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THE “OTHER” PARENT: PROTECTING THE RIGHTS OF NONCUSTODIAL PARENTS IN EMERGENCY REMOVAL SITUATIONS

*Lindsay Mather**

I. INTRODUCTION

Decades of legal jurisprudence have shown that the right to raise one’s children as one sees fit is a fundamental right.¹ As the legal system and society have changed, however, both the definitions and roles of parents have changed. The increasing prevalence of divorced parents in particular has led to the need for legal custody and visitation arrangements. The result of these changes has been the creation of the legal entity known as the “noncustodial parent,” the rights of which have yet to be concretely defined.² The term noncustodial parent refers to a natural parent who does not have primary custody,³ including parents who have regular visitation with their children as well as those who do not.

Of the many areas in which the rights of noncustodial parents are at issue, perhaps one of the most difficult are those situations involving state intervention to protect the welfare of the child. When the custodial parent becomes the subject of removal proceedings based on allegations of child abuse or neglect, child welfare officials face the novel question of the role noncustodial parents are to play in these situations. Cases involving emergency removal of a child based on an imminent danger of serious bodily harm are particularly problematic because questions of notification of, and objection by, the noncustodial parent become an issue.

Consider, for example, a situation in which a couple gets married, and the marriage produces a female child. The couple subsequently divorces, and although the divorce decree awards sole physical custody

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1. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972), *overruled as stated in* *Gen. Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402 (6th Cir. 2010); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

2. See David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 *HOFSTRA L. REV.* 1461 (2006).

3. *BLACK’S LAW DICTIONARY* 454 (3d pocket ed. 2001).

of the child to the mother, the father retains some right to visitation of his daughter. Years later, the mother remarries, and the daughter reveals to police officers that her mother's new husband—her stepfather—has been violent toward her and has engaged in inappropriate sexual conduct with her. Based on the child's statements, a police officer decides that emergency removal of the child from the mother and stepfather's home is necessary because she is at risk of imminent harm. What duty, if any, does the police officer have to notify the child's father of her removal? The Ninth Circuit Court of Appeals addressed this question in *Burke v. County of Alameda*,⁴ discussed below.

As yet, courts have done little to clarify the rights and roles of noncustodial parents in these types of situations, leaving law enforcement and child welfare officials without any meaningful guidance. In late 2009, however, the Ninth Circuit declared that noncustodial parents have an interest in the "companionship, care, custody, and management" of their children that is implicated in emergency removal situations.⁵ In determining that the noncustodial father was entitled to have a jury determine whether his rights had been violated by the emergency removal, the court seemed to imply that noncustodial parents should play a role in emergency removal situations.⁶ The court did not specify what actions state officials must take to ensure that noncustodial parents' rights are protected, however, and other circuits have similarly failed to articulate workable standards for these situations.

This Comment argues for clearer legal standards regarding the rights of noncustodial parents in emergency removal situations. Part II provides background information regarding the termination of parental rights, including the constitutional foundation of the "right to parent" and the process by which parents' rights are terminated. Part III specifically examines emergency removal, focusing on the standards by which the appropriateness of such removal is measured. Part III also examines abuse of emergency removal authority and qualified immunity issues that accompany claims of abuse. Part IV analyzes the court cases addressing the parental rights of noncustodial parents and the ambiguities that exist with regard to noncustodial parents' due process rights in emergency removal situations. Finally, Part V advocates that other circuits follow the Ninth Circuit's lead in *Burke*⁷ and articulate the rights of noncustodial parents. Part V also recommends that states

4. *Burke v. County of Alameda*, 586 F.3d 725 (9th Cir. 2009).

5. *Id.* at 733.

6. *See id.*

7. *Id.*

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recognize noncustodial parents as the primary placement option in emergency removal situations—both statutorily and in child protective services' policies. This Comment ultimately concludes that the Ninth Circuit's *Burke* decision was important in terms of clarifying the rights of noncustodial parents, and that state courts, legislatures, and executive agencies need to expand on that foundation to adequately protect the rights of noncustodial parents.

