial burden of proving that they were unfit, rather than requiring parents to "show affirmatively that [they were] fit and proper person[s] to have charge of [their] own children."[123] Litigants pushed courts to recognize that the common-law presumption of parental fitness must also be a constitutional requirement, necessary to constrain the state's power to separate parent and child.[124]

Finally, habeas petitioners not only challenged commitment orders on technical legal grounds; they also questioned the fundamental fairness of the new child protection regime—and built pressure for reform—by highlighting how delinquency and neglect laws were used to punish parents and children for poverty and "misfortune."[125] Petitioners began to argue, explicitly, for class equality in the legal regulation of families. In challenges to the commitment of children like John Van Heck and Roy Aikins, parents urged judges to recognize that "even the poor children and their parents [had] their rights under the law, and they [were] entitled to its protection," as the court wrote in

121. *See* GROSSBERG, *supra* note 31, at 265 ("The presumption of parental fitness that guided the judiciary in other custody cases simply did not hold for parents dependent on poor relief."). Of course, because the law of slavery afforded no protection to family relationships, the presumption of parental fitness did not even nominally extend to enslaved parents. *See* Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. 187, 189, 203-05 (1987) (discussing "the denial of legal protection to [the] slave family" and the consequences for parent-child relationships).

122. *See, e.g.*, *Aikins*, 67 N.Y.S. at 679; People *ex rel.* O'Connell v. Turner, 55 Ill. 280, 283-85 (1870); Martin v. Vincent, 201 P. 492, 493 (Idaho 1921).

123. Cincinnati House of Refuge v. Ryan, 37 Ohio St. 197, 200-01 (1881) (quoting appellee father's argument); *cf. In re* Juv. Appeal (83-CD), 455 A.2d 1313, 1323 (Conn. 1983) ("Where a fundamental right is involved, the burden of proof is always on the party seeking to interfere with that right.").

124. That position won the endorsement of the U.S. Supreme Court in *Stanley v. Illinois*, in which "the Court adopted a fitness standard as the central constitutional protection for parents' and children's family integrity," grounded in procedural and substantive due process. Gupta-Kagan, *supra* note 54, at 776; Stanley v. Illinois, 405 U.S. 645, 649, 651 (1972) (holding that, "as a matter of due process of law, [a parent is] entitled to a hearing on his fitness as a parent before his children [are] taken from him," and stating that parents' interest in children "undeniably warrants deference").

125. *See Turner*, 55 Ill. at 287 ("Why should minors be imprisoned for misfortune? Destitution of proper parental care, ignorance, idleness and vice, are misfortunes, not crimes.").

Aikins.[126] Habeas petitioners asked courts to reject the age-old assumption that poverty "abrogated [parents'] common-law rights," and to extend principles of private custody law—namely, the presumption of parental fitness—to the new public law of child welfare.[127]

In particular, habeas cases pushed courts to draw a line between child endangerment and the mere condition of poverty—even as SPCC officers, committing magistrates, and the leaders of juvenile reformatories tended to blur the distinction.[128] As one trial court wrote, New York's child neglect law should not apply to the "temporary emergencies" that poor parents faced when they were "unable to furnish all the necessary comforts to their children," or "constantly guard and prevent them from wandering upon the streets."[129] Another judge warned that "improvident arrests" of children on the street inflicted "great suffering" on "[t]he poor," who were "not destitute of great love [for] their offspring," though unable to provide them "all the necessary comforts."[130] Increasingly, appellate courts across the country made similar pronouncements against the conflation of poverty and neglect, and against the disparate application of child protection laws to deprive poor parents of their children.[131] As juvenile courts assumed jurisdiction over delinquency and

126. *Aikins*, 67 N.Y.S. at 679.

127. GROSSBERG, *supra* note 31, at 267 (describing the poor law's disrespect for parental rights). In private custody disputes, nineteenth-century courts often proclaimed that birth parents, "however poor and humble, if able to support the child in [their] own style of life," generally had a superior claim to third-party caretakers, even those with greater financial means. Verser v. Ford, 37 Ark. 27, 29-30 (1881). Courts recognized that to hold otherwise would "make poverty a crime, and [] punish it by the bitterest of penalties." Moore v. Christian, 56 Miss. 408, 411 (1879); *see* Legate v. Legate, 28 S.W. 281, 282 (Tex. 1894); 2 JOEL PRENTISS BISHOP, NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION § 1166 (Chi., T.H. Flood & Co. 1891). The question was how those principles extended to parents whose children were removed from their care by the *state*.

128. On SPCCs' tendency to conflate poverty, neglect, and waywardness, see generally LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE: BOSTON 1880-1980, at 82-115 (1988).

129. *Aikins*, 67 N.Y.S. at 679.

130. *In re* Maloney, 4 N.Y.S. 428, 429 (Gen Term. 1889).

131. *See, e.g.*, Moore v. Dozier, 57 S.E. 110, 111 (Ga. 1907) (reversing an order committing children to an orphanage because "poverty alone, save in extreme circumstances, furnishes no reason to deprive [a mother] of her children"); Commonwealth v. Dee, 110 N.E. 287, 288 (Mass. 1915) (dismissing charges that a boy was neglected as a result of his mother's dependence on public charity, because "the purpose of the 'neglect law,' . . . was to provide for the removal of children from those parents who are undesirable and unfit, and not from parents who are merely poor"); Commonwealth v. Bickel, 78 Pa. Super. 348, 350-51 (1922) (declining to remove children from their parents to a public orphanage, since the mere fact that the children were "dirty and not well groomed"—largely because of the city's failure to clean up the "public dump" by their home—did not make the children "neglected"); *In re* Kelber, 200 N.W. 786, 789 (N.D. 1924)
footnote continued on next page

neglect cases in the early twentieth century, newspaper coverage of those courts also demonstrated growing public scrutiny of the class divide in the law's treatment of parents and children.[132]

In their briefs before New York's appellate courts at the turn of the twentieth century, parents' attorneys invoked the ascendant ideal of family preservation: the notion that "a poor and humble home wherein the relationship of parent and child is affectionately, even though somewhat unintelligently maintained, is a more favorable place for the nurture of children than a public institution," no matter how well funded or well intentioned.[133] They protested that statutes "designed to protect children" should not be used "to incarcerate children merely because their parents' poverty does not give them the same social and educational opportunities as those . . . more fortunate."[134] Of course, when parents argued that they were "discriminated against by reason of [their] poverty," they did not always get a sympathetic hearing.[135] Working-class mothers, in particular, struggled to persuade judges that their means of subsistence—say, taking in boarders,

(reversing a juvenile court order that removed children from their parents for neglect, because "[p]overty, lack of education or of culture alone, are never sufficient justification for severing the ties that bind families together").

132. *See, e.g.*, *Children's Court: A Place of Laughter and Tears*, BROOKLYN DAILY EAGLE, Sept. 14, 1902, at 1 (discussing how children brought before New York's juvenile court "learn[ed] . . . that in the eye of the law, it is a crime to be poor"); *A Morning at the Children's Court*, N.Y. TIMES, May 20, 1906 ("The Gerry Society [SPCC] cannot break into a mansion to snatch a child away from unfit parents. . . . Poverty rears a thin wall between home and the world outside—a veil . . . through which . . . the officers of the law may look and say, 'Stop!'"); *see also* Edward Lindsey, *The Juvenile Court Movement from a Lawyer's Standpoint*, 52 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 145 (1914) (protesting that neglect and delinquency laws were "not applied to the dominant social class and if ever [they were] so applied [they would] undoubtedly be largely modified"); *cf.* N.Y. SOC'Y FOR THE PREVENTION OF CRUELTY TO CHILD., EIGHTEENTH ANNUAL REPORT 33-34 (N.Y.C. 1893) (on file with N.Y. Soc'y for the Prevention of Cruelty to Child. Archive) (complaining about "cases brought to the notice of the public through the Press, . . . where common sympathies are enlisted in [sic] behalf of parents who really deserve but little consideration"). On Progressive-era legislators' responses to those concerns, see Part III below.

133. Brief of Respondents at 14-15, People v. Giles, 46 N.E. 326 (N.Y. 1897) (on file with N.Y. St. Libr., New York Court of Appeals Records).

134. Brief on Behalf of Lillian Fowler at 14, People v. Fowler, 152 N.Y.S. 261 (App. Div. 1915), (on file with N.Y. St. Libr., New York Supreme Court Appellate Division Records) (emphasis omitted). In *Giles* and *Fowler*, mothers challenged their daughters' commitment to asylums on charges of improper guardianship, and both ultimately lost on technical grounds. *See Giles*, 46 N.E. at 328; *Fowler*, 152 N.Y.S. at 261; People v. Fowler, 148 N.Y.S. 741, 744 (Bronx Cnty. Ct. 1914).

135. Purinton v. Jamrock, 80 N.E. 802, 805 (Mass. 1907) (upholding a Massachusetts law that permitted a girl's adoption without her mother's consent, after the girl was committed and "supported as a pauper" by the state).

working outside the home, or sending their teenaged children out to work—did not amount to neglect or unfitness.[136] Nevertheless, such cases provide evidence that, from the very beginning of our modern child protection regime, parents and attorneys advanced a powerful and persistent critique of the state's impulse to remove children because of circumstances caused by poverty—a practice that later legislative reforms have constrained, but not eliminated.[137]

Litigation over children's commitment to institutions demonstrated a general recognition, by the turn of the twentieth century, that parents and children were entitled to due process when facing separation at "the hand of the State."[138] Moreover, jurists recognized that judicial review, through writs of habeas corpus or other means, provided an important constraint on the otherwise "autocratic powers" that commitment courts and the managers of juvenile institutions wielded.[139] Parents turned to courts not only to contest children's removal, but also, as the next Subpart explains, to vindicate their right to regain custody once they remedied the reasons for children's removal—another key precept of modern child welfare law.

B. Defending the Right to Reclaim Children in Courts of Equity

In habeas cases where parents challenged the legality of commitment orders, judges articulated statutory and constitutional limitations on the state's power to remove children from their parents. In another set of habeas cases, litigants and judges tested the scope of institutions' power to keep children from their parents, even after children were lawfully committed or surrendered to institutions' custody. The latter cases helped to clarify an important and durable principle: A child's transfer to out-of-home care did not itself terminate parents' legal rights over the child. Rather, as treatises recognized at the end of the nineteenth century, a parent could petition for the child's return by showing that the parent's "disability or default ha[d] been removed, that the object of the commitment ha[d] been accomplished, and that

136. For discussion of how Progressive-era child protection societies and welfare authorities viewed poor, unwed mothers and their survival strategies as "morally suspect," see MASON, note 32 above, at 107-08; and GORDON, note 129 above, at 82-115. For analysis of how the moral construction of poverty generates unwarranted CPS interventions today, see BRIDGES, note 7 above; and Washington, note 2 above.

137. On contemporary efforts to limit the conflation of poverty and neglect, see Part III below.

138. Brief of Respondents, *supra* note 134, at 14; *Fowler*, 148 N.Y.S. at 745 ("[T]he strong arm of the state as *parens patriae* should only be extended in forcing a child from its parent, after all the requirements of law have been complied with.").

