Reforming Child Protection in Response to the Catholic Church Child Sexual Abuse Scandal

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I. INTRODUCTION

The University of Florida Center on Children and the Law inaugural conference: “Defending Childhood: Developing a Child-Centered Law and Policy Agenda” was held December 2001. For many of us, it was our first time traveling after the terrorist attacks on the World Trade Center just three months before. Discussion about September 11th and the changes in our lives caused by the events of that day was constant at the conference and continues today. We all recognized it as an event that would mark our lives — a turning point as we think about international and domestic security.

In January 2002, one month after the conference, a scandal began to unfold in the Catholic Church involving priests sexually abusing children, mostly adolescent boys. The parameters of that scandal continued to unfold as news broke about the sexual abuse of nuns. The court system of

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California began to allow tort claims against the church caps under a one-year waiver of the statute of limitations, and information on the extent of the abuse and the cover-up by bishops continued to seep out of Boston and seemingly every diocese in the country. Reflecting back on the conference and the events that are shaping our times, I hypothesize that these are events that we will mark as a turning point when we think of child abuse and the law.

As our country embraces law enforcement heroes and homeland security with patriotic vigor, the government on every level is poised to move into our private lives in the name of security. Concurrently, many states are reviewing their child protection, criminal, and tort laws to comprehend how widespread abuse of children could be hidden in dioceses throughout the country and now be outside the reach of the law. Through the child welfare system, public agencies have long intervened in families in the name of the protection of children. The “child welfare system” is a broad term encompassing a range of child-helping systems designed to address abuse and neglect in many forms. The child protection system is a component of the child welfare system. The system includes the reporting, investigation, and record-keeping of abuse and neglect, and is at the front end of the child welfare system.

As states contemplate an expansion of their child protection laws to include perpetrators from outside the family/household/caretaker categories of the child protection system, a new wave of investigative authority may sweep into our child protection system. How are we to think about such an expansion of an already overburdened system? Is an expansion of the investigative powers of the child protection and law enforcement systems the best way to protect the security of children and thereby defend childhood?

At the conference, I spoke about the tensions between empowerment and protection among children, parents, and state forums in the domestic violence, child protection, and status offender systems. Such tensions are heightened as we contemplate expanding the mandatory reporting laws now in place. Mandatory reporting laws are an integral aspect of the child protection system, requiring designated individuals under certain circumstances to report child abuse or neglect to authorities. Any expansion of reporting laws — to child protection or to law enforcement — must be properly targeted to address the needs of the child, family, and community if we are truly to stand behind the banner of defending childhood. If they unnecessarily disrupt the parent-child relationship instead of addressing the source of the abuse, child protection services will be repeating mistakes made in the initial years of collaborations with domestic violence systems. Such mistakes punish parents (often mothers), and are not carefully
implemented to protect children. The interrelationship between law
enforcement and child welfare systems in collaborating to address violence
against children must recognize the boundaries while utilizing the resources
of both systems.

This Article is composed of this introduction and three other parts. Part
II draws on previous writing and provides background to the current wave
of reform by describing two previous reform periods in the development of
the child protection system. In both periods, there was agitation for reform
at a variety of levels and then the culmination of the reform era in a series
of sweeping legislative initiatives. The first reform period, from 1961-1974,
was precipitated by the medical community's recognition of the widespread
physical abuse of children. Advocacy by the medical community led to the
passage of state mandatory reporting laws in the 1960s and culminated in
the passage of the federal Child Abuse Prevention and Treatment Act of
1974. The second reform period lasted from the mid-1980s through the
mid-1990s. Its genesis was in the frenzied attention given to cases of
egregious parental child abuse. A series of tragic deaths of children
receiving family preservation services led to widespread calls for reform.
During this period, there was a move away from family preservation in the
late 1980s and early 1990s culminating in passage of the federal Adoption

Part II then discusses the current sexual abuse scandal in the Catholic
Church and makes the argument that these widely publicized revelations
represent another period of agitation, which will bring about a new era of
reform in the child protection system. This time, the culmination will be an
expansion of the mandatory reporting laws to require more citizens to act
as mandated reporters and, more importantly, to require mandated
reporting of child abuse committed by perpetrators outside of the child's

1. Susan Vivian Mangold, Transgressing the Border Between Protection and
Empowerment For Domestic Violence Victims and Older Children: Empowerment as Protection
in the Foster Care System, 36 NEW ENG. L. REV. 69 (2001); Susan Vivian Mangold, Extending
Non-Exclusive Parenting and the Right to Protection for Older Foster Children: Creating Third
Options in Permanency Planning, 48 BUFF. L. REV. 835 (2000), reprinted in CHILDREN'S LAW
INSTITUTE: LEGAL AND SOCIAL WELFARE ISSUES OF GIRLS AND ADOLESCENTS 7-53 (2001); Susan
Vivian Mangold, Welfare Reform and the Juvenile Courts: Protection, Privatization and Profit
in the Foster Care System, 60 OHIO ST. L.J. 1295 (1999); Susan Vivian Mangold, Challenging the
Parent-Child-State Triangle in Public Family Law: The Importance of Private Providers in the


3. Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (codified as
household or caretaker circle. By moving beyond the realm of family violence, the mandatory reporting scheme created to address only intrafamilial violence will be transformed into a clearinghouse to receive reports and feed information to both child protection and law enforcement.