II. BACKGROUND INFORMATION ON THE TERMINATION OF PARENTAL RIGHTS

This Part examines states' authority to terminate parents' rights to their children. Subpart A explores an individual's constitutionally protected right to parent and the way that right is implicated in termination proceedings. Subparts B and C then provide background information on the termination of parental rights: B addresses states' processes for terminating those rights; C discusses the grounds on which termination is justified.

A. *The Constitutional Right to Parent*

Although it is not specifically enumerated in the Bill of Rights, the right of a person to have and raise children is generally considered fundamental. The foundation for this right, referred to generally in this Comment as the "right to parent," has been solidified by the Supreme Court, and the integrity of the family unit has found protection in various constitutional provisions, including the Due Process Clause of the Fourteenth Amendment,⁸ the Equal Protection Clause of the Fourteenth Amendment,⁹ and the Ninth Amendment.¹⁰ In its decisions regarding the right to privacy, the Court has determined that the right ensures that there are certain areas of one's life into which the government cannot intrude.¹¹ The Court's various decisions have emphasized that adults have the right to use contraceptives,¹² choose to have an abortion,¹³ live with whichever family members they choose,¹⁴

8. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

9. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

10. *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965).

11. *See, e.g., Griswold*, 381 U.S. 479; *Roe v. Wade*, 410 U.S. 113 (1973); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990); *Lawrence v. Texas*, 539 U.S. 558 (2003).

12. *Griswold*, 381 U.S. 479. *See also Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding the right applies to unmarried as well as married couples).

13. *See, e.g., Roe v. Wade*, 410 U.S. 113; *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

14. *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977).

make decisions regarding the education of their children,¹⁵ and generally raise their children as they see fit. The Court has emphasized that “the custody, care and nurture of the child reside first in parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”¹⁶

The overall tenor of the Supreme Court’s family law jurisprudence with respect to the right to parent and, more specifically, the termination of parental rights has been that parents have a fundamental, constitutionally-protected interest in the continuity of the legal bond with their children, and the Court has placed a high value on the integrity of the family.¹⁷ With regard to the termination of parental rights specifically, the Court stated in *Santosky v. Kramer*:¹⁸

[t]he 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 relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.¹⁹

The *Santosky* Court not only recognized the fundamental liberty interest parents have in raising their children, but also emphasized that parental rights cannot be terminated without respecting the parents’ procedural due process rights. Specifically, the Court determined that, 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 affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.”²⁰

While the *Santosky* Court did not set out definitive procedural requirements for ensuring that parents’ due process rights were protected, it did indicate that any analysis of what process is due is the same in cases involving parental rights as in other cases. Specifically, the Court cited the “three distinct factors” set out in *Mathews v.*

15. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972), *overruled as stated in* *Gen. Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402 (6th Cir. 2010).

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

17. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (holding that a parent has the primary responsibility to care for and nurture her children); *Yoder*, 406 U.S. at 233 (holding that parents have the right to prepare their children to meet societal obligations and explaining that children are not “mere creature[s] of the state”).

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

19. *Id.* at 753.

20. *Id.* at 753–54.

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Eldridge:²¹ (1) the private interests affected by the action; (2) the risk of error created by the state’s chosen procedure; and (3) the corresponding governmental interest in utilizing the challenged procedure.²²

In cases in which the government has a compelling interest in doing so, the state can restrict a person’s right to parent.²³ Intervention into a situation in which a child’s safety may be at risk has traditionally been done under the government’s authority as *parens patriae*. Literally “parent of the country” in Latin,²⁴ this doctrine has historically stood for the concept that the state is responsible for providing protection to those who are unable to care for themselves.²⁵ Specifically, the doctrine has been the basis for government intervention into situations in which citizens—primarily children—are unable to protect themselves.²⁶

This concept does not give the government an all-access pass with respect to inserting itself into, and terminating, the parent–child relationship. Although the Supreme Court has not required that specific alternatives be employed, it has implied that immediate termination of parental rights in every case is not in keeping with the government’s *parens patriae* role:

As *parens patriae*, the State’s goal is to provide the child with a permanent home. Yet while there is still reason to believe that positive, nurturing parent–child relationships exist, the *parens patriae* interest favors preservation, not severance, of natural familial bonds. “[T]he State registers no gain towards its declared goals when it separates children from the custody of fit parents.”²⁷

While the Supreme Court has not directly addressed alternatives to termination, lower federal courts have held that the state must consider other options before terminating parental rights.²⁸ These alternatives may include requiring parents to attend therapy with or without their children, requiring parents to take parenting classes, or helping parents

21. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

22. *Santosky*, 455 U.S. at 754.