139. *Giles*, 46 N.E. at 328; *cf.* Brief of Respondents, *supra* note 134, at 16 (urging the Court to protect "the right of appeal," without which "fathers and mothers of children [were] entirely at the mercy of wicked or incompetent officials").

the child [could] properly be restored to [the parent's] custody."[140] Thus, even when parents themselves initially surrendered their child to an institution or asked a magistrate to commit the child, parents found they could still later invoke a trial court's "general equitable powers"[141] to restore custody of the child if the court determined that "such course [was] for the child's benefit."[142]

The flipside, as parents discovered, was that the court could exercise the same discretionary authority to refuse parents' requests for their children's release. Still, courts' equitable power "to restore the child to the custody of the parent,"[143] as this Subpart shows, offered parents and child inmates a measure of hope for winning release in court when their applications to the institutions' managers failed. For families seeking reunification, the New York Supreme Court could be their ally—if parents could demonstrate their "fitness . . . for the trust of caring for [their] child" and expose the dangers of leaving children's freedom "to the mere discretion of the officers of . . . institutions."[144]

The leading precedent on courts' equitable "right to restore the child to the custody of the parent, where the later has reformed," was the New York Court of Appeals' decision in *In re Knowack*.[145] In 1897, Charles and Johanna Knowack petitioned for the return of their four children, whom a police justice had committed two years earlier to the Rochester Children's Aid Society, "on the ground of the intemperance and neglect of their parents."[146] The Rochester Children's Aid Society, different from the New York City organization with the same name, was empowered by statute to receive "all children whose commitment to an institution is provided for by . . . the penal code," including delinquent, neglected, or impoverished children, and to place those children in

140. CHURCH, *supra* note 78, § 444c.

141. FREUND, *supra* note 41, § 263

142. HOCHHEIMER, *supra* note 11, § 101. As jurists explained, courts' equitable jurisdiction over minors stemmed from the historical power of English chancery courts, "delegated by the crown, as *parens patriae*, to interfere in particular cases for the benefit of such as are incapable to protect themselves"—a power historically exercised to protect minors' property interests, but extended in the nineteenth century to support courts' authority to adjudicate custody disputes, and ultimately to justify juvenile courts' power to decide the disposition of delinquent and dependent children. CHURCH, *supra* note 78, § 425; George B. Curtis, *The Checkered Career of* Parens Patriae*: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895, 897-902 (1976).

143. FREUND, *supra* note 41, § 263.

144. HOCHHEIMER, *supra* note 11, §§ 57, 101-02.

145. FREUND, *supra* note 41, at § 263 (citing *In re* Knowack, 53 N.E. 676 (N.Y. 1899)).

146. *In re* Knowack, 53 N.E. 676, 676 (N.Y. 1899). Specifically, the children were committed under the Penal Code charge that they were destitute and without "proper guardianship." *Id.*

foster and adoptive families.[147] The Knowacks did not challenge the police court's legal grounds for "removing [their] children from their care and custody."[148] Instead, they argued that the grounds for commitment had been "fully . . . removed," because they were now "sober," gainfully employed, and "able, willing and desirous of caring for their four children," who would otherwise remain "a charge upon the [city's] poor fund."[149] The Knowacks went to court after the Society's managers rejected their application for their children's return.[150]

The trial court granted their petition, and on appeal, the question for New York's high court was "whether the [S]upreme [C]ourt . . . ha[d the] power to intervene . . . and restore the[] children" to their parents—or whether, as the Society contended, the children must "remain in the custody of [the] institution during their minorities," even if "conditions ha[d] changed," unless the managers "consent[ed] to their release."[151] The Court of Appeals rejected the Society's "startling doctrine" and affirmed the New York Supreme Court's "general equitable powers" both to "take" children from their parents and "restore" children to their care.[152] The *Knowack* Court endorsed what became the enduring standard for judges to return children to their parents after a finding of neglect, namely, where the children's "interests . . . [would] be promoted thereby" and the parents were "fit, competent and able" to fulfill their duties.[153]

147. Act of Apr. 18, 1895, ch. 355, §§ 3-4, 1895 N.Y. Laws 497, 497-98. When children were committed to the Rochester Children's Aid Society, the city paid "a reasonable sum for [their] support . . . in families or elsewhere." *Id.*

148. *In re Knowack*, 53 N.E. at 676.

149. *Id.* at 676-77.

150. *Id.* at 677. The Knowacks provided supporting materials typical of such applications, including evidence of their financial assets and "affidavits of third parties" confirming that they had been "living honorable and respectable lives," and they also made clear that their children were "all anxious and desirous of returning to the home of their parents." *Id.*

151. *Id.*

152. *Id.* at 677-79. The latter power, the Knowacks' lawyer argued, was critical in ensuring that the Society retained "the care and custody of [the] children . . . *only so long as* the circumstances made it necessary that the State should care for them." Brief for Respondents at 6-7, *In re* Knowack, 53 N.E. 676 (N.Y. 1899) (emphasis added) (on file with N.Y. St. Libr., New York Court of Appeals Records).

153. *In re Knowack*, 53 N.E. at 679. Here, the Court found that New York's "statutory scheme" was "in line with the general chancery powers of the [S]upreme [C]ourt," referring, specifically, to New York's 1884 statute on "pauper" children committed to institutions, which conditioned children's return to their parents on a court's "determin[ation] that the interests of such child will be promoted thereby, and that such parent is fit, competent and able to duly maintain, support and educate such child." *Id.* (quoting Act of May 31, 1884, ch. 438, § 4, 1884 N.Y. Laws 511, 512); *cf.* N.Y. SOC. SERV. LAW § 383(1) (McKinney 2024) (retaining the same standard for family courts to return children to

footnote continued on next page

Knowack established an important limit on juvenile institutions' power to retain children indefinitely, and it supplied a powerful precedent for parents who "reformed" their ways and demanded their children's return from institutions reluctant to release them.[154] The decision reflected a broader pattern. Habeas petitioners in other states secured rulings that when children were removed for neglect or "misfortune," the "right of [the] parent, when competent, to resume the custody and care of his child," must "not be dependent on the discretion of the [institution] officers" alone; rather, such parents could invoke courts' equitable power to "restore the child."[155]

Moreover, the *Knowack* case shaped the legislative design of juvenile courts and their successors: modern family courts. In 1922, when the New York legislature established specialized "children's courts" statewide to assume jurisdiction of delinquency and neglect cases, lawmakers codified *Knowack*'s holding by empowering the parent or guardian of any child "committed . . . to the custody of an institution" to "petition" the court for the child's return, and authorizing the court to vacate or modify its prior order and "return such child to the custody of its parents or guardian."[156] Today, family courts retain that same continuing jurisdiction—and obligation—to review the propriety of children's out-of-home placements and to adjudicate parents' petitions for

---

their parents after "commit[ment] to an authorized agency"); N.Y. FAM. CT. ACT § 1089(d) (McKinney 2025) (governing family courts' determination, in permanency hearings, of whether to continue foster care placement or return children to their birth parents, "in accordance with the best interests and safety of the child, including whether the child would be at risk of abuse or neglect if returned to the parent").

154. *See In re Knowack*, 53 N.E. at 678.

155. Milwaukee Indus. Sch. v. Supervisors of Milwaukee Cnty., 40 Wis. 328, 339-340 (1876). Anticipating *Knowack*, the Wisconsin high court made clear that "the power of the state" to keep dependent or neglected children from their parents had limits; it did not "survive" any longer than "the disability or default of the parent." *Id.*; *see also In re* Klein, 70 N.W. 64, 66 (Wis. 1897). After *Knowack*, other state courts similarly emphasized that institutions did not have "exclusive" jurisdiction to decide children's release, and that courts had the "right" to return children to parents based on changed circumstances. *See, e.g.*, *In re* Kol, 88 N.W. 273, 274-76 (N.D. 1901); McFall v. Simmons, 81 N.W. 898, 900 (S.D. 1900); Kennedy v. Meara, 56 S.E. 243, 249 (Ga. 1906).

156. Act of Apr. 10, 1922, ch. 547, § 24, 1922 N.Y. Laws 1250, 1268. Specifically, the 1922 law allowed parents to petition the children's court after their "application for the release of the child ha[d] been made to and denied by [the] institution" holding the child. *Id.* Additionally, in 1910, when the legislature established the beginnings of a juvenile court system in Rochester (where the *In re Knowack* case arose), it specifically empowered those courts to return "any neglected child . . . that has been taken from . . . its parents," when "conditions have so changed that it is consistent with the public good and the welfare of said child that the parents again have the custody of said child." Act of June 23, 1910, ch. 611, § 15, 1910 N.Y. Laws 1568, 1575.

children's return.[157] Thus, the Knowacks' case helped to enshrine "a core rule of child abuse and neglect law . . . that when parents remedy conditions of neglect, the state should return their children."[158] However, the Knowacks' victory came with caveats.

First, the Court's reasoning only extended to cases where children were removed from home based on neglect or abandonment by their parents—that is, "commitments for care and guardianship," not cases where children were committed to institutions for "actual crime," nor "quasi criminal" cases of "incorrigible" children.[159] Months after *Knowack* was decided, the parents of Harry Cohn tested how far the precedent would extend: They argued that since Harry was committed to the New York House of Refuge on his father's complaint that he was a "disorderly child," his parents should be "entitled to terminate [his] imprisonment on proof that they deem the boy sufficiently reformed."[160] The trial court rejected that claim, reasoning that "[i]f young Cohn had been committed . . . for some grievous fault of his parents," then *Knowack* "might require his discharge," but since Harry was committed as a "quasi criminal," it was left to "the board of managers of the institution" to "determine when he had sufficiently reformed to justify his restoration to society."[161] Courts might override reformatory managers' judgment about whether neglectful parents had "reformed," but hesitated to overrule their judgment on whether wayward children had "reformed." Underlying that hesitation was a deep suspicion of working-class parents who turned to institutions for the temporary care and discipline of troublesome children—a

157. *See* N.Y. FAM. CT. ACT §§ 1061-62, 1088 (McKinney 2025); Merril Sobie, Practice Commentary, N.Y. FAM. CT. ACT § 1086 (McKinney 2025) (discussing the roots of family courts' continuing jurisdiction).

158. Gupta-Kagan, *supra* note 23, at 35-36. *But see* Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 STAN. L. & POL'Y REV. 217, 220, 247 (2022) (arguing that the *Knowack* precedent provided guidance on the question of when courts should reunify families, but it also left "CPS agencies and family courts with wide discretion to reunify or not as they deem appropriate," thereby preserving "the indeterminacy at the heart of child protection law").

159. *In re Knowack*, 53 N.E. at 677. In an era when commitments of both delinquent and neglected children occurred within criminal courts, and were governed by the penal code, the *Knowack* Court distinguished "three classes" of cases involving children: commitments for improper guardianship and neglect; commitments for "crime" by children, meaning delinquency; and "quasi criminal" commitments, meaning disobedience and status offenses. *See id.*; HOCHHEIMER, *supra* note 11, at §§ 96, 99. Even in the early juvenile court era, those different "classes" of children remained subject to similar dispositions—including indeterminate confinement in an institution or foster placement, *see* BRECKINRIDGE & JETER, *supra* note 114, at 43-44, 48-50—but the legal distinction mattered for parents seeking children's return.

160. *In re* Cohn, 59 N.Y.S. 1028, 1029 (Sup. Ct. 1899).