Parts III and IV consider the collaborative ramifications of the new mandatory reporting systems predicted in Part II. Multisystem collaboration is not new to child welfare and in responding to child abuse, domestic violence, and status offenses, law enforcement and child protection have begun to collaborate with mixed results. Tensions emerge between the protection rights of certain individuals impacted by the abuse, violence, or offense, and the rights of others. Part III describes the rights involved and the tensions that emanate from the enforcement of those rights. Finally, Part IV proposes reform legislation and practice that adopts a collaborative approach for law enforcement and child welfare law, balancing the protection rights and interests of children with the empowerment rights of parents and alleged perpetrators.

II. PERIODS OF REFORM OF THE CHILD WELFARE SYSTEM

A. Reforming the Child Welfare System: Establishment of the Mandatory Reporting System

A seminal event in the history of state intervention into the exclusive, private realm of the family in order to protect children from child abuse and neglect was the 1962 publication of *Battered Child Syndrome*, by Dr. Henry Kempe.\(^4\) Kempe was a pediatrician who worked with pediatricians and radiologists to identify the causes of suspicious injuries to children.\(^5\) With the new knowledge Dr. Kempe helped provide about injuries that could only be caused by abusive behavior, states moved to codify responses to protect children. Between 1963 and 1967, every state passed a statute requiring some form of reporting of incidents of child abuse. Such reporting is an initial trigger for state intervention into the exclusive parent-child relationship. Reporting triggers the state response based on the child’s right to protection from abuse and neglect.

In 1973, the Senate Subcommittee on Children and Youth of the Committee on Labor and Public Welfare held hearings in Washington, and at hospitals that treat children around the country, on the needs of abused

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and neglected children.\textsuperscript{6} Bills were introduced in both the House and Senate, but the Senate subcommittee chaired by Walter Mondale held the main hearings. In a letter of transmittal to the Senate Committee Chairman, Mondale explained the need for legislation:

The Subcommittee held hearings in Washington, New York, Denver and Los Angeles. Members of the Subcommittee personally visited victims of child abuse in hospitals and observed firsthand the operations of multidisciplinary child abuse teams in several cities. We were appalled to learn how many abused and neglected children there are and how little is being done to help them and their troubled families. Statistics vary widely, but there is little question that thousands and thousands of youngsters suffer severe physical and emotional abuse every year. This is a problem that cuts across social and economic barriers. It occurs in all kinds of neighborhoods. Yet there was no focused Federal effort to deal with the problem. Nowhere in the Federal government could we find one official assigned full time to the prevention, identification and treatment of child abuse and neglect.\textsuperscript{7}

One year later in 1974, the Child Abuse Prevention and Treatment Act (CAPTA) was passed.\textsuperscript{8} CAPTA initiated a federal response to child abuse based on the right of a child to state protection when there is evidence of parental harm. It formulated the mandates for the development of a bureaucracy within the Department of Health, Education, and Welfare (HEW) (now called the Department of Health and Human Services) to gather information and expertise on the problem of child abuse, a largely undocumented subject at the time.\textsuperscript{9} It also provided funding through HEW for state demonstration projects that were broadly defined in terms of federal directives for their operation.\textsuperscript{10} Most important for the subsequent history of the federal/state relationship addressing child abuse, CAPTA contained provisions for a grant program.\textsuperscript{11} Unlike the demonstration projects, eligibility for grants required states to follow a series of mandates

\textsuperscript{7} Id. at 2 (letter of Walter Mondale to Hon. Harrison A. Williams).
\textsuperscript{8} CAPTA, supra note 2.
\textsuperscript{9} See Mondale Hearings, supra note 6, Letter of Transmittal.
\textsuperscript{10} See CAPTA, supra note 2, §§ 5106a(a) & (b).
\textsuperscript{11} See id.
in order to receive the funds.\textsuperscript{12} Those provisions concerned reporting, investigating, confidentiality of record-keeping, and law enforcement cooperation.\textsuperscript{13} They constituted the earliest version of the more complete and complicated federal-to-state reimbursement system that funds state child protection systems today.

The key state response to child abuse became the mandatory reporting, investigating, and record-keeping system that is commonly known as the child protective services system. While all states had some form of reporting law in place before CAPTA, few met the more rigorous CAPTA requirements before 1974. CAPTA, in effect, maintained continuing attention on reporting laws, confidentiality, and investigation. It established a minimum state response, outlining when exclusive parental control could be questioned and temporarily interrupted, and which children had a plausible right to protection.

B. Reforming the Child Welfare System: Emphasis on Safety As Opposed to Family Preservation

Following CAPTA, reports of child abuse and neglect put pressure on public authorities to develop a spectrum of care for abused or neglected children. Concerns that children were being unnecessarily placed outside their homes, and were languishing without permanency in foster care, led to passage of the Adoption Assistance and Child Welfare Act of 1980 (AACWA).\textsuperscript{14} It was hoped that temporary supportive services would enable parents to resume their exclusive authority and safely care for their children. AACWA mandated that states provide a plan to the federal government for implementing the requirement that the state-based child welfare agency make reasonable efforts to prevent placement of children in foster care, and achieve reunification for children temporarily so placed.\textsuperscript{15} The law also provided for adoption subsidies to encourage the adoption of children out of foster care who could not be reunified.\textsuperscript{16} States codified the reasonable efforts and adoption language in their laws.\textsuperscript{17} If states failed to meet the mandates of the law to plan for resumed or new exclusive parenting

\textsuperscript{12} See id.
\textsuperscript{13} See id. § 4(b)(3) (referencing Parts A and B of Title IV of the Social Security Act, which contained provisions for Aid to Families with Dependent Children and Medicaid).
\textsuperscript{15} Id.
\textsuperscript{17} See, e.g., CAL. WELF. & INST. CODE § 366 (West 1999), MISS. CODE ANN. § 43-15-13 (1999).
REFORMING CHILD PROTECTION IN RESPONSE TO THE CATHOLIC CHURCH

relationships, they would risk losing eligibility for matching federal reimbursement for their foster care expenses.  