23. *See, e.g., Parham v. J.R.*, 442 U.S. 584, 603 (1979) (“[A] state is not without constitutional control over parental discretion in dealing with children when [the children’s] physical or mental health is jeopardized.”).

24. BLACK’S LAW DICTIONARY 520 (3d pocket ed. 2001).

25. *Id.*

26. It is interesting to note that *parens patriae* has also been employed to protect those with mental disabilities, so the government, when dealing with mentally ill parents whose children may need protection, may in fact have plausible grounds for protecting both the parents and the children. In the context of the termination of parental rights, however, the government’s focus has most often been on the children.

27. *Santosky*, 455 U.S. at 766–67 (quoting *Stanley v. Illinois*, 405 U.S. 645, 652 (1972)).

28. *See, e.g., Franz v. United States*, 707 F.2d 582, 602 (D.C. Cir. 1983); *Roe v. Conn*, 417 F. Supp. 769, 779 (M.D. Ala. 1976).

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slowly move toward regaining custody of their children through supervised visitation and regular in-home supervision by a case worker.²⁹ Subpart II(C) discusses the efforts states may make to facilitate reunification of parent and child.

Overall, while the courts have recognized that the state has a valid interest in protecting children from unfit or abusive parents, courts have also acknowledged that parental rights are significant and should only be permanently terminated in rare situations. The Supreme Court has, through various decisions, recognized a person's right to parent, and has held that the government must respect parents' due process rights before interfering with the parent-child relationship. Even operating in its capacity as *parens patriae*, the government has an obligation to consider less drastic options before severing the parent-child bond entirely.

B. Process by Which a State Terminates a Parent's Rights to a Child

Termination proceedings generally begin with a "tip" from someone—often a concerned neighbor or a school official, physician, or other mandatory reporter³⁰—who suspects abuse or neglect.³¹ Following the report of suspected abuse, the local child protective services agency investigates the claim, and, if the investigation substantiates the claim, the child may be temporarily removed from the parent's home.³² During the period in which the child is removed from the home, the court with jurisdiction will usually hold a series of hearings to determine the end result of the situation.³³ Also during this interim period, the state is typically required to create a "reunification plan" and to provide the parent with services aimed at facilitating reunification with the child.³⁴

29. Courts have wide discretion in creating case plans for the reunification of parents with their children; these are merely a few of the options available to the court.

30. For a more in-depth treatment of mandatory reporters, see CHILD WELFARE INFO. GATEWAY, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT: SUMMARY OF STATE LAWS (2010), http://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.pdf. Most jurisdictions designate professions whose members are mandated by law to report child maltreatment. Although it may vary by state, the list may include social workers, teachers and other school personnel, physicians and other healthcare workers, mental health professionals, childcare providers, medical examiners or coroners, and law enforcement officers. *Id.*

31. See Chris Watkins, *Beyond Status: The Americans With Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CAL. L. REV. 1415, 1435 (1995).

32. Susan Kerr, *The Application of the Americans with Disabilities Act to the Termination of the Parental Rights of Individuals with Mental Disabilities*, 16 J. CONTEMP. HEALTH L. & POL'Y 387, 402 (2000).

33. *Id.* See generally Watkins, *supra* note 31.