161. *Id.*

reluctance, as the court in *Cohn* put it, "[t]o permit parents to complain of their children, incarcerate them, and take them out at will."[162]

Second, even as *Knowack* highlighted courts' equitable power to return children to their parents, courts could invoke that same authority to withhold children from parents who failed to demonstrate their fitness to the court's satisfaction. Courts warned against removing children from their parents without due process, but also cautioned that courts would not return children to "unfit" parents in cases where it would be "a great injustice to the infant to discharge it from the institution,"[163] and where "the best interests of the children required their continuance in the asylum."[164] When doctrines like the best-interests-of-the-child standard migrated from private custody law to the public law of child welfare, they could be "double-edged swords": a remedy *or* a license for the separation of parent and child.[165] Still, for parents who failed to win their children's release by applying to asylum managers, an appeal to the court's "discretionary power" offered some hope.[166]

Finally, while *Knowack* confirmed that children's commitment to an institution did not eliminate their parents' right to regain custody, the Court of Appeals also clarified that it did *not* "decide what effect legal adoption in good faith by third parties would have on an application" by birth parents seeking their child's return.[167] Uncertainty about institutions' authority to place children in new homes by indenture or adoption, as the next Subpart shows, generated another important line of habeas cases, as well as persistent debate about the state's power to make family separations permanent.

---

162. *Id.* at 1030.

163. People *ex rel.* Aikins v. Superintendent, 67 N.Y.S 674, 678 (Sup. Ct. 1900).

164. People *ex rel.* Horton v. Fuller, 58 N.Y.S. 835, 836, 838 (App. Div. 1899) (reasoning that the same principle applied in custody disputes "between private persons"); *see* State *ex rel.* Bethell v. Kilvington, 45 S.W. 433, 435 (Tenn. 1898) ("[W]hen it clearly appears that it is not for the welfare of the state or the child that it should be taken from [the] institution, the court will not so direct, but will leave the child where its safety, purity, and well-being requires . . . .").

165. *See* GROSSBERG, *supra* note 31, at 266-67; *see also* Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS., Summer 1975, at 226 (critiquing the indeterminacy and bias embedded in the best-interest standard in private and public family law cases).

166. *In re Knowack*, 53 N.E. 676, 678 (N.Y. 1899).

167. *Id.* at 677. When the Knowacks' children were committed to the Rochester Children's Aid Society, they were placed "temporarily" with foster families who were "paid board for their care"; thus, it remained uncertain whether the Knowacks would have prevailed if their children had instead been "legally adopted." PROCEEDINGS OF THE NEW YORK STATE CONFERENCE OF CHARITIES AND CORRECTION AT THE FIRST ANNUAL SESSION 83-84 (Isabel C. Barrows ed., 1901).

C. Indenture, Adoption, and Parents' Residual Rights

A third set of habeas cases raised the issue that vexed many juvenile institutions at the turn of the twentieth century: the question, as one orphan asylum officer put it, of "what right we have to place . . . children in families after they are surrendered by their parents, and whether we have the right to place them . . . where they will not be disturbed by [their] parents."[168] From parents' perspective, the question was whether they could turn to orphanages and reformatories for temporary state-subsidized childcare without losing the right to reclaim their children or the right to refuse consent to their children's indenture or adoption in the future. Cases like *Knowack* showed that children's transfer to an institution did not legally extinguish parents' rights; however, as this Subpart explains, when institutions placed children in new homes, parents faced particular legal and practical obstacles in recovering those children.

In the same period that states built the foundations of today's foster care system, habeas cases over children's home placements required courts to resolve crucial questions about the authority of the state and its agents "to take children and not return them to their parents."[169] Those legal conflicts shaped key features of the modern law of foster care and public adoption—including the scope of parents' rights to reclaim children from foster placements and withhold consent to adoption—and set off long-running disagreement about the respective claims of children, birth parents, and foster and adoptive parents.[170]

Nineteenth-century lawmakers empowered juvenile institutions not only to withhold children's release until adulthood, but also to place them in new homes by indenture and, in some circumstances, by adoption. In New York, as in other states, the laws establishing reformatories and orphan asylums expressly authorized the institutions to "bind out" children to any person the managers deemed suitable through indenture contracts terminating at the age of majority.[171] Often, the indenturing parties merely sought children's cheap

168. PROCEEDINGS OF THE FIRST NEW YORK STATE CONFERENCE OF CHARITIES AND CORRECTION AT THE FIRST ANNUAL SESSION 82 (New York 1857).

169. *Id.*

170. On those disputes, see notes 190, 203, 209, 214-17, and accompanying text below.

171. *See, e.g.*, Act of Mar. 29, 1824, ch. 216, § 4, 1824 N.Y. Laws 110, 111 (authorizing indentures by the New York House of Refuge); Act of May 8, 1846, ch. 143, § 13, 1846 N.Y. Laws 150, 153 (authorizing the same for the Western House of Refuge); Act of June 30, 1851, ch. 332, § 18-19, 1851 N.Y. Laws 633, 638-39 (Juvenile Asylum); Act of May 5, 1863, ch. 448, § 6, 1863 N.Y. Laws 767, 769 (Catholic Protectory); Act of Apr. 6, 1878, ch. 112, sec. 1, § 1, 1878 N.Y. Laws 113, 113 (orphan asylums); Act of Apr. 10, 1896, ch. 235, § 4, 1896 N.Y. Laws 281, 282 (Brooklyn Disciplinary Training School for Boys); Act of Apr. 28, 1901, ch. 453, § 132-a, 1904 N.Y. Laws 1131, 1132 (State Training School for Girls).

labor as farm hands or domestic servants, but they sometimes assumed other roles, including quasi-adoptive parents.[172] Advocates for placing children in "rural homes" away from their birth families justified the practice both as a way to reduce the public expense of maintaining children in institutions, and as a means of "withdraw[ing] boys and girls from [the] degrading environment" of the "slums" and providing them with "training . . . to become useful, virtuous and normal citizens."[173]

Additionally, after New York legalized formal adoption in 1873,[174] the legislature authorized asylums to "place[] . . . by adoption" any child who had been "absolutely surrendered to the [institution's] care and custody," as well as any child "left . . . with no provision by the parent . . . for its support for a period of one year."[175] In the late nineteenth century, the distinction between placements "by adoption" and placements by indenture or other temporary arrangements was sometimes blurred.[176] But in legal terms, formal adoption differed from other fostering arrangements in that it required judicial approval, terminated birth parents' legal "duties" and "rights," and created a new, lifelong "legal relation of parent and child" between the adoptive parent and adopted child.[177] Indenturing remained the dominant method by which reformatories and orphanages placed children in new homes until the early twentieth century, when state-funded foster care and formal adoption became more prevalent.[178]

---

172. *See* Ross, *supra* note 79, at 1260-61.

173. NYJA 49TH REPORT, *supra* note 44, at 18; *see* BIRK, *supra* note 79, at 18, 25-26 (analyzing the importance of the "rural ideal" in driving the transfer of dependent children from Eastern cities to the Midwest in the late nineteenth century).

174. Act of June 25, 1873, ch. 830, 1873 N.Y. Laws 1243.

175. Act of May 31, 1881, ch. 438, §§ 1, 5, 7, 1884 N.Y. Laws 511-13. Legal historical scholarship on adoption tends to focus on private, consensual adoptions, but a few scholars have taken note of nineteenth-century laws allowing charitable institutions to place children for adoption—the foundation for the modern law of public adoptions. *See, e.g.*, Naomi Cahn, *Perfect Substitutes or the Real Thing?*, *in* FAMILIES BY LAW: AN ADOPTION READER 19, 20 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004).

176. *See supra* note 79.

177. 1884 N.Y. Laws at 513; 1873 N.Y. Laws at 1244; Ross, *supra* note 79, at 1260-61.

178. *See* Homer Folks, *Family Life for Dependent and Wayward Children*, *in* THE CARE OF DEPENDENT, NEGLECTED AND WAYWARD CHILDREN 69, 75 (Balt., Johns Hopkins Press 1894) (explaining that, although "[l]egal adoption" was "the ideal" means of placing children out of institutions, it was "rarely secured" except for infants, and "[t]he more usual arrangement [was] that of the indenture"); VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 169-208 (1985) (discussing states' shift toward the modern practice of paying foster parents to "board" children, rather than indenturing or placing children in "free" foster homes where children were expected to earn their keep). The volume of legal adoption in the nineteenth and early twentieth centuries—including both privately arranged adoptions and adoptions of children in institutions' care—is a matter of some historical debate. *See, e.g.*, E. Wayne

footnote continued on next page

In habeas cases contesting the legality of children's indenture, parents argued that institutions lacked authority to bind out their children without their consent, and that, as birth parents, their rights superseded those of foster parents. Courts treated such cases, in many respects, like other custody disputes between birth parents and surrogate caretakers, where the governing question was the best interests of the child.[179] But there was a difference. Habeas litigation over orphanages and reformatories' indenturing practices presented courts with a further, deeper question about the authority of the state—and the institutions it empowered—to remove and withhold children from their parents, without the latter's consent.

The New York Juvenile Asylum, which indentured thousands of its young inmates to families in Illinois and nearby states over the late nineteenth century,[180] was a repeat defendant in habeas litigation over indentures. The Asylum generally prevailed in court in cases where parents had unconditionally surrendered or abandoned their children to the institution's care. In 1874, for example, the widowed mother of Michael Joseph Splain lost her habeas suit against the Asylum because her "previously unqualified surrender" gave the Asylum power to indenture the boy in Illinois, and because, in the trial court's view, "[t]he interests of the child himself, as well as those of his mother, [would] undoubtedly be best subserved by leaving him during . . . his minority among the new friends" who had "become interested in his welfare."[181] Institutions' power was less certain, however, when it came to children whose parents paid board for their support, or agreed to only a temporary surrender—in the words of the Juvenile Asylum managers, children

---

Carp, *The Sentimentalization of Adoption: A Critical Note on Viviana Zelizer's* Pricing the Priceless Child, 5 ADOPTION & CULTURE, 2017, at 7, 8-9, 20 (concluding from census data that adoption did not become broadly popular until around World War II, when it also became more central to foster care policy). Scholars have also detailed how, by law and practice, children's religious, ethnic, and racial identities shaped their eligibility for adoptive placements, with Black children excluded from most child-caring institutions and child-placing agencies. *See, e.g.*, Elizabeth D. Katz, *Fostering Faith: Religion and Inequality in the History of Child Welfare Placements*, 92 FORDHAM L. REV. 2077, 2091-92 (2024).

179. For nineteenth-century courts' treatment of custody disputes between birth parents and third parties to whom parents had voluntarily transferred their children's care without the involvement of institutions, see Hasday, note 7 above, at 312-13; and Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1076 (1979).

180. *See* NYJA 49TH REPORT, *supra* note 44, at 21. The Asylum indentured about 7,500 children, or approximately a quarter of its inmates, from 1853 to 1900. *See id.* at 67 tbl.9 (total number of children "[a]pprenticed"); *id.* at 58 tbl.1 (total number of children committed for the first time to the institution from 1853 to 1900).