As a consequence of the fiscal incentives offered in AACWA, family preservation efforts to reunify families flourished, and the number of children in foster care began to decrease. Unnecessary foster care placement, and foster care drift, were diminished by requiring case planning, case reviews, reunification efforts, and subsidies for adoptions of children leaving foster care. The law required that whenever the determination to place a child in foster care was pending, the court had to make a finding as to whether reasonable efforts had been made to prevent the placement. It was hoped that this procedural requirement would reduce the unnecessary placement of children in foster care when services to their families could maintain them safely at home.

Following passage of the AACWA, criticism began to mount over the perceived emphasis on family preservation and reunification. While the law had also provided for adoption subsidies to encourage and support the adoption of children out of foster care, the emphasis on family preservation was criticized for fostering a climate where children were left in, and sometimes returned to, unsafe homes. The deaths of several children when public child welfare agencies knew of the dangers posed by the parents raised the urgency of reform efforts.

The Adoption and Safe Families Act of 1997 (ASFA) was a response to the outcry for both swifter removal from abusive homes, and for expedited adoptions. ASFA was passed to clarify that the health and safety of the child should always be paramount, and to detail circumstances under which reasonable efforts did not have to be pursued. The new law provides exceptions to the reasonable efforts requirement introduced in the AACWA when aggravated circumstances are present. ASFA also retreats from the goal of reunification in certain cases where aggravated circumstances or felony convictions exist. The section providing for the exceptions appears uncontroversial at first glance, citing torture, death of another child, or sexual abuse as examples; but a broader exception comes from the aggravated circumstances catch-all provision, which is left to the states to

20. AACWA, supra note 14.
23. See id.
24. ASFA, supra note 3.
define. In a shift away from reunification and toward adoption, ASFA also required that child welfare agencies file a petition to terminate parental rights for children in foster care for fifteen of the last twenty-two months. By setting a deadline for filing the petition to terminate parental rights, ASFA limits the goal of family reunification.

C. Reforming the Child Welfare System: Expanding Reporting Requirements and Collaboration Between Child Protection and Law Enforcement

Since 2002, a series of cases of child sexual abuse by Roman Catholic priests and bishops has been revealed and reported in the press. These revelations have been of two types: first, information has been pouring out about the sexual abuse of adolescent boys by priests; second, details about what bishops knew about abusive priests in their respective dioceses have been revealed. Collectively, this Article will refer to the revelations as the Catholic Church child sexual abuse scandal. There are reports from all over the country of instances of abuse, repeated relocation of accused priests, and the failure of bishops or others in the church hierarchy to alert public authorities in appropriate circumstances. The bishops met in June 2002 and again in November 2002, to draft policies to deal with the problem of child sexual abuse by priests.

These reports have highlighted gaps in criminal and child protection laws. The laws make it difficult, and in many instances impossible, to hold priests or their superiors accountable. The criminal laws have statutes of limitation that make it impossible to prosecute many crimes of sexual abuse because victims often do not come forward until they reach adulthood and the statute of limitations has passed. Furthermore, the child protection laws only require the reporting of abuse perpetrated by family or household

26. Id.
27. See Naomi R. Cahn, Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption, 60 OHIO ST. L.J. 1189 (1999) (criticizing this shift in emphasis).
28. Laurie Goodstein, Trail of Pain in Church Crisis Leads to Nearly Every Diocese, N.Y. TIMES, Jan. 12, 2003, at 1. Goodstein states that “[u]sing information from court records, news reports, church documents and interviews, the survey found accusations of abuses in all but 16 of the 177 Latin Rite dioceses in the United States.” Id. at 1.
members. This means that adding the positions of clergy or clergy administrator to the list of persons mandated to report abuse would only require clergy to report abuse by family or household members, and would not reach the problem of abuse by clergy. To include abuse by clergy in the mandated reporting laws would require a much greater expansion of the reporting laws to encompass abuse perpetrated by those outside of the family structure, and outside the current authority of the public child protective agency.

As previously discussed, the child protective services system was developed to address the hidden problem of child abuse by parents and other household members by requiring the mandated reporting of abuse by certain professionals who work with children. The ultimate remedy of the child protective system is the removal of the child, as the system has no criminal prosecutorial authority. State laws are explicit as to when reports made to child protection can be shared with law enforcement. While there are emerging trends in responding to domestic violence and status offender cases when law enforcement and child protection work cooperatively, there has not been a change to the basic structure of the state mandatory reporting laws that focus upon reports of family violence.

There will likely be a widespread expansion of the mandatory reporting laws as a result of the Catholic Church child sexual abuse scandal. To address the problem of hidden abuse by priests, states are examining their criminal laws, and their civil child protection laws, to discover what gaps can be filled. Abuse by teachers, daycare providers, clergy from other religions, and others in authoritative positions and private settings are examples of similar problem areas.