34. This requirement is discussed in more detail in the following subsection.

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While reunification with the parent is always the goal, in certain situations it may not be feasible. If, after a set amount of time, reunification has not occurred, the state can move to terminate the parent's rights to the child. In order to overcome the strong policy preferring reunification, the state must prove, by clear and convincing evidence, that reunification is not, and will not be in the future, in the child's best interest.³⁵ Correspondingly, if a preponderance of the evidence shows that a child can safely return to the parent, or that progress has been made and reunification is likely to be possible in the future, parental rights will not be terminated.³⁶ In the former situation, the parent and child will be reunited; in the latter, the removal and reunification plans will remain in place until reunification is appropriate.³⁷

C. Grounds for the Termination of Parental Rights

The grounds for the state's termination of parental rights arise from the specific circumstances under which a child cannot safely be returned to his parents because of the risk of harm by the parent or the parent's inability to provide for the child's basic needs.³⁸ Because each state is allowed to enact its own legislation with respect to issues such as termination of parental rights, the specific grounds for such action vary from state to state; however, certain commonalities exist among the states. In many states, the government can terminate parental rights in situations in which any of the following are present: (1) severe or chronic abuse or neglect; (2) abuse or neglect of other children in the household; (3) abandonment; (4) long-term substance abuse of the parents resulting in incapacity; (5) failure to support or maintain contact with the child; or (6) involuntary termination of the parental rights of the parent to another child.³⁹ These various grounds often fall under the broad "unfitness" standard used by many states.⁴⁰ In many states, long-

35. Kerr, *supra* note 32, at 402. See generally Watkins, *supra* note 31; Santosky v. Kramer, 455 U.S. 745 (1982).

36. Kerr, *supra* note 32, at 403.

37. *Id.*

38. CHILD WELFARE INFO. GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: SUMMARY OF STATE LAWS (2010), available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/groundterminal.pdf [hereinafter CHILD WELFARE INFO].

39. *Id.*

40. Some states do not provide a definition of "unfitness," leaving the determination in such cases to the discretion of the judge hearing the case. See, e.g., IOWA CODE § 232.116(1)(e) (West 2010); MINN. STAT. § 260C.301(b) (West 2010); 23 PA. CONS. STAT. ANN. § 2511(a)(5) (West 2010). Other states provide specific definitions or parameters for "unfitness." See, for example, 750 ILL. COMP. STAT. ANN. 50/1 D (West 2010), in which the Illinois legislature has set out eighteen factors, any one of

term mental illness or deficiency of a parent is also recognized as valid grounds for terminating parental rights.⁴¹

Additionally, in some states, if a child has been in a placement outside of the parent's care for a statutorily-defined length of time, and the parent has failed to correct the conditions which led to the child's initial removal, that failure constitutes valid grounds for termination. These grounds necessarily require that the state attempt to provide services to assist the parent in correcting the conditions that led to the removal of the child before terminating the parent's rights. Specifically, states are required to make reasonable efforts to reunite the parent and child by offering services to the parent.⁴² These "reasonable efforts" may include services such as counseling or other mental health services, substance abuse treatment, parenting classes, assisting with the provision of housing, or any other services realistically focused on meeting the parent's and child's needs.⁴³ The state must be diligent in its efforts to implement the necessary services.⁴⁴ To justify removal, the state must also prove that the parent did not benefit from the services, did not use the services, or was unlikely to benefit from the services.⁴⁵

The decision to terminate parental rights generally involves two steps; the court must find that: (1) there is clear and convincing evidence of parental misconduct or inability;⁴⁶ and (2) the termination of parental rights is in the best interest of the child. The aforementioned grounds for termination satisfy the first requirement. In order for a court to make a determination as to the second step of the process, it should consider the child's physical, mental, emotional, and moral condition as well as

which can indicate unfitness.

41. CHILD WELFARE INFO, *supra* note 38. See also, e.g., IOWA CODE § 232.116(1)(e) (West 2010); MINN. STAT. § 260C.301(b) (West 2010); 23 PA. CONS. STAT. ANN. § 2511(a)(5) (West 2010). Even in the absence of statutes specifically indicating that mental illness is a basis for an "unfitness" determination, courts often use the label of "mental deficiency" in making decisions about the termination of parental rights. See, e.g., R.G. v. Marion County Office, 647 N.E.2d 326 (Ind. Ct. App. 1995); *In re Elijah R.*, 620 A.2d 282 (Me. 1993); *In re K.F.*, 437 N.W.2d 559 (Iowa 1989).