181. People *ex rel.* Splain v. N.Y. Juv. Asylum, 2 N.Y. Sup. Ct. 475, 477, 479 (1874), *aff'd*, 59 N.Y. 629 (1874).

whom parents voluntarily "surrender[ed] . . . for a definite period with the certainty that on the expiration of that period they [would] be entitled to receive their children again."[182] Standard surrender agreements expressly commanded parents "not to interfere in any way in the [institution's] management . . . of [the] child," including the child's placement in a foster home.[183] But institutions' stated policy was generally to secure living parents' consent to the indenture or adoption of their children,[184] showing that institutions doubted their own legal authority to place children beyond the recall of their birth parents, without the latter's consent. Non-consensual placements continued to generate habeas challenges, which required courts to clarify the legal consequences of surrendering one's child, the authority that institutions assumed over children, and the respective rights of birth parents and foster parents.

A pair of habeas cases against the New York Juvenile Asylum—Giuseppe Billotti's suit in 1900, and Ellen Dunlap's suit in 1901—laid bare the legal and practical obstacles facing parents who sought the return of indentured children. But the cases also revealed that earlier precedents like *Splain* had not put an end to the legal controversy over institutions' power to place children

182. Appellant's Brief at 31-32, *In re* N.Y. Juv. Asylum, 64 N.E. 764 (N.Y. 1902) (on file with N.Y. St. Libr., New York Court of Appeals Records). *Compare* People *ex rel.* Stewart v. Paschal, 22 N.Y.S. 881, 882-83 (Gen. Term 1893) (overturning an orphan asylum's indenture of Mabel Stewart because her mother had not "absolute[ly]" surrendered the girl and had continued to pay for her care, and because the foster parents were "improper persons to have . . . custody"); *with* People *ex rel.* Wehle v. Weissenbach, 60 N.Y. 385, 390, 393 (Gen. Term 1875) (upholding Ella Wehle's indenture, where her father had left her in the care of New York's poor relief authorities and ceased making board payments or any "inquiry as to her condition").

183. *E.g.*, Parent Surrender Forms (1853-1861) (on file with Colum. Univ. Libr., Rare Book and Manuscript Library, New York Juvenile Asylum Records, Box 58, Folder 1). Similar pledges not to "interfere" appeared in the surrender instruments used by other charitable organizations around the country over the late nineteenth century, and when local public welfare commissioners took on the work of placing poor children in foster homes in the twentieth century, the surrender form was almost identical to the nineteenth-century model, with the added proviso that the parent "expressly authorize[d]" the commissioner "to consent to the [child's] adoption . . . without notice" to the parent. People *ex rel.* Converse v. Derrick, 261 N.Y.S. 447, 449 (Sup. Ct. 1933) (quoting a father's surrender agreement).

184. *See, e.g.*, N.Y. CATH. PROTECTORY, SEVENTEENTH ANNUAL REPORT OF THE NEW YORK CATHOLIC PROTECTORY TO THE LEGISLATURE OF THE STATE, AND TO THE COMMON COUNCIL OF THE CITY 29 (Westchester, New York Catholic Protectory 1880); Resolution, Indenturing Committee Minutes (June 18, 1857) (on file with Colum. Univ. Rare Book & Manuscript Library, New York Juvenile Asylum Records, Box 83); PROCEEDINGS OF THE FIRST CONVENTION OF MANAGERS AND SUPERINTENDENTS OF HOUSES OF REFUGE AND SCHOOLS OF REFORM IN THE UNITED STATES OF AMERICA 62 (New York 1857). *But see* Ross, *supra* note 79, at 1281 (noting ways in which institutions pressured parents to consent to their children's indenture).

beyond their parents' reach; rather, by the turn of the twentieth century, habeas petitioners were drawing ever more scrutiny to state policies that separated low-income parents and children. Billotti and Dunlap's cases arose on similar facts: Like many other parents who turned to the Juvenile Asylum in emergencies, Billotti and Dunlap signed agreements to "surrender" their children "for a period of two years"—conditional surrenders made "on account of poverty," after the deaths of their spouses.[185] In both cases, before two years expired, and over the parents' "protests," the Asylum indentured the children to farmers in Illinois.[186] The Asylum distributed the three Billotti siblings to three different couples in different towns to remain "during [their] minority."[187] After failing in their direct appeals to the Asylum authorities—and in Billotti's case, failed entreaties to the indenturing parties—Billotti and Dunlap petitioned for their children's custody in New York Supreme Court, arguing that the children's placements were "illegal" and that they were "able and willing to support" their children.[188]

Judges were divided in both cases. In both *Billotti* and *Dunlap*, the trial court ruled in the parent's favor, ordering the Juvenile Asylum to restore the children to the custody of their parent, but the appeals court reversed, in each case over a two-judge dissent.[189] In *Billotti*, the dissenters objected that the Juvenile Asylum had violated its "compact with the father" and exceeded its

185. Petition of Giuseppe Billotti, Read on Behalf of Relator at 14-15, People *ex rel.* Billotti v. N.Y. Juv. Asylum, 68 N.Y.S. 279 (App. Div. 1901) (on file with N.Y. St. Libr., New York Supreme Court Appellate Division Records); Return to Writ—Read on Behalf of Respondent at 20-21, 25, People *ex rel.* Billotti v. N.Y. Juv. Asylum, 68 N.Y.S. 279 (App. Div. 1901) (on file with N.Y. St. Libr., New York Supreme Court Appellate Division Records); People *ex rel.* Dunlap v. N.Y. Juv. Asylum, 68 N.Y.S. 656, 656-57 (App. Div. 1901); *see also* Michael J. Scanlan, *Relation of Parent and Child*, 6 ST. VINCENT DE PAUL Q., May 1901, at 133, 133 (discussing the facts in both cases).

186. Petition of Giuseppe Billotti, Read on Behalf of Relator, *supra* note 185, at 14-15; *Dunlap*, 68 N.Y.S. at 657.

187. Return to Writ—Read on Behalf of Respondent, *supra* note 185, at 21-25.

188. Petition of Giuseppe Billotti, Read on Behalf of Relator, *supra* note 185, at 14-15; *Dunlap*, 68 N.Y.S. at 657. The case record in *Dunlap* is not available, so my characterization of the petitioner's argument is drawn from the published decision. *See Dunlap*, 68 N.Y.S. at 657 ("The mother alleges that before suing out the writ she demanded the return of the child, which was refused.").

189. People *ex rel.* Villotti v. N.Y. Juv. Asylum, 66 N.Y.S. 157, 160 (Sup. Ct. 1900); *Bilotti*, 68 N.Y.S. at 281; *Dunlap*, 68 N.Y.S. at 657-58. Despite the different spelling of the petitioner's last name, the similarities in the factual record confirm that the *Villotti* decision is about Billotti. *Compare Villotti*, 66 N.Y.S. at 159 ("James, aged 14 years, was indentured to James A. Hasbrouck[;] . . . Annie, aged 10 years, was indentured July 7, 1898, to Charles Lanhead[;] . . . Rosie, aged nearly 8 years, was indentured September 10, 1898, to Joesph McIntosh"), *with* Return to Writ—Read on Behalf of Respondent, *supra* note 186, at 21-25 (noting the same).

statutory authority[190]; however, the majority credited the Asylum's claim that it lacked control over the indentured children, and thus the father's only "remedy" was to sue in Illinois[191]—not a very practical option for parents of Billotti's means. In *Dunlap*, though, the appeals court reversed and remitted for a "hearing" in New York to investigate whether the Asylum had "control" of Dunlap's daughter Nellie, and whether Dunlap was "a proper person to be intrusted with the [girl's] custody."[192] The ruling gave Dunlap an opportunity to be heard in court on her "ability" to care for Nellie and to show that "circumstances [had] changed" since surrendering her daughter, such that she was now able "to support and sustain her child."[193]

In both *Billotti* and *Dunlap*, the appeals court majorities dodged the question of whether the Juvenile Asylum acted illegally, but to the litigants and other interested observers the cases marked another important test of juvenile institutions' legal authority—in particular, a test of what rights parents retained or lost when they turned to state-funded institutions for emergency childcare. The cases also required courts to consider the nature of parental rights: Were they an impediment to the vindication of children's interests, or a necessary shield against the state's overreach?

In *Billotti*, the parties' briefs presented clashing views on that question. A ruling in Billotti's favor, the Juvenile Asylum argued, would mean endorsing an outmoded view of children as their father's "property" and retreating from the modern doctrine that prioritized children's "welfare" over their father's

190. *Billotti*, 68 N.Y.S. at 283 (Patterson, J., dissenting).

191. *Id.* at 280 (majority opinion). The Asylum's argument here—namely, that it could not be compelled to produce the children pursuant to a habeas writ because it no longer had custody and control—was its typical defense in similar cases. However, that position appeared to conflict with the Asylum's own enabling law, which declared the Asylum managers the "guardians of every child, bound or held, for service," Act of June 30, 1851, ch. 332, § 24, 1851 N.Y. Laws 633, 640. In the managers' own words, this charter imposed a "duty"—"owe[d] to [children's] parents"—to "maintain a supervision over all the children [the Asylum] indenture[d], during their minority." NYJA 18TH REPORT, *supra* note 12 (foreword by the President and Treasurer).

192. *Dunlap*, 68 N.Y.S. at 657-58.

193. *Id.* at 658. The ruling implied that Dunlap bore the burden of persuasion, but the New York Court of Appeals later made clear that when a mother sought to regain a child she had previously surrendered, "the burden rests, not . . . upon the mother to show that the child's welfare would be advanced by being returned to her, but rather upon the nonparents to prove that the mother is unfit to have her child and that the latter's well-being requires its separation from its mother." People *ex rel.* Kropp v. Shepsky, 113 N.E.2d 801, 804 (N.Y. 1953). Nevertheless, scholars observe a persistent phenomenon in family court proceedings whereby, once a child is removed to an out-of-home placement, "[t]he burden of proof shifts, in effect, if not in law, from the state to the parents," to show that the child should be returned. Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM. CT. REV. 457, 459 (2003); *see* ROBERTS, *supra* note 2, at 130.

"strict right."[194] Billotti's attorney countered that considerations of child welfare "cannot justify those who unlawfully obtain or retain [children's] custody" and warned that it would be "a monstrous doctrine to hold that . . . a parent could be deprived of his children without having an opportunity to offer any defense," that is, "without any hearing."[195] Billotti urged the court to reject the notion that poverty made him an unfit parent and to protect "the poor man" against "the breaking of family ties."[196]

Here, Billotti's brief echoed arguments by some child welfare professionals—in particular, leaders of Catholic institutions—that working-class parents should be able to rely on institutions for state-subsidized childcare without losing their children to distant foster homes.[197] In fact, both Billotti

194. Points of Defendant-Appellant at 9, 12, 16, *Billotti*, 68 N.Y.S. 279 (on file with N.Y. St. Libr., New York Supreme Court Appellate Division Records). Leading figures in the child-saving movement often credited the movement with rebutting the notion that parents had "property [rights] in their offspring," or that parents "obtain[ed] their rights by nature." *E.g.*, PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION AT THE EIGHTEENTH ANNUAL SESSION HELD IN INDIANAPOLIS, IND. 328 (Isabel C. Barrows ed., Press of Geo. H. Ellis, Bos. 1891) (statement of Charles Martindale). More specifically, the Asylum's argument here echoed recurrent complaints by the managers of institutions that parents only sought their children's return in order to get the "pecuniary value" of their services. *E.g.*, Return to Writ—Read on Behalf of Respondent, *supra* note 186, at 9. However, the Asylum's brief also implicitly acknowledged the reality that the indenturing program was not driven solely by an interest in children's welfare, but also by the desire "to save the City of New York expense," because the City's per capita payments for children's upkeep in institutions "cease[d] when the child [was] sent out West"—that is, when foster parents assumed the cost of care in exchange for the child's labor. Points of Defendant-Appellant, *supra*, at 2.