The year 2002 and upcoming years will constitute a period of agitation as cases continue to come to light and states experiment with a variety of legislative remedies to address the problem of child sexual abuse by

The culmination of this ferment will likely be an expansion of the reporting function of the child protection system. As will be discussed in Part IV, the investigative and record-keeping functions of the child protective system will have to be shared with law enforcement when the abuse is perpetrated outside the family. The response to the investigation will also have to be collaborative to be effective.

III. CHILDREN’S RIGHTS AND PARENTAL RIGHTS IN THE CHILD WELFARE SYSTEM

The child welfare system attempts to balance parental rights to raise children free from state intervention with the rights of children to be free from harm. Constitutional law has established the framework for this balance. Since violence perpetrated by those outside of the parental role is not the norm of the system, rights of such outside perpetrators are left to the criminal justice system and are not part of the procedural protections of the reporting, investigating, and record-keeping functions of the child protection system.

While parents have a right to raise their children free from state intervention, children have a countervailing right to protection from abuse and neglect. If allegations of abuse and neglect are severe enough, federal and state laws34 aimed at protecting children require that they be removed from their parents and placed in foster care. Foster care is an entitlement, and every state is required by state and federal law to provide foster care for eligible children.35 Foster care provides out-of-home care for approximately half a million children in the United States every day.36 Most


34. See infra Part II.


36. Committee on Ways and Means of the U.S. House of Representatives, 1998 Green Book: Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways
of these children are in foster care as a result of allegations of abuse and neglect against their parents.\textsuperscript{37}

At the age of eighteen or twenty-one, the right to protection is superseded by a right of empowerment as children mature out of the system, whether they are ready for independence or not.\textsuperscript{38} This is because foster care ends when children reach the age of majority, which is eighteen or twenty-one, depending on state law and regulations.\textsuperscript{39} In 1999, Congress estimated that twenty thousand teens exited foster care because they aged-out of the system, reaching the age at which eligibility for foster care benefits is terminated.\textsuperscript{40} The U.S. Congress passed the Foster Care Independence Act\textsuperscript{41} to provide federal funds to allow some services to continue to age twenty-one.

The right to protection frames the entire child welfare system and much of the state laws governing the state systems, but this right is not clearly recognized under constitutional law.\textsuperscript{42} In her now famous and often misunderstood article on the rights of children, Hillary Rodham Clinton wrote in 1973 that the rights of children was a “slogan in need of a definition.”\textsuperscript{43} Thirty years later, the notion of the rights of children is still not well defined. The right is strongest at the front end of the child welfare system, where the child protection system cases are investigated and initial placements are developed. In making early placement decisions, non-exclusive parenting\textsuperscript{44} is the child welfare norm in the allocation of parental

\textsuperscript{37} Id. at 790.

\textsuperscript{38} Gerald P. Mallon, After Care, Then Where? Outcomes of an Independent Living Program, 77 CHILD WELFARE 61 (1998) (stating at the outset that “[p]reparing young people in out-of-home care for independent living and for successful adulthood has not been one of the child welfare system’s primary goals”).

\textsuperscript{39} See WASH. REV. CODE § 13.34.030(1) (2000) (stating that a child is “any individual under the age of eighteen years”); HAW. REV. STAT. § 346-17.4(a)(1) (1999) (stating that a child is eligible for foster care if “[t]he person is twenty-one years or younger”).

\textsuperscript{40} H.R. 3443, 106th Cong. (1999). As a result of the Foster Care Independence Act, states may now continue some benefits to age 21 and receive federal reimbursement for those foster care benefits. \textit{Infra} Part III.

\textsuperscript{41} H.R. 3443, 106th Cong. (1999).

\textsuperscript{42} See Deshaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189 (1989) (deciding that the state does not owe a duty to protect a child from violence at least until the child is in state custody); \textit{see infra} Part II.B.

\textsuperscript{43} Hillary Rodham Clinton, Children Under the Law, 43 HARV. EDUC. REV. 487, 487 (1973).

\textsuperscript{44} See generally Katherine T. Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed, 70 VA. L. REV. 879 (1984) (introducing and developing the notion of alternatives to exclusive parenting for
rights. Parental rights are shared by the biological parents of a child, the state as *parens patriae*, and the foster parents who provide day-to-day care for the child under contract with a public or private agency. Such an intrusion into the custodial rights of the parent-child relationship should not occur due to abuse perpetrated by clergy, teachers, or others outside of the household; yet, a norm to respond to abuse by perpetrators outside the family is not developed in the current child welfare system.

At the back end of the child welfare system, children exit foster care when they age-out of the foster care system or are discharged from state care. The first option upon exit from foster care is to again make parental rights exclusive. This first option is accomplished by recreating exclusive parenting through reunification of children with their parents or adoption, but ongoing shared parenting is not a goal. A second option, a fall-back, is to discharge the child to independent living with no parental support. The second option results in children who leave foster care solely because of age. They age-out of the system despite the fact that no familial resources are identified for them.

Private family law operates within a framework of exclusive rights, usually exalting biology over all other considerations. It allocates the distribution of rights between biological parents in situations of marital

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45. With the passage of the Adoption and Safe Families Act in 1997, the focus has arguably shifted from reunification to adoption in some cases as the preferred goal. See Celeste Pagano, *Adoption and Foster Care*, 36 HARV. J. ON LEGIS. 242 (1999). Debate is beginning on the propriety of this shift. See, e.g., Naomi R. Cahn, *Children’s Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189 (1999) (arguing that either reunification or adoption assumes exclusive parenting and that must be challenged to allow non-exclusive parenting options in appropriate cases). But see *In re Billy Joe M. and Jason M.*, 521 S.E.2d 173 (W. Va.) (where the court posits that following termination of parental rights to free children for adoption, visitation with the biological former parents may be appropriate).