42. See 42 U.S.C. §§ 620-28 (2006), which require states, in order to receive certain federal funding, to make reasonable efforts to keep the child with his or her natural parents. Several state statutes impose a similar requirement. See, e.g., ARIZ. REV. STAT. ANN. § 8-533 (2010); MINN. STAT. ANN. § 260C.301 (West 2010); N.H. REV. STAT. ANN. § 170-C:5(IV) (2010); N.Y. SOC. SERV. LAW § 384-b (McKinney 2010); S.C. CODE ANN. § 63-7-2570 (2010).

43. See, e.g., *In re Weaver*, 606 N.E.2d 1011 (Ohio Ct. App. 1992).

44. See, e.g., *State v. Robert H.*, 393 A.2d 1387 (N.H. 1978).

45. See, e.g., *State v. Michael B (In re Michael B.)*, 604 N.W.2d 405 (Neb. 2000).

46. In *Santosky*, the Supreme Court held that the standard in termination proceedings must be clear and convincing evidence, rather than a preponderance of the evidence, because the action of terminating parental rights is so "severe and irreversible." *Santosky v. Kramer*, 455 U.S. 745, 759 (1982).

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the child’s needs.⁴⁷

Although the Supreme Court has recognized a right to parent, it has also recognized that the right is not indestructible—it can be superseded by the state’s interest in protecting the welfare of minor children. In those situations in which the state’s interest outweighs the parents’, the children can be removed and the parental rights terminated. Termination only happens upon a showing of unfitness, but the basis for initially removing children from their parents’ homes need not meet such a demanding standard.

III. EMERGENCY REMOVAL

This Part specifically examines emergency removal, which occurs in situations in which a child’s safety is in imminent risk of harm. Subpart A focuses on the standards by which the appropriateness of emergency removal is measured. Subpart B then turns to an analysis of *Burke v. County of Alameda*,⁴⁸ a Ninth Circuit case that specifically examines the rights of noncustodial parents in emergency removal situations.

A. Emergency Removal Standards

Removal of a child from the home of his parents generally occurs after the local social services agency has conducted an investigation, evidence of abuse or neglect has been collected, and a judge has issued a court order for the child’s removal.⁴⁹ In some situations, however, state officials find that circumstances exist in which the child is in imminent danger, and therefore needs to be removed immediately and without waiting for a court order. Although emergency removal is permitted in

47. See, e.g., *In re L.H.*, 511 S.E.2d 253 (Ga. Ct. App. 1999).

48. *Burke v. County of Alameda*, 586 F.3d 725 (9th Cir. 2009).

49. *Brokaw v. Mercer County*, 235 F.3d 1000, 1020 (7th Cir. 2000) (“[G]overnmental officials will not remove a child from his home without an investigation and pre-deprivation hearing resulting in a court order of removal, absent exigent circumstances.”) (citation omitted). See also *Hollingsworth v. Hill*, 110 F.3d 733, 739 (10th Cir. 1997) (“Removal of children from the custody of their parents requires predeprivation notice and a hearing ‘except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.’”); *Malik v. Arapahoe County Dep’t of Soc. Serv.*, 191 F.3d 1306, 1315 (10th Cir. 1999) (“[A] parent has a liberty interest in familial association and privacy that [—absent extraordinary circumstances—] cannot be violated without adequate pre-deprivation procedures.”) (citation omitted). But see *Lossman v. Pekarske*, 707 F.2d 288, 291–92 (7th Cir. 1983) (“When a child’s safety is threatened, that is justification enough for action first and hearing afterward.”) (citation omitted); *Jordan by Jordan v. Jackson*, 15 F.3d 333, 346 (4th Cir. 1994) (“[O]nly where a child’s life is in imminent danger or where there is imminent danger of severe or irreparable injury to the child’s health (and prior judicial authorization is not immediately obtainable) may an official summarily assume custody of a child from his parents.”) (citation omitted).

such situations, states have carefully crafted specific standards to ensure that it only occurs in true emergencies.