195. Brief for Relator-Respondent at 3-4, *Billotti*, 68 N.Y.S. 279 (on file with N.Y. St. Libr., New York Supreme Court Appellate Division Records). Evidently, such arguments won over the trial court judge, who, according to newspaper coverage, declared that "parents have the right to their children under the law, and . . . children are better off with their parents" in most cases. *Asylum Managers Rebuked: Unable to Produce Children on a Writ of Habeas Corpus*, N.Y. TRIB., Mar. 29, 1900, at 4 (on file with ProQuest Historical Newspapers, https://perma.cc/UW2M-54NN).

196. Brief for Relator-Respondent, *supra* note 195, at 3-4 (quoting Giffin v. Gascoigne, 47 A. 25, 26 (N.J. Ch. 1900)). In contrast, the Asylum emphasized the "easy circumstances" of the "worthy childless farmers" to whom the Billotti children were indentured. Points of Defendant-Appellant, *supra* note 195, at 2.

197. Thomas Mulry of the New York Catholic Protectory, for example, promoted institutional care as a means of preserving "the family bond" through times of need, and criticized other reformers' "institution-phobia" and over-emphasis on placing children in new homes. Thomas M. Mulry, *The Home or the Institution?*, *in* PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION AT THE TWENTY-FIFTH ANNUAL SESSION HELD IN THE CITY OF NEW YORK 362, 362-63 (Isabel C. Barrows ed., Geo. H. Ellis, Bos., 1899); *see also* MAUREEN FITZGERALD, HABITS OF COMPASSION: IRISH CATHOLIC NUNS AND THE ORIGINS OF NEW YORK'S WELFARE SYSTEM, 1830-1920, at 134 (2006) (explaining how Catholic institutions "functioned . . . as an immense revolving

footnote continued on next page

and Dunlap secured legal assistance through Catholic charitable societies, which had, over previous decades, developed a legal aid program to assist Catholic parents in recovering the custody of children who were sent to Protestant-led institutions and foster placements.[198] In the words of Thomas Kinkead, a leader of the Catholic Charities in New York, such cases presented the "question" of whether parents' "mere lack of ability to support" their children was sufficient for "the State [to] separate permanently, children from their parents"; in other words, "[w]hat have parents unable to support their children a right to ask?"[199] Kinkead's answer recalled the arguments of habeas petitioners: "[P]arents have a right to expect that [the state] will safeguard them in their just claims to their children; and unworthy of its high dignity, . . . would be the state that, in return for support, demands from worthy parents the absolute surrender of their children and the relinquishment of all claims to them."[200]

Not all judges agreed about what rights parents relinquished, or retained, when they received the "support" of state-funded institutions. In *Billotti* and *Dunlap*, New York courts confirmed that when parents conditionally surrendered their child to an institution, they retained the right to seek the child's return, but they would have to overcome significant legal and practical hurdles once the child was indentured in a new home in another state.[201] Some state courts went further in limiting parents' ability to retrieve children from foster homes, reasoning that juvenile institutions' ability to recruit unpaid foster parents required legal certainty that birth parents were "estopped" from reclaiming their children.[202]

---

door," accepting children when their "financial need [was] greatest" and "return[ing]" the children "when [the] parents' financial struggles were less urgent").

198. *See* Dorothy A. Mohler, *The Advocate Role of the St. Vincent de Paul Society*, 86 REC. AM. CATH. HIST. SOC'Y PHILA., Mar.-Dec. 1975, at 79, 79-82; Scanlan, *supra* note 185, at 133; People *ex rel.* Dunlap v. N.Y. Juv. Asylum, 68 N.Y.S. 656, 656 (App. Div. 1901) (noting Scanlan's representation of the respondent); DANIEL T. MCCOLGAN, 2 A CENTURY OF CHARITY: THE FIRST ONE HUNDRED YEARS OF THE SOCIETY OF ST. VINCENT DE PAUL IN THE UNITED STATES 365 (1951). Those legal aid efforts constituted one part of a broader strategy by Catholic groups in New York and other cities to combat native-born Protestants' domination of child welfare services. *See* CRENSON, *supra* note 8, at 70-72; FITZGERALD, *supra* note 197, at 79, 98-101.

199. PROCEEDINGS OF THE FIRST NEW YORK STATE CONFERENCE OF CHARITIES AND CORRECTION AT THE FIRST ANNUAL SESSION, *supra* note 168, at 126.

200. T. L. Kinkead, *State Supervision of Dependent Children*, *in* PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION AT THE THIRTY-FIRST ANNUAL SESSION HELD IN THE CITY OF PORTLAND, MAINE 342, 348 (Isabel C. Barrows ed., 1904).

201. *See supra* notes 190-94 and accompanying text.

202. *See, e.g.*, Lovell v. House of the Good Shepherd, 37 P. 660, 662 (Wash. 1894); Whalen v. Olmstead, 23 A. 964, 965 (Conn. 1891). In *Lovell*, the Washington Supreme Court ordered an orphanage to return a child to her mother, but the court stated that it might

footnote continued on next page

The perceived need to clarify birth parents' residual rights became more acute in the early twentieth century as asylums increasingly sought to place children in new homes, not by indenture, but by formal adoption. Around the mid-twentieth century, demand for legal certainty about foster children's adoptable status helped produce a wave of legislation across the United States, creating a new procedure for termination of parental rights separate from and prior to adoption.[203] But the seeds of that movement were laid decades earlier in conflicts over the legality of children's adoption out of institutions.[204]

In habeas litigation over the adoption of child inmates, the legal question was whether the institution's managers had authority, based on one of the statutorily specified exceptions to the general requirement of parental consent, to formalize a child's adoption without giving notice or securing consent from the child's living birth parents.[205] The deeper questions, presented more starkly in adoption cases than in custody disputes over indentured children, were the justification for the state to deprive parents of their children permanently, and what process parents were due in such cases. Two statutory rules commonly cited to waive parental consent were the provisions dispensing with consent when a parent had "abandoned" the child, and when a parent had been "judicially deprived of the custody of the child on account of cruelty or neglect."[206] New York's high court, like most states, endorsed a high

---

have found the mother "estopped" from asserting her rights if—instead of being in the care of an institution with "no soul"—the child had been placed with a "foster parent" and developed a "reciprocal affection." 37 P. at 662. In *Whalen*, Connecticut's high court upheld an institution's refusal to return a child from a foster placement to her birth mother because, in order for the placing-out program to function, a prospective foster mother "might . . . demand to know[] that even a natural parent could not have, during the time in which the state assumed to hold the guardianship of the child, a right superior to her own." 23 A. at 965.

203. For a discussion of the origins of termination-of-parental-rights laws in the context of rising foster care populations and increased adoption demand, see generally Chris Gottlieb, *The Birth of the Civil Death Penalty and the Expansion of Forced Adoptions: Reassessing the Concept of Termination of Parental Rights in Light of Its History, Purposes, and Current Efficacy*, 45 CARDOZO L. REV. 1319 (2024).

204. On reactions to parents' litigation challenging children's foster and adoptive placements, see notes 222, 251, 253 and accompanying text below.

205. *See* cases cited *infra* notes 214, 216, 217; *see, e.g.*, Act of June 25, 1873, ch. 830, 1873 N.Y. Laws 1243, 1244; *see also* Act of Apr. 17, 1896, ch. 272, 1896 N.Y. Laws 215, 226.

206. 1873 N.Y. Laws at 1244; 1896 N.Y. Laws at 226. States across the United States enacted similar exceptions, generating similar litigation. *See* EMELYN FOSTER PECK, U.S. DEP'T OF LAB., ADOPTION LAWS IN THE UNITED STATES: A SUMMARY OF THE DEVELOPMENT OF ADOPTION LEGISLATION AND SIGNIFICANT FEATURES OF ADOPTION STATUTES, WITH THE TEXT OF SELECTED LAWS 13-16 (1925). The history of adoption statutes' differential treatment of nonmarital children and fathers is beyond the scope of this Article, but it is important to note that most states' early adoption laws, including New York's, did not give unwed fathers the presumptive right to consent to their child's adoption. *See* Gottlieb & Guggenheim, *supra* note 66, at 319. Indeed, until a 2022 amendment, New

footnote continued on next page

standard for abandonment: As Judge Cardozo wrote in *In re Bistany*, waiving the consent rule on that ground required a court to find that the birth parents "manifested an intention to abandon the child forever" by "acts so unequivocal as to bear [only] one interpretation."[207]

In addition, appellate courts in New York and other states began to recognize "constitutional safeguards" around the state's power to sever parents' "natural rights," declaring that, as a matter of constitutional due process, parents must be given notice and an opportunity to be heard at the proceeding where a judge determined that their children were abandoned or otherwise adoptable without parental consent.[208] Those rules provided fairly strong protection for parents who privately arranged to leave their children with temporary caretakers; courts held that they did not give up the right to challenge their children's adoption by those caretakers.[209]

However, courts took different views on whether parents lost the right to prevent their children's adoption after they voluntarily surrendered their children to an institution, or when a juvenile court committed their children to an institution.[210] Multiple states' adoption statutes expressly waived the

---

York law conditioned unmarried fathers' right to object to their children's adoption on their payment of child support, which created special burdens for fathers of children in foster care. *See* Brian Lee, *Hochul Signs into Law Measure Granting Custody Hearings to Unwed Fathers*, 229 N.J.L.J. 3, 3 (2023).

207. 145 N.E. 70, 71 (N.Y. 1924); *see also* Helen Simpson, *The Unfit Parent: Conditions Under Which a Child May be Adopted Without the Consent of His Parent*, 39 U. DET. L.J. 347, 370 (1962) (discussing states' caselaw on abandonment).

208. *See, e.g.*, *Ex parte* Livingston, 135 N.Y.S. 328, 329, 332 (App. Div. 1912) (reversing the lower court's order that had granted a couple's adoption of a child without notice to the birth mother on the ground that the mother had "abandoned" the child); Schiltz v. Roenitz, 56 N.W. 194, 196 (Wis. 1893) (holding that the Fourteenth Amendment's Due Process Clause barred a court from granting an adoption order which deprived a birth parent of "his most sacred natural rights," without giving the parent "notice" and an "opportunity . . . to defend against the charge of abandonment"); *In re* Knott, 197 S.W. 1097, 1098 (Tenn. 1917) ("[A]doption statutes, in order to be constitutional, must be construed so as to authorize the adoption of a child by strangers only in cases where the natural parents consent to the adoption, or where the proof shows that the child has been abandoned by its natural parents, or that it is manifestly to the interest of the child that it be taken from their custody by some judicial proceeding of which they had notice.").