46. I refer to private family law to describe matrimonial law, domestic relations, and the general doctrinal area governing the allocation of rights and property within families. The state holds no custodial interest in such families.

dissolution. Even in such disputes, the goal is to develop a custody arrangement which can operate free of state intervention and oversight. Law enforcement, not child protection, which operates under a norm of exclusive parental rights, is better able to investigate and respond to abuse by teachers, clergy, and other adults outside of the parent/caretaker role. Yet, law enforcement must collaborate to obtain child welfare resources to fully respond to abuse and protect the abused child and possible future victims.

In contrast, public family law operates under no such illusion of exclusivity. I refer to public family law to describe “cases where the state has intervened into the ‘private’ family to assume some custodial interest from the parents." The parent-child-state doctrinal framework assumes a sharing of parental responsibilities among the state, its agents, and the parents. Abuse perpetrated by clergy, teachers or others outside of the family, but with a relationship to the child, should not impact the rights and protections of the private family. There is no basis for such crimes to trigger a public family law response that limits parental rights, but a collaborative response involving the child, parent, and state may be necessary.

Constitutional case law has fortified the notion of exclusive parenting and protection rights of children. The holdings lead to the doctrinal conclusion that even when the state does intervene to protect children, it is in a power-sharing role with parents. Other caretakers do not share in the exclusive parent-child-state balance of rights and responsibilities. In this next wave of reform of the child welfare system, it is important that the rights of parents are not erroneously harmed as a result of the response to abuse perpetrated by adults outside the household.

In the first half of the twentieth century, three Supreme Court cases dealt with the rights of parents or legal guardians to exercise exclusive authority and control over the upbringing of their children in the face of state laws limiting that authority. These cases have long been considered key to understanding state intervention into the private family. They establish a tripartite balance of rights and responsibilities among the exclusive parents, the child, and the state. By ignoring the role of all other caretaking actors beside parents, the norm of exclusive parenting is accepted and solidified. Absent acceptable state intervention to protect

49. Mangold, Challenging, supra note 1, at 1397.
children, the exclusive control of parents over their children is protected. The framework is insufficient to support a child welfare system responding to abuse perpetrated by individuals outside the family.

In *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, state laws infringing upon the authority of parents were deemed unconstitutional. The *Pierce* Court recognized the exclusive rights of parents and their vital duty to their children and the state:

> Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, we think it entirely plain that the Act of 1922 [mandating that children attend public schools] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control . . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

This oft-quoted language recognizes an exchange of rights and duties between exclusive parents and the state on behalf of children. The parent-child-state triangular framework is accepted as the constitutional contribution of the *Pierce* Court, but it ignores the importance of the rights and duties of the provider agency, the Society of Sisters, that was so integral to the *Pierce* decision. In *Pierce*, the rights of parents to choose religious over secular education was upheld in striking down a public-school-only state law. The fact that the case was brought by a religious organization, the Society of Sisters, to enjoin enforcement of the law, and the importance of such religious organizations in the community, is lost in the later constitutional analysis.

In *Prince v. Massachusetts*, the *Prince* Court built upon the foundation laid by *Meyer* and *Pierce* by further articulating the parent-child-state framework. The *Prince* Court held valid a state child labor law against both the assertion of the legal guardian that the law violated her right to raise the child as she saw fit, and the right of the child to practice Jehovah’s Witness beliefs by selling religious magazines. In discussing the

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52. *Pierce*, 268 U.S. at 536.
53. *Id.* at 534-35.
55. *Id.* at 170-71 (stating appellant is caretaking aunt). The three cases building the parent-state-child framework of rights and responsibilities are all brought by “others.” See *id.*; see also *Meyer v. Nebraska*, 268 U.S. 390, 391 (1923) (stating plaintiff is teacher); *Pierce*, 268 U.S. at 511.
applicable precedents, the *Prince* Court limited the holdings of *Meyer* and *Pierce* to an exchange of rights and duties among parents, children, and the state:

Previously, in *Pierce v. Society of Sisters*, 268 U.S. 510, this Court had sustained the parent’s authority to provide religious with secular schooling, and the child’s right to receive it, as against the state’s requirement of attendance at public schools. And in *Meyer v. Nebraska*, 262 U.S. 390, children’s rights to receive teaching in languages other than the nation’s common tongue were guarded against the state’s encroachment. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. *Pierce v. Society of Sisters*, *supra*. And it is in recognition of this that these decisions have respected the private realm of family life that the state cannot enter . . . . It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare . . . .

The *Prince* Court focused on the limits of state and parental control over children, and obscured the holding in the earlier cases that included rights and duties of other rights holders, namely teachers, schools, and private providers. By defining the parent leg of the triangle as an exclusive realm and relying on a narrow, three-party balance of rights and responsibilities, the *Prince* Court further established the parent-child-state framework for considering liberty rights and concurrent duties. 57

This framework was not constitutionally developed further by the U.S. Supreme Court until the 1972 case of *Wisconsin v. Yoder*, 58 which reinforced the exclusive authority of parents. In *Yoder*, parents had been convicted under a Wisconsin law requiring children to attend school until the age of sixteen. The parents argued that sending their teens to school past the eighth grade violated their Amish beliefs and lifestyle. The Court agreed with the parents, and relied upon the parent-child-state balance established in *Meyer, Pierce, and Prince*. The Court stated in relevant part:

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Meyer v. Nebraska, 268 U.S. 390, 391 (1923) (stating plaintiff is teacher); *Pierce*, 268 U.S. at 511 (stating plaintiff is private provider agency).