In general, emergency removal is justified when the state official has reasonable cause to suspect the child is in immediate physical danger from which the state needs to protect him.⁵⁰ Courts have determined that, in such situations, state officials are not required to wait to obtain a court order before removal when the child's "life or limb is in immediate jeopardy."⁵¹ Where "[f]urther investigation could result in delay during which the . . . abuse could [] continue[]," state officials are justified in removing the child.⁵²

In determining whether this type of emergency situation exists, officials are to consider all relevant factors, including:

whether there was time to obtain a court order . . . [,] the nature of the abuse (its severity, duration, and frequency), the strength of the evidence supporting the allegations of abuse, the risk that the parent will flee with the child, the possibility of less extreme solutions to the problem, and any harm to the child that might result from the removal.⁵³

Courts have been careful to emphasize that this list is not all-inclusive, however, and have emphasized that no one factor in particular ought to be given more weight than any other.⁵⁴ This flexible, factor-based test gives guidance to child welfare officials facing situations in which emergency removal may be necessary.⁵⁵

When parents initiate a court action challenging the actions of state officials in removing children from their homes in such emergency situations, the question of whether the officials' actions were appropriate is generally one for the jury. Where a court finds, however, that no rational jury could conclude that it was objectively unreasonable for the officials to believe that removal of the children was necessary to protect them from immediate physical danger, the officials are entitled to summary judgment.⁵⁶

The policy rationale behind this result is simple. The ultimate decision of whether to remove a child in a given situation rests,

50. *P.C. v. Conn. Dep't of Children & Families*, 662 F. Supp. 2d 218, 230 (D. Conn. 2009). *See also, e.g.,* *Burke v. County of Alameda*, 586 F.3d 725 (9th Cir. 2009); *Wernecke v. Garcia*, 591 F.3d 386, 389 (5th Cir. 2009).

51. *Tenenbaum v. Williams*, 193 F.3d 581, 605 (2d Cir. 1999) (internal quotation marks and citation omitted).

52. *Doe v. Conn. Dep't of Children & Youth Servs.*, 712 F. Supp. 277, 285–86 (D. Conn. 1989).

53. *Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 429 (5th Cir. 2008).

54. *See, e.g., id.; Wernecke*, 591 F.3d at 398.

55. *Wernecke*, 591 F.3d at 400.

56. *P.C. v. Conn. Dep't of Children & Families*, 662 F. Supp. 2d 218, 230 (D. Conn. 2009). *See also* *Burke v. County of Alameda*, 586 F.3d 725 (9th Cir. 2009); *Wernecke*, 591 F.3d 386.

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appropriately, on the shoulders of the official, and there is value in allowing the official to use her judgment with respect to whether removal is appropriate. To prescribe certain actions that must be taken or certain conditions that must exist prior to removal could deter an honest official from taking action to protect a child who really is at risk.⁵⁷ Such a result is directly contrary to the interest of the community in protecting its children from harm.⁵⁸ "When a child's safety is threatened, that is justification enough for action first and hearing afterward."⁵⁹

B. *Burke v. County of Alameda*

In *Wallis v. Spencer*,⁶⁰ the Court of Appeals for the Ninth Circuit recognized, as the Supreme Court has done many times,⁶¹ that parents and children have a constitutional right to live together and be free from governmental interference.⁶² The *Wallis* court emphasized that any separation of parent and child requires the state to afford the parent due process of law,⁶³ and declared:

[o]fficials may remove a child from the custody of its parent without prior judicial authorization only if the information they possess at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury.⁶⁴

Following the *Wallis* decision, courts acknowledged a two-prong standard for determining the appropriateness of emergency removal: (1) the state has reasonable cause to believe the child is in imminent danger; and (2) the scope of the intrusion on the parents' due process rights was reasonable in light of the circumstances.⁶⁵ However, the *Wallis* standard was only applied to custodial parents.⁶⁶

In 2006, the Ninth Circuit addressed the rights of noncustodial parents, recognizing that noncustodial parents have a reduced liberty interest in the companionship, care, custody, and management of their

57. See *Conn. Dep't of Children & Youth Servs.*, 712 F. Supp at 286.

58. *Id.*

59. *Robison v. Via*, 821 F.2d 913, 921 (2d Cir. 1987) (internal quotation marks and citation omitted).

60. *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 2000).

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

62. *Wallis*, 202 F.3d at 1136.

63. *Id.*

64. *Id.* at 1138 (citation omitted).