209. *See, e.g.*, *In re* Bistany, 145 N.E. at 71 (rejecting the notion that birth parents abandoned their children because the parents "did not forfeit their parenthood in becoming the recipients of bounty" when they allowed another couple to care for the children during the mother's illness); Nugent v. Powell, 33 P. 23, 28, 30-31 (Wyo. 1893) (upholding the constitutionality of adoption without the consent of "abandoning parents," but distinguishing temporary transfers of children's care, which did not extinguish parents' "right to reclaim" children).

210. For examples of how courts adjudicated the latter question, see notes 214-17 and accompanying text below.

parental consent rule when parents surrendered their children to an orphan asylum and failed to make board payments or visit for a specified time period; nevertheless, as a 1925 survey by the U.S. Children's Bureau indicated, there remained "considerable confusion about the legal status of children left in institutions by parents."[211] Courts also divided on whether a child's involuntary commitment to an institution sufficed to waive the parent's right to withhold consent to the child's adoption in the future—in particular, whether the child's commitment meant that parents were "judicially deprived of the custody of the child on account of cruelty or neglect" within the meaning of the adoption statute.[212]

Rose Antonopulos tested that question in New York in 1915 when she sought a writ of habeas corpus to void a relative's adoption of her three children, whom the juvenile court had committed to an institution after finding they were "without proper guardianship" and "neglected by [their] parents."[213] The appeals court upheld the adoption, concluding that when juvenile court proceedings "result[ed] in taking away the children from the control . . . of [a] delinquent parent and committing them to an institution," that parent was "'judicially deprived of custody' within [the] adoption statute," and lost the right to consent to the children's adoption.[214] Some state courts similarly held that, as long as parents had a chance to be heard at the proceeding where their children were committed, the Due Process Clause did not require notice of subsequent adoption proceedings.[215] But, in the same

211. FOSTER, *supra* note 207, at 13-14. Ultimately, New York and other states amended their statutes to specify that no parental consent to adoption was necessary when a parent legally surrendered a child "to an authorized adoption agency *for the purpose* of adoption," subject to revocation under limited circumstances. Jean P. Ritz, *Termination of Parental Rights to Free Child for Adoption*, 32 N.Y.U. L. REV. 579, 583-84 (1957) (emphasis added).

212. Act of June 25, 1873, ch. 830, § 6, 1873 N.Y. Laws 1243, 1244; *see, e.g.*, *In re* Antonopulos, 157 N.Y.S. 587, 589 (App. Div. 1916).

213. *In re* Antonopulos, 157 N.Y.S. at 588-89.

214. *Id.* at 589-90. The appeals court did not expressly address the "constitutional question" raised by Antonopulos: namely, the claim that because she was denied notice, she was deprived of her children "without due process of law." Appellant's Brief at 4, *In re Antonopulos*, 157 N.Y.S. 587 (on file with N.Y. St. Libr., New York Supreme Court Appellate Division Records); *see In re Antonopulos*, 157 N.Y.S. at 589. But the lower court found Antonopulos's case "a startling instance of what may be done under the forms of law," and urged that the problem "be called to the attention of the Legislature." Ex. No. 2—Decisions at 12-13, *In re Antonopulos*, 157 N.Y.S. 587.

215. *See, e.g.*, Egoff v. Bd. of Child.'s Guardians, 84 N.E. 151, 154-55 (Ind. 1908); Fischer v. Meader, 111 A. 503, 503-505 (N.J. 1920) (upholding a child's adoption without notice to the mother after a proceeding in which the child was "legally committed" to the state's care); *cf.* Juvenile Court Law, ch. 631, 1915 Cal. Stat. 1225, 1236-38 (enacting a new procedure for California's juvenile courts to "make a final written order . . . judicially

footnote continued on next page

period, other courts disagreed, insisting that parents must retain the right to contest their children's adoption after a neglect or dependency finding: The state could not "transform a temporary separation of the family . . . into an absolute severance of those ties" without "due process of law."[216]

Those adoption cases revealed the complex legacy left by habeas litigation over children's confinement in institutions. Over previous decades, parents had prevailed against courts and lawmakers to recognize their rights to notice and an opportunity to be heard before their children were removed from home and committed to institutions.[217] Disputes over the adoption of child inmates, however, confronted courts with the question of whether the state must afford parents any *further* process before the temporary separation of parent and child became permanent.[218] Parents urged courts to affirm, as a matter of statutory interpretation and constitutional law, their right to notice and a hearing before they forever "forfeited [their] natural rights" to custody, and at least some courts agreed.[219] Many decades later, the U.S. Supreme Court enshrined that position in constitutional due process doctrine.[220] But for parents in the early twentieth century, the law was still in flux.

Uncertainty about the legal status of children in institutions generated litigation and protests from powerful figures in the field about the "great difficulty in placing children in [new] homes" when their parents might still

---

depriving [a child's] parents of . . . custody and control," thereby enabling adoption without their consent).

216. Lacher v. Venus, 188 N.W. 613, 618 (Wis. 1922). In *Lacher*, the Wisconsin Supreme Court rejected the proposition that parents' rights were "terminated" by virtue of a juvenile court order committing their children to the State Public School, as well as the claim that due process was satisfied by parents' appearance at the commitment proceeding. *Id.* at 619 (Owen, J., dissenting). Rather, unless there was a judicial finding of abandonment, denying parents notice of the subsequent adoption proceeding violated "the constitutional rights secured to the individual in his family relationship." *Id.* at 617 (majority opinion). Wisconsin's adoption statute did not include a provision waiving the consent rights of parents "judicially deprived of custody," so the Court did not confront the *Antonopulos* question, *see id.* at 615, 617, but other state courts did. For example, Idaho's high court narrowly construed the meaning of "judicially deprived of . . . custody" in the state's adoption law to signify that parents did not lose their right to veto children's adoption after a commitment order, but only after a "final and unconditional judgment, absolutely and permanently depriving the parents of the custody of their children." Jain v. Priest, 164 P. 364, 368-369 (Idaho 1917).

217. *See supra* Part II.A.

218. *See supra* notes 215-17 and accompanying text.

219. *Ex parte* Livingston, 135 N.Y.S. 328, 332 (App. Div. 1912).

220. *See* Santosky v. Kramer, 455 U.S. 745, 753-54 (1982) (recognizing parents' right to "fundamentally fair procedures" when the state seeks to terminate their parental rights after placing their children in foster care, because parents' "fundamental liberty interest . . . in the care, custody, and management of their child does not evaporate simply because they have . . . lost temporary custody of their child to the State").

exercise the right to "reclaim them," or refuse their adoption.[221] As the next Part notes, Progressive-era habeas litigation had far-reaching consequences for twentieth-century child welfare law and policy debates—including enduring debates about whether, or to what degree, the law should promote children's placement with adoptive parents rather than their reunification with birth parents.

III. The Future of Family Preservation

Parents' litigation against juvenile institutions left a significant and lasting impact on family law by enshrining procedural and substantive limits on the state's power to disrupt, or even terminate, the parent-child relationship. Recovering the story of that litigation supplies a missing chapter in the history of family regulation and a new understanding of the roots of constitutional rights to family integrity. But from our vantage today, we can also see that habeas challenges of the late nineteenth and early twentieth centuries were only the beginning of an unfinished and ongoing struggle. As this Part argues, habeas litigation left a complicated legacy that is well worth examining today, as scholars, lawyers, and activists call for transforming the adjudication of child maltreatment cases and the provision of state assistance to families. The history of legal conflicts within the early years of the family regulation system presents several insights for contemporary efforts to reshape the system as it exists now—including efforts to heighten legal protections against family separations and terminations of parental rights, to expand state support for child-rearing, and to build the political power of families who are most harmed by the status quo.

Excavating the deep historical grounding of parents' and children's rights to family integrity supports two important undertakings by lawyers and scholars today: a defensive effort to establish the continued vitality of constitutional parental rights in the wake of *Dobbs v. Jackson Women's Health*,[222] and a more forward-looking effort to assert those rights in innovative ways to challenge the existing legal structure of family regulation. On the defensive front, it is not yet clear whether, or to what degree, the U.S. Supreme Court's

221. STATE CHARITIES AID ASS'N, FIFTH ANNUAL REPORT OF THE STATE CHARITIES AID ASSOCIATION TO THE STATE BOARD OF CHARITIES OF THE STATE OF NEW YORK 7 (New York, 1877). *Compare id.* (casting parents' efforts to reclaim children from foster placements as threats to children's "right . . . to a fair chance in life"), *with Lacher*, 188 N.W. at 618 (noting the state school's argument that preserving birth parents' notice and consent rights after their children's commitment would "seriously interfere with the obtaining of homes by adoption for such children," but concluding that such concerns could not "override constitutional guaranties [sic]").

222. 142 S. Ct. 2228 (2022).

recent changes to substantive due process analysis will undermine canonical cases on parental rights and family privacy.[223] Although the majority in *Dobbs* asserted that the decision should *not* "cast doubt on precedents that do not concern abortion,"[224] the dissenting justices—echoed by a host of legal scholars—warned that the ruling imperils "other settled freedoms involving bodily integrity, familial relationships, and procreation."[225] In any case, the project of shoring up unenumerated family rights against possible restriction requires inquiry into the "history and tradition" by which the U.S. Supreme Court determines the "contours" of those rights.[226] Thus, a richer account of nineteenth-century parental rights claims will be needed.[227]

On the offensive front, a more complete historical account of constitutional family rights—including the as yet unrecognized roots of those rights in conflicts over the emergent family regulation system—also has value. Advocates for strengthening the right to family integrity today rightly observe a long history of the government's disrespect for the rights of families at the margins.[228] However, critical accounts of American family law and family regulation must also include the story of how the law first came to recognize impoverished families' right to remain together. Documenting the origins of those formal legal protections—however thin and insufficient they proved to be, in practice—provides additional authority, from history, for asserting those rights in modern-day family court proceedings and appeals.

In particular, history may be informative for ongoing efforts to enhance the procedural rights and legal standards applicable in dependency and

223. *See* Chris Gottlieb, *The Enduring Vitality of* Meyer *and* Pierce *Post*-Dobbs, 100 NOTRE DAME L. REV. (forthcoming 2025) (manuscript at 129-30) (noting that *Dobbs* conveyed "mixed messages" about unenumerated family rights and endorsed a more restrictive approach to fundamental rights, but arguing that there should nevertheless be "broad consensus that parental rights are deeply rooted in American history and tradition . . . [and] entitled to constitutional protection"); Erwin Chemerinsky, *The Future of Substantive Due Process: What Are the Stakes?*, 76 SMU L. REV. 427, 438-39 (2023) (warning that *Dobbs* threatens existing rights, including those involving parenthood and marriage, and advocating for an ongoing "defense of substantive due process"); *see also* Ira C. Lupu, *The Centennial of* Meyer *and* Pierce *Parents' Rights, Gender-Affirming Care, and Issues in Education*, 26 J. CONTEMP. LEGAL ISSUES 147, 168, 174-76 (2025) (forecasting possibilities for more restrictive interpretations of constitutional parental rights under the reasoning adopted in *Dobbs*).

224. 142 S. Ct. at 2239.

225. *Id.* at 2319 (Breyer, Sotomayor & Kagan, JJ., dissenting); *supra* note 224.

226. Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 845 (1977) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

227. My argument is *not* that history is or should be dispositive of questions of constitutional interpretation, but rather, that history is necessarily relevant to any defense of constitutional family rights.