57. See id.

There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925). Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in Pierce, made to yield to the right of parents to provide an equivalent education in a privately operated system. There the Court held that Oregon's statute compelling attendance in a public school from age eight to age 16 unreasonably interfered with the interest of parents in directing the rearing of their offspring, including their education in church-operated schools. As that case suggests, the values of parental direction of the religious formative years have a high place in our society. (citation omitted)

The Yoder Court quoted and relied upon Meyer, Pierce, and Prince extensively in a decision that worked within a balance of exclusive rights and responsibilities between parents and the state and further developed the closed triangular doctrinal framework.

Indeed it seems clear that if the State is empowered, as parens patriae, to "save" a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the State will in large measure influence, if not determine, the religious future of the child. Even more markedly than in Prince, therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children . . . . If not the first, perhaps the most significant statements of the Court in this area are found in Pierce v. Society of Sisters, in which the Court observed: Under the doctrine of Meyer v. Nebraska, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control . . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right,

59. Id. at 213-14.
60. The rights of children were not considered explicitly by the majority but they were raised by Justice Douglas in his dissent. Id. at 241 (Douglas, J. dissenting and arguing for a remand to consider the wishes of the children whose parents were convicted under the law). The framework developed was a triangle of rights and duties on behalf of, but not owed to or by the child. See id.
coupled with the high duty, to recognize and prepare him for additional obligations... 61

Meyer, Pierce, Prince and Yoder dealt with state intervention into parental authority but were not public family law cases dealing with state custody of children. In Santosky v. Kramer,62 and then in DeShaney v. Winnebago County Department of Social Services,63 parental rights and duties, and state rights and duties toward abused and neglected children, were addressed by the U.S. Supreme Court. The Court imposed the parent-child-state framework on public family law.

In Santosky, the Court held that the standard necessary to involuntarily terminate parental rights was clear and convincing evidence.64 Even when children were in the dependency system and their care was subject to procedural safeguards at each juncture, the U.S. Supreme Court found that the importance of the parental right to the care and control of their child could not be severed absent a showing by the state of clear and convincing evidence of unfitness.65 The Santosky Court relied on a line of cases, beginning with Meyer, Pierce, and Prince to demonstrate historical recognition of exclusive parental rights.

[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relations are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family matters.66

In DeShaney,67 the exclusive control of parents was upheld in a case whose facts were deeply challenging to the notion of exclusive parenting.

61. Id. at 232-34.
64. Santosky, 455 U.S. at 769.
65. See id.
66. Id. at 753.
67. DeShaney, 489 U.S. at 189.
The U.S. Supreme Court declined to find a state duty to protect a child who was in the custody of his father when the child suffered permanent serious injury at his hands. Winnebago County Department of Social Services was repeatedly informed of incidents of abuse and the risk of further abuse, but the agency did not remove the young child from the care of his father. The Court reasoned that the state right to intervene — to investigate and monitor the situation — did not implicate a duty to protect the child who remained in the care of his father. In accordance with the parent-child-state framework developed in the Meyer-Pierce-Prince line of cases, the state had not taken on the custodial right, and therefore did not hold the accompanying duty to protect the child. The right of control had been left exclusively to the father, and the child could not make out a liberty claim for breach of a duty to protect based on the acts of private violence by the father.

These U.S. Supreme Court decisions determined the parameters of the parent-child-state relationship. Although the interests of additional parties were present in the early cases — the teacher and schools in Meyer, the private provider Society of Sisters in Pierce, the caretaking aunt in Prince — the decisions stand for a line of family law cases that developed a framework for analyzing parent, child, and state rights and responsibilities in the face of state intervention. Even though additional parties were intimately involved in the cases and in the lives of the children affected by the challenged laws, the decisions are accepted as precedents for a family law jurisprudence that operates as if only parents, children, and the state were involved in the cases or held rights and duties in the lives of children.

68. See Akhil Reed Amar & Daniel Widawsky, Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney, 105 HARV. L. REV. 1359 (1992) (for a provocative discussion of the thirteenth amendment as the more appropriate cause of action in this case).

69. See DeShaney, 489 U.S. at 191. DeShaney was one of many cases discussed which fermented agitation with the family preservation and reunification philosophy of the AACWA. Infra Part II.

70. See id. at 197.

71. While third parties, such as grandparents, may seek visitation over the wishes of a parent, especially when they have an ongoing relationship with a child, such infringements on parental control are limited. See Troxel v. Granville, 530 U.S. 57 (2000); Barbara Bennett Woodhouse, Protecting Children's Relationships with Extended Family: The Impact of Troxel v. Granville, 19 CHILD LAW PRAC. 65, 70 (2000) (examining the plurality opinion and finding that "[t]he core of the plurality opinion was quite simple and limited: given that parents enjoy constitutional protection of their child-rearing decisions, the state may not intervene without giving 'some special weight' to a fit parent's decision"). Valuing exclusive parenting elevates complete authority over a child above bonding, a child's wishes and any other considerations that may be relevant to the child-parent relationship. Critics argue that "important others" such as grandparents, foster parents, private provider agencies, and others should have rights recognized...
In the latter cases, when the state does intervene based on the right the child has to protection from abuse and neglect, the norm of exclusive parenting persists. The state may intervene into the otherwise exclusive parent-child relationship, but such intervention is structured to protect parental rights. Parental rights and child protection rights are best left intact when abuse is perpetrated by adults outside the household such as clergy or teachers. Law enforcement, not child protection, should investigate and respond. Older children and parents should be able to participate and assist at their discretion with no impact on their rights.

Misuse of the child protection system to investigate and respond to violence perpetrated by individuals outside of the family or household would disturb the balance of exclusive parental rights and child protection. While practices such as mandated reporting can be borrowed from child protection, it is the law enforcement system that should respond to abuse by those outside the family. The constitutional framework of the child welfare system and the practical child protection system itself are ill-suited to the task of protecting children from abuse by clergy, teachers, or others outside the family.

in relation to their responsibility toward the child. Mangold, Challenging, supra note 1, at 1397; Erica L. Strawman, Grandparent Visitation: The Best Interests of the Grandparent, Child, and Society, 30 U. Tol. L. REV. 31 (1998). These important others have gained limited legal recognition in sharing the rights and responsibilities of caring for children. See Troxel, 530 U.S. at 57; Woodhouse, supra. For older children, especially those in foster care, the need for a broadened circle of care in the form of non-exclusive parenting is imperative to a successful transition to adulthood. See Mangold, Challenging, supra note 1; Mangold, Extending, supra note 1; Mangold, Transgressing, supra note 1. Non-exclusive parenting defines the foster care system, but has not been used as a way to imagine permanent arrangements for children to safely exit care. See Marianne Berry, Adoption in an Era of Family Preservation, 20 CHILD. & YOUTH SERVICES REV. 1 (1998) (for an introduction to the issues in choosing and supporting caring relationships for foster children). In the foster care system, biological parents voluntarily or by order of a court surrender the caretaking responsibilities of their child. See Mangold, Challenging, supra note 1, at 1438-42 (discussing the legal procedures of the system). The state takes temporary custody of children, but parental rights to visit and make certain formative decisions remain with the parent. See, e.g., N.Y. Soc. Serv. Law § 431.14 (McKinney 2000). The state places the child in a placement directly provided by the state or contracts with a nonprofit or for-profit private provider to place the child in a foster home. See Mangold, Welfare Reform, supra note 1, at 1295 (describing and analyzing subcontracting with profit and nonprofit providers in the foster care system). Parenting responsibilities and rights can thereby be shared by the biological parents, state agency, private agency, and foster parents. See Mangold, Challenging, supra note 1, at 1442-49.
IV. LEGISLATING COLLABORATIVE INTERVENTION WITHOUT HARMING PARENTS AND CHILDREN

Increasingly, there is recognition that family violence does not fit neatly into one category per family, and that different forms of family violence occur concurrently and need to be addressed simultaneously. Currently, the institutional responses to family violence are bifurcated mainly between two systems: the child protective services system and the domestic violence system. While often ignored as a form of family violence and not dealt with by either the child protection or domestic violence systems, assaults by minors on their parents or on other siblings in the home are often handled as status offenses of incorrigibility or, in more severe cases, as acts of delinquency. Each of these systems is premised on a clearly identified victim: the innocent child in need of protection in the child protective services system, the battered wife in the domestic violence system, and the uncontrollable teen headed for trouble in the status offender system. For those families who do not neatly fit into the paradigm single victim image of one system, access to legal or social service assistance to escape the violence is complicated — sometimes complementary, but often contradictory.

Because of the high comorbidity between domestic violence and child abuse, there is a fledgling effort to coordinate institutional responses to violence against women and children. Tragically, this coordination has been at times awkward, and sometimes resulted in new system-imposed harms to the women and children it seeks to protect.

Frequently, the woman victim of domestic violence is blamed for failing to protect her children from the violence. Instead of illuminating the dynamic of violence, stopping the perpetrator from committing violent acts, and supporting the non-offending caregiver of the child, the coordination efforts have primarily made law enforcement and child protective services


73. See NATIONAL CENTER ON WOMEN AND FAMILY LAW, FAILURE TO PROTECT: A REFERENCE MANUAL FOR NEW YORK ATTORNEYS REPRESENTING BATTERED WOMEN AT RISK OF LOSING THEIR PARENTAL RIGHTS FOR FAILURE TO PROTECT THEIR CHILDREN FROM THE ABUSER (1993); GROSSIER-KELLER, BATTERED WOMEN AND THEIR BATTERED CHILDREN: CRIMINAL AND CIVIL ALLEGATIONS OF THE WOMEN’S FAILURE TO PROTECT (discussing early recognition of this problem including position paper).
workers more conscious of the risk of concurrent incidents of violence. Instead of stopping the violent perpetrator, the institutional response has often been to separate the mother caretakers from their children. While violence by the same perpetrator cannot occur simultaneously if the mother and children are in different places, the harm of separation and the failure to address the dynamic that causes the violence may result in more tragic results.

Without a unifying theory to conceptualize the complexity and comorbidity of the violence, the coordination efforts have employed easy solutions with tragic consequences. I highlight two such solutions here. The first is the prosecution of mothers for failing to protect their children from family violence when the mother has never herself abused the children and is a victim at the hands of the same abuser. The second is the loss of custody by the parents to the child protective services agency ensuing, in part, from the portrayal of the mother as a helpless victim.