228. *See supra* note 6 and accompanying text.

termination cases. One strategy toward that end is "to explicitly recognize and encourage the assertion of a *child's* independent constitutional right to family integrity," as Shanta Trivedi and other legal scholars, as well as a growing body of law student scholarship, have argued.[229] Another strategy advocated by practitioners and scholars is to convince courts across the country to apply strict scrutiny to "any governmental action that threatens to separate parents and children"—a standard, grounded in the right to family integrity, that could meaningfully limit terminations of parental rights by requiring courts in those cases to determine that no viable alternatives, such as relative custody, exist.[230]

Although the U.S. Supreme Court has recognized parents' rights to preserve their relationship with their children as fundamental, it has never expressly held that children have an independent right to that relationship, nor has the Court clarified the substantive level of scrutiny applicable to the state's infringement of those rights.[231] Many state high courts and lower federal courts *have* endorsed the view that parents and children have reciprocal rights to remain together, and some have determined that severing those bonds triggers the strictest judicial scrutiny.[232] However, the challenge remains to enforce and extend those principles in the everyday practice of family courts nationwide.[233] Toward that end, this Article illuminates the deep historical

229. Trivedi, *supra* note 4, at 270-71 (emphasis added) (exploring how that right could be mobilized to effect change in the family regulation, immigration, and criminal legal systems); *see e.g.*, Cherneff, *supra* note 76, at 2511-12 (drawing connections between freedpeople's challenges to forced apprenticeship and current-day articulations of children's rights to family integrity); Note, *Tied Together, Torn Apart: Exploring "Incidental" Interferences with the Right to Family Integrity*, 137 HARV. L. REV. 2364, 2366-67 (2024) (examining how children's rights to family integrity could support wrongful death and wrongful incarceration claims); Rachel Kennedy, Comment, *A Child's Constitutional Right to Family Integrity and Counsel in Dependency Proceedings*, 72 EMORY L.J. 911, 933 (2023) (arguing that children's right to family integrity should support their right to counsel in family court).

230. Dailey & Rosenbury, *supra* note 3, at 111 (also noting that other burdens on parental rights may properly be subject to a lower standard of review); Christopher Church & Vivek Sankaran, *Applying Strict Scrutiny in Termination of Parental Rights Proceedings: Why Alabama's Jurisprudence Should Reshape Child Protection Practice*, 76 ALA. L. REV. 383, 387, 389, 414 (2024) (joining "the collection of scholars arguing for the application of strict scrutiny to reviewing [termination of parental rights] decisions," and mapping various ways for attorneys to "invo[ke] . . . this constitutional framework . . . to challenge the overuse of [termination of parental rights]").

231. On the U.S. Supreme Court dicta relevant to both questions, see Trivedi, note 4 above, at 277-82; and Church & Sankaran, note 230 above, at 385.

232. *See supra* note 94 and accompanying text; Trivedi, *supra* note 4, at 282-84; Church & Sankaran, *supra* note 230, at 393-95.

233. Indeed, notwithstanding those rulings, the notion that children's and parents' rights are "detached," MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 176 (2005), and that "only a parent and not the child [] has an interest in keeping their family intact," continues to shape modern child protection rhetoric and law, including

footnote continued on next page

grounding for children's "right to the care and nurture of [their] parents" as the basis for heightened judicial oversight of family separations.[234]

In addition, the history of habeas litigation suggests that rights claims in court may also become a catalyst for legislative and policy reforms that expand state assistance to families in need. Here, history holds out both hopeful guidance and notes of caution. Nineteenth-century habeas challenges contributed to a major shift among Progressive-era child welfare reformers and state officials in favor of family preservation policies—most notably, public cash assistance in the form of "mothers' pensions"[235]—that were intended to prevent children's removal from their parents and confinement in institutions "for reasons of poverty" alone.[236] Habeas petitioners spotlighted how the sweeping child protection laws of the nineteenth century had extended the state's power to separate children from parents on grounds tailored to poverty, and they pushed courts to recognize that "even . . . poor children and their parents" must have "rights under the law."[237] Some of the most influential advocates for mothers' pensions laws were those who witnessed firsthand the problem of sending children to institutions because of parents' privation: juvenile court judges, and, in New York, State Senator John Ahearn, who proposed a mothers' aid bill in 1897 to prevent the painful family separations that he had observed as a Manhattan court clerk in the 1880s.[238]

---

federal incentives for terminations of parental rights, Shanta Trivedi, *The Adoption and Safe Families Act is Not Worth Saving: The Case for Repeal*, 61 FAM. CT. REV. 315, 320 (2023).

234. State *ex rel.* Neider v. Reuff, 2 S.E. 801, 806 (W. Va. 1887).

235. Mark H. Leff, *Consensus for Reform: The Mothers'-Pension Movement in the Progressive Era*, 47 SOC. SERV. REV. 397, 397-400 (1973).

236. PROCEEDINGS OF THE CONFERENCE ON THE CARE OF DEPENDENT CHILDREN, S. DOC. NO. 60-721, at 190, 192-93 (1909) (declaring, in a resolution issued at the first White House Conference on the Care of Dependent Children in 1909, that "[e]xcept in unusual circumstances, the home should not be broken up for reasons of poverty, but only for considerations of inefficiency or immorality," and "aid [should be] given as may be necessary to maintain suitable homes for the rearing of . . . children"). Judge Julian Mack argued that "poverty alone" should not "give anybody the right to deprive [a] child of that which it needs most in life—its own parents' love and care and sympathy," nor "deprive the parent of that which he or she needs most in life, the love and the support of the child, the reciprocal relations between the parent and the child." *Id.* at 51.

237. People *ex rel.* Aikins v. Superintendent, 67 N.Y.S. 674, 679 (Sup. Ct. 1900).

238. *See The Work of a State Board of Charities*, 8 CHARITIES REV. 426, 428-29 (1898) (describing Ahearn's proposal); Letter from John Ahearn, Sen., N.Y. State Senate, to William Strong, Mayor, N.Y.C. (Apr. 18, 1897) (on file with N.Y.C. Mun. Archives, Early Mayor Records) (explaining to New York's mayor the "reasons" for the 1897 bill, including Ahearn's experience "as clerk of the Essex Market Police Court," which "convinc[ed him] that the existing system of dealing with poor children . . . was radically wrong"); Leff, *supra* note 235, at 400, 405 (describing juvenile court judges' support for mothers' pensions in New York and other states).

The initial proposal failed because of private charities' opposition,[239] but in 1915, New York joined most other states in providing eligible poor mothers with cash allowances in lieu of paying institutions the same sums to maintain their children.[240]

Decades of legal conflict helped to shift the trajectory of American welfare policy by undermining the legitimacy of family separation as a response to child poverty—but that shift only went so far. In practice, because of restrictive and racially discriminatory implementation, mothers' aid programs and subsequent federal welfare laws did not fulfill the promise of "preventing the breaking up" of families.[241] Today, the United States remains exceptional among wealthy countries in both the thinness of government supports for parenting and the high rates at which children are temporarily and permanently removed from their parents' care.[242] Seeking to change that dynamic, many have argued that poor families should have an affirmative legal entitlement to greater levels of state assistance in order to avert children's removal from their parents and promote family reunification—though

239. STATE CHARITIES AID ASS'N, TWENTY-SEVENTH ANNUAL REPORT OF THE STATE CHARITIES AID ASSOCIATION TO THE STATE BOARD OF CHARITIES OF THE STATE OF NEW YORK 83 (N.Y., 1899) (discussing the "successful" opposition to early bills by New York's "organized charities").

240. *See* Act of Apr. 7, 1915, ch. 228, § 153, 1915 N.Y. Laws 690, 692-93; Leff, *supra* note 235, at 397 (noting that the adoption of mothers' pensions "swept forty states in less than a decade").

241. 1 ANNUAL REPORT OF THE STATE BOARD OF CHARITIES FOR THE YEAR 1916, at 146-47 (1917) (stating that widows' pensions were designed to "prevent[] the breaking up of the family and the placing of children in institutions whether for dependent children because of the mother's poverty or for delinquent children because she has been unable to keep them under her protection and oversight"). For analysis of the mothers' pensions movement, the laws' significance in laying the ground for New Deal federal welfare programs, and the laws' severe limitations because of meager levels of support, restrictive eligibility criteria, and discriminatory implementation to exclude Black mothers, see generally Hasday, note 7 above, at 347-56; and LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935 (1994). For discussion of how the "nineteenth-century model of family preservation" endured alongside the newer model of mothers' pensions—because parents, particularly single fathers, continued to rely on institutions for childcare—see David S. Tanenhaus, *Growing Up Dependent: Family Preservation in Early Twentieth-Century Chicago*, 19 LAW & HIST. REV. 547, 569-572 (2001).

242. *See generally* Maxine Eichner, *Slow to Support Families, Quick to Remove Children: US Exceptionalism in the Role of Government in Children's Lives*, *in* THE STATE'S POWERS TO INTERVENE IN FAMILY LIFE (Arkadiusz Wudarski, ed., forthcoming) (arguing that "the United States comes closer than any other wealthy country to a system of pure free-market policy" that is centered on the idea that "families do better when they negotiate what they need privately through markets").

perspectives differ on whether that entitlement is or should be grounded in constitutional rights, federal legislation, or state law.[243]

In addition to proposals for alleviating poverty, scholars and advocates have argued that, at minimum, lawmakers should revise statutory definitions of child maltreatment in order to limit the law's tendency to punish parents for poverty.[244] Many states, including New York, have limited the substantive definition of child neglect to exclude situations in which parents are simply not financially "able" to provide for children's needs.[245] That statutory mandate to consider parents' financial hardship, often described as a "poverty defense," has constrained but not ended states' practice of removing children from parents because of circumstances caused by poverty.[246]

---

243. *See, e.g.*, Josh Gupta-Kagan, *Distinguishing Family Poverty from Child Neglect*, 109 IOWA L. REV. 1541, 1602-03 (2024) (proposing that Congress enact a "significantly invigorated reasonable efforts requirement to provide the legal structure for a state obligation to provide greater material supports" to families facing separation or seeking reunification); Jessica E. Marcus, *The Neglectful* Parens Patriae*: Using Child Protective Laws to Defend the Safety Net*, 30 N.Y.U. REV. L. & SOC. CHANGE 255, 281-83 (2006) (tracing how state courts, interpreting state law, may impose affirmative obligations on CPS agencies to provide greater cash or in-kind assistance to families); Kay P. Kindred, *God Bless the Child: Poor Children,* Parens Patriae*, and a State Obligation to Provide Assistance*, 57 OHIO ST. L.J. 519, 521 (1996) (arguing that the "right to family integrity, when coupled with the state's power as *parens patriae*, creates an affirmative obligation on the state to provide income assistance to impoverished families when necessary to protect the welfare of the children and maintain the family intact," but acknowledging obstacles posed by current constitutional doctrine).

244. *See* Clare Huntington, *The Restatement of the Law, Children and the Law: A Blueprint for Reforming the Child Welfare System*, 60 FAM. CT. REV. 32, 37 (2022).

245. *See* N.Y. Fam. Ct. Act § 1012(f)(i)(A) (McKinney 2025) (defining "neglected child" to include one endangered by a parent's failure to provide adequate care "though financially able to do so or offered financial or other reasonable means to do so"). Modern statutes have also eliminated the original juvenile court's jurisdiction over "destitute" children, which, as early critics lamented, made poverty a "reason for judicial interference with the family." BERNARD FLEXNER & ROGER N. BALDWIN, JUVENILE COURTS AND PROBATION, at x-xi (1914). New York lawmakers made both of those changes under the state's 1922 juvenile court law. *See* Act of Apr.10, 1922, ch. 547, sec. 2, § 4, 1922 N.Y. Laws 1259, 1261 (revising the definition of "neglected child"); Memorandum from Fred L. Merrit, Clerk, Westchester Cnty. Bd. of Supervisors 10 (Apr. 4, 1922) (on file with N.Y. State Libr., Bill Jacket Collection) (discussing how the 1922 law would eliminate the court's jurisdiction to intervene in the families of children who are "merely destitute"). That timing suggests that the legislature may have been influenced by habeas petitioners' complaints over previous decades, but the legislative history does not provide clear evidence.

246. *See* Michele Estrin Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495, 523-29 (2013) (explaining how the "defense" operates in neglect and termination statutes, typically, by requiring states to show that parents' failure to exercise a minimum degree of care or failure to maintain the parent-child relationship was not due merely to poverty); Josh Gupta-Kagan, *Nudging Improvements to the Family Regulation System*, 91 U. CHI. L. REV. 469, 484 (2024) (noting with approval that about half the states, as well as the

footnote continued on next page

Today, as Josh Gupta-Kagan has argued, "[t]ools to better distinguish poverty from neglect are urgently needed."[247] Recent years have witnessed a push to narrow the breadth and indeterminacy of child maltreatment statutes in other ways: for example, the more stringent definition of physical neglect adopted in the new Restatement of Children and the Law and legislation in several states limiting liability for inadequate supervision of children, sometimes called "free range parent" laws.[248] Those more specific definitions of child neglect can and should reduce unwarranted family separations—*if*, as parents and judges recognized more than a century ago, courts "carefully scrutinize[]" whether neglect allegations meet statutory requirements.[249]

However, history may offer a further warning about the risks of counter-reaction against litigation and legal reforms that limit the state's power to remove children from their parents and withhold their return. At the turn of the twentieth century, prominent figures in the child welfare field argued for legislation to cut off parents' "right to reclaim" their children from institutions—the core right affirmed in habeas cases like *Knowack*—in order to secure children's swift transfer to foster and adoptive homes.[250] In New York and elsewhere, habeas petitioners' successes in court fueled complaints that the "judiciary" had come to "guard so rigidly the sacred rights of parents"[251]—or as

---

Restatement of Children and the Law, provide some version of the "poverty defense," and analyzing why those provisions are nevertheless insufficient).

247. Gupta-Kagan, *supra* note 243, at 1544.

248. Cynthia Godsoe, *Racing and Erasing Parental Rights*, 104 B.U. L. REV. 2061, 2095-97 (2024); *see* Huntington, *supra* note 244, at 36-37.

249. People *ex rel.* Van Riper v. N.Y. Cath. Protectory, 13 N.E. 435, 436-377 (N.Y. 1887); *see also* People *ex rel.* Aikins v. Superintendent, 67 N.Y.S. 674, 679 (Sup. Ct. 1900) (stating that New York's child protection statute was not enacted to remove children based on "temporary emergencies" faced by "poor people," but rather "to provide against culpable neglect").

250. JOSEPHINE SHAW LOWELL, PUBLIC RELIEF AND PRIVATE CHARITY 74 (N.Y. & London, G..P Putnam's Sons 1884); *see also* Josephine Shaw Lowell, *Considerations Upon a Better System of Public Charities and Correction for Cities*, *in* PROCEEDINGS OF THE EIGHTH ANNUAL CONFERENCE OF CHARITIES AND CORRECTION 168, 178 (F. B. Sanborn ed., Bos., A. Willliams & Co. 1881) (proposing a new government agency to "find permanent places" for children who remained in city-funded care for three years, on the view that parents of such children should not have "the right to reclaim [them] at any moment"); Josephine Shaw Lowell, *Out-Door Relief*, *in* ANNUAL REPORT OF THE STATE BOARD OF CHARITIES FOR THE YEAR 1890, at 207, 212 (Albany, James B. Lyon, State Printer 1891) (advocating for legislation to specify that the parent of any child supported in an institution at public expense would be automatically "deprive[d] . . . of his rights over his child," and "have no voice in regard to [the child's] present care or future fate"). For other arguments that birth parents' rights hindered or delayed foster and adoptive placements, see sources cited in note 257 below.

251. WILLIAM H. SLINGERLAND, RUSSELL SAGE FOUND., CHILD WELFARE WORK IN CALIFORNIA: A STUDY OF AGENCIES AND INSTITUTIONS 209-10 (1915) (quoting protests by California SPCC officials that courts were "over-weighing the alleged rights of parents

footnote continued on next page

Elbridge Gerry put it, "mistaken views of so-called parental rights"—that it frustrated efforts to place needy children in new homes.[252] Reformatories and orphanages have long since declined as the state's primary method of caring for dependent children, but disagreement over parents' "rights to reclaim" their children from out-of-home care has not ended.[253] Rather, demands for legislative reform to restrict those rights and accelerate children's path to adoption recurred and gained force over the twentieth century.

Multiple factors contributed to states' enactment of termination-of-parental-rights statutes in the mid-twentieth century and Congress's 1997 enactment of the Adoption and Safe Families Act (ASFA), which sharply increased rates of termination to about seventy thousand per year.[254] But one throughline underlying those legal reforms has been the perception that birth parents' rights are a hindrance to children's prospects because they cloud children's availability for adoption.[255] The history of parents' habeas litigation helps us understand how that perception first arose and became entrenched in the law and rhetoric of child protection—even though it has never perfectly captured reality.[256]

---

against the actual needs and rights of the children" by declining to "set . . . children free from unworthy parents, or protect[] as they should worthy foster parents," making it difficult for institutions and "placing-out agencies" to secure foster and adoptive placements).

252. N.Y. SOC'Y FOR THE PREVENTION OF CRUELTY TO CHILD., *supra* note 69, at 8-9, 11 (setting out Gerry's complaints about children's premature release from institutions to their relatives through writs of habeas corpus).

253. On the eventual decline of institutional care beginning in the 1930s, see generally E. Wayne Carp, *Orphanages vs. Adoption: The Triumph of Biological Kinship, 1800-1933*, *in* WITH US ALWAYS: A HISTORY OF PRIVATE CHARITY AND PUBLIC WELFARE 123, 123-44 (Donald T. Critchlow & Charles H. Parker eds., 1998).

254. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. § 1305); Gottlieb, *supra* note 203, at 1321 (discussing how ASFA's incentives led to more than two million terminations of parental rights since the law's enactment); *see id.* at 1364-65 (discussing New York and other states' adoption of termination-of-parental-rights statutes).

255. That perception became a central, explicit part of the rationale for enacting termination-of-parental-rights statutes and, later, ASFA. *See* Gottlieb, *supra* note 203, at 1365; Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1190-91 (1999). Similar concerns influenced the U.S. Supreme Court's decision foreclosing parents' use of the federal habeas statute to challenge their children's removal. *See* Lehman *ex rel.* Lehman v. Lycoming Cnty. Child.'s Servs. Agency, 458 U.S. 502, 513-14, 514 n.18 (1982).

256. Although parents faced various hurdles in asserting the right to reclaim indentured and adopted children, *see supra* Part II.C, advocates for placing children in new homes often described birth parents' right to reclaim children—or at least litigate the issue—as a latent threat, *see supra* notes 222, 251, and 253 and accompanying text. For broader analysis of the perceived "danger of birth mothers" as "an underlying theme" in child

footnote continued on next page

The question of whether and when "the State [may] separate permanently, children from their parents"—as it was framed at a conference of New York's child-caring institutions in 1900—has been heavily contested from the beginning of the family regulation system.[257] Today, there remains good-faith disagreement about the degree to which the law should promote adoption, but there is a growing recognition that the current termination-of-parental-rights procedure, which makes children "legal orphans" in advance of their adoption, is not the only, nor the most rational, means by which the state might pursue the goal of securing safe and stable homes for children.[258] History provides some clarity about the choices and assumptions that have, over time, made terminations of parental rights—or the threat of terminating rights—so central to contemporary child welfare law. From that vantage, it becomes easier to see that different choices are possible, and indeed, necessary, in order to vindicate parents' and children's rights to family integrity.

Ultimately, neither procedural rights nor meager financial assistance have sufficed to fulfill the promise of family preservation.[259] The history of parents' legal struggles in the late nineteenth and early twentieth centuries recounted in this Article shows that those cases left an important, lasting imprint on the law, but the possibilities for legal and policy transformation were limited by low-income families' lack of political clout. The past illuminates both the value and limitations of litigation and lawyer-led reform, suggesting that more radical change in the current day will also depend on building the political power of parents and children who are most exposed to the harms of family policing.[260]

---

welfare and adoption history, see generally Naomi Cahn, *Birthing Relationships*, 17 WIS. WOMEN'S L.J. 163 (2002).

257. PROCEEDINGS OF THE NEW YORK STATE CONFERENCE OF CHARITIES AND CORRECTION AT THE FIRST ANNUAL SESSION, *supra* note 168, at 126; *see also id.*, at 83 (discussion of whether a law permitting such separation "would be constitutional").

258. For examples of criticisms of ASFA and the overuse of terminations relative to other permanency options for children, see generally Trivedi, *supra* note 233; Josh Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. JUV. L. & POL'Y 1 (2015); and Church & Sankaran, *supra* note 231. For a proposed alternative legal mechanism for adjudicating children's availability for adoption, see generally Chris Gottlieb, *A Path to Eliminating the Civil Death Penalty: Unbundling and Transferring Parental Rights*, 19 HARV. L. & POL'Y REV. 43 (2024).

259. *See* Gupta-Kagan, *supra* note 243, at 1602 (describing how—despite reforms meant to limit poverty-based separations—the "present legal system deems parents neglectful and separates families when some anti-poverty interventions would have prevented that separation").

260. On shifting power, see ROBERTS, *supra* note 2, at 277-83; SPINAK, *supra* note 2, at 284-87; and Washington, *supra* note 2, at 1583-87.

Conclusion

Though far removed in time from contemporary debates about reforming or dismantling the family regulation system and the use or misuse of parental rights claims, parents' habeas litigation deserves attention in those debates. The history chronicled in this Article elucidates the origins of both core features of our modern system and persistent conflicts over the state's legal authority and obligations in the realm of child welfare. Thus, history holds lessons for the important endeavor by lawyers, scholars, and organizers today to reshape the body of law and legal institutions that govern vulnerable families. Viewed in hindsight, habeas litigation around the turn of the twentieth century marked a crucial phase of a still-unfinished struggle to achieve equality and fairness in the legal treatment of parenthood—a struggle that confronts us with the question of what the state can demand from parents, and what parents have "a right to ask" of the state.[261]

261. PROCEEDINGS OF THE NEW YORK STATE CONFERENCE OF CHARITIES AND CORRECTION AT THE FIRST ANNUAL SESSION, *supra* note 168, at 126.