Cases of prosecuting women who are in relationships with violent men for civil or criminal failure to protect their children have occurred in many jurisdictions. In some cases, this response has brought victims of violence before the criminal courts due to the actions of their abusers and deprived children of the vital caretaker in their lives. In others, the perceived inaction of the mother is viewed as failure to protect a child from witnessing abuse or being concurrently abused. A mother's action in calling authorities and seeking shelter or protective orders can alert child welfare authorities to the presence of domestic violence in the home, and lead to a civil child protection proceedings. Fear of losing children can prevent caretakers from seeking the help they need to protect children. Collaboration between law enforcement and child protection has not been a smooth, harmless relationship. Extending the collaboration to respond to child abuse perpetrated by clergy, teachers, and other non-family members is a tremendous challenge.

The child protection system is governed by laws in all fifty states under minimum mandates codified in federal law. In exchange for federal funds to reimburse the activities of state child protection efforts, the states abide by the federal mandates. In the two earlier periods of reform discussed in Part II of this Article, the culmination of reform efforts was passage of a major piece of federal legislation which then shifted the landscape for all

74. The term “prosecution” is used to describe criminal cases brought against women for failure to protect. There is an even larger body of case law in the civil child protective services system using “failure to protect” as grounds for an adjudication and possible removal of the children. See, e.g., NATIONAL CENTER FOR WOMEN AND FAMILY LAW, supra note 73.

75. Id.
fifty states via federal mandates. In the current period of agitation caused by the child sexual abuse scandal in the Catholic Church, there are only nascent efforts to reform the laws in the states. This may precede federal activity as it did in the 1960s when all fifty states passed reporting laws before the reporting law mandates of the CAPTA. Whether legislative reform efforts remain on the state level with a variety of different approaches, or advance to the federal level where mandates introduce some uniformity to the reforms, a basic framework of collaboration must be employed. The protection rights of children must be balanced with the exclusive rights of parents and the rights of the accused in the criminal justice system. I suggest four points to guide the reforms.

First, the mandatory reporting system must be expanded not only to require clergy to be mandated reporters, but to require that all mandated reporters report abuse by those in professional positions over children such as teachers, day care providers, camp counselors, and clergy. As is true with the current system, states should have latitude to determine their particular definitions. This focus on perpetrators with a professional relationship with children captures the essence of the right to protection, legislated through the child protection system that mandated informing authorities about abuse that would otherwise have gone unnoticed or been protected by professional privilege. By limiting the scope of the reports of

76. Illinois took this approach in enacting H.B. 5002 which reads in part:

Recognizing that children can also be abused or neglected while living in public or private residential agencies or institutions meant to serve them, while attending day care centers, schools, or religious activities, or when in contact with adults who are responsible for the welfare of the child at that time, this Act also provides for the reporting and investigation of child abuse and neglect in such instances.


Minnesota has enacted a similar approach:

The legislature hereby declares that the public policy of this state is to protect children whose health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse. In furtherance of this public policy, it is the intent of the legislature under this section to strengthen the family and make the home, school, and community safe for children by promoting responsible child care in all settings...

“Sexual abuse” means the subjection of a child by a person responsible for the child’s care, by a person who has a significant relationship to the child . . . or by a person in a position of authority . . . .

abuse by those in professional positions over children, the child protection system will remain focused and will not unduly expand to intervene into the parental relationship, or run over the rights of alleged perpetrators.

Second, reports of abuse by perpetrators outside of the family or household should be referred to law enforcement, not child protective services, for investigation— but only after the child’s parents have been notified. If the call is made to local law enforcement, they can work with the parents to respond. If the report is made to the child protection system hotline maintained in every state as part of their reporting mechanism, the child protection hotline should immediately report the allegation to the parents and to local law enforcement for investigation. This is an added responsibility for the child protection system, but does not go so far as to include investigation by the system. Further, activities by the child protection system in working with law enforcement to address domestic violence have shown that child protection, with its limited experience in working with families and removing children from families to protect them from abuse, may be too quick to remove children and implicate caretakers when children suffer harm. Law enforcement, with its heightened procedural protections and experience in working with families in investigations of crimes perpetrated by those outside the family, is best able to focus on nonfamilial abuse and thus protect children while not unnecessarily altering exclusive parental rights.

Third, criminal records involving child abuse should be maintained by statewide central registries just as with records of abuse perpetrated by family or household members. By doing so, employment checks whereby a prospective employee agrees to submit to a child abuse check before employment will render more thorough information. Such information will also be available to child protection workers to better protect children in investigations and not incorrectly implicate parents where others outside the home are responsible for abuse.

Finally, penalties for failure to report abuse must be enforced and should include civil as well as criminal penalties. Currently, penalties for failure to report run from misdemeanor to felony penalties. The collaboration between law enforcement and child protection to address abuse perpetrated by non-family members should borrow from the penalties of the statewide central registry record-keeping scheme in the child protection systems. Failure to report child abuse should be reported in employment checks for

employment dealing with children and should result in loss of license, where applicable, for repeat offenses. This way, children will not only be protected against social workers, doctors, teachers, clergy, and others who perpetrate abuse, but also against those who do not intervene and call in the proper authorities to investigate the abuse.

The Catholic Church child sexual abuse scandal, like the discovery of child abuse by the medical profession in the 1960s or the reports of repeated parental abuse known to authorities in the 1980s, will lead to reforms of the child protection system. With collaboration between the reporting, investigating, and record-keeping functions of law enforcement and child protections, the culmination of the reforms as a result of the scandal can result in safer, more protective environments for children without further overtaxing the child protection system, or harming parents or families already suffering due to the abuse of a child.