65. See generally *Burke v. County of Alameda*, 586 F.3d 725, 731–33 (9th Cir. 2009).

66. See *id.* at 733.

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children.⁶⁷ The court had not elaborated on the rights of noncustodial parents following that decision, however, until late in 2009 in *Burke v. County of Alameda*.⁶⁸ The Ninth Circuit in *Burke* held that the *Wallis* test applied to any parent with legal custody—including noncustodial parents.⁶⁹

1. Background and Facts

Burke dealt with the emergency removal of a young woman, B.F., from the home of her mother and stepfather, the Burkes. On July 12, 2005, Officer Mark Foster of the Alameda County Sheriff's Office interviewed B.F. because she ran away from home a few weeks earlier, and he wanted to discuss the circumstances surrounding the runaway.⁷⁰ During the course of the interview, B.F. disclosed that her stepfather had smacked her several times on the face when she returned home after having run away.⁷¹ B.F. also told the interviewer that her stepfather often made inappropriate sexual comments to her, and that he frequently pinched her buttocks and grabbed her breasts.⁷² B.F.'s comments indicated that her mother was aware of the abuse, but did not take adequate measures to stop it.⁷³

Based on these facts, Officer Foster removed B.F. from the Burkes and placed her in protective custody.⁷⁴ Officer Foster did not seek a custody warrant before executing the emergency removal and did not contact B.F.'s biological father.⁷⁵ B.F.'s noncustodial father found out about the removal two days afterward.⁷⁶ B.F.'s mother and noncustodial father brought suit against both the county and Officer Foster under 42 U.S.C. § 1983, claiming that Foster's actions deprived them of their constitutional right of familial association.⁷⁷ The district court granted summary judgment for the county and Officer Foster.⁷⁸

67. *Brittain v. Hansen*, 451 F.3d 982, 992 (9th Cir. 2006).

68. *Burke*, 586 F.3d at 725.

69. *Id.* at 734.

70. *Id.* at 729.

71. *Id.*

72. *Id.* at 730.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

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2. B.F.’s Parents’ § 1983 Claims Against Officer Foster

Because qualified immunity is a defense to § 1983 claims against state officials, the test for determining whether a violation occurred involves two questions: first, did the defendant’s actions violate the Constitution; and second, was the right violated clearly established at the time of the defendant’s actions.⁷⁹ If both questions are answered in the affirmative, the actor is not entitled to qualified immunity and can be held liable under § 1983.

In the context of emergency removal, the question of whether the Constitution was violated also turns on a two-part analysis—the aforementioned *Wallis* test. The *Wallis* test indicates that emergency removal is not unconstitutional if the state has reasonable cause to believe the child is in imminent danger, and the scope of the intrusion on the parents’ rights was reasonable given the circumstances.⁸⁰ Here, if a jury were to find that Officer Foster had reasonable cause to believe that B.F. was in imminent danger and that the intrusion on B.F.’s parents’ rights was reasonable, the Constitution was not violated.

If Officer Foster’s actions in this case *did* violate one of the plaintiffs’ constitutional rights, the § 1983 inquiry turns to whether the law protecting that right was clearly established at the time the actions were taken. The Ninth Circuit has held that a law is clearly established when it is “sufficiently clear that a reasonable official would understand that what he is doing violates that [constitutional] right.”⁸¹

a. Reasonable Cause and Imminent Danger

In B.F.’s case, the Ninth Circuit had little trouble finding reasonable cause for her removal. B.F.’s parents attempted to argue that the state could not have had reasonable cause because B.F. was lying.⁸² The Ninth Circuit rejected this argument, holding that a victim’s report of abuse is compelling evidence.⁸³ Such a statement provides the necessary “specific, articulable evidence” required to support a claim of reasonable cause.⁸⁴ No rational jury, therefore, could conclude that Officer Foster’s reliance on B.F.’s statement of abuse was

79. *Saucier v. Katz*, 533 U.S. 194, 200 (2001).

80. *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000); *Burke*, 586 F.3d at 731–33.

81. *Trevino v. Gates*, 99 F.3d 911, 917 (9th Cir. 1996) (internal quotation marks, citation, and emphasis omitted).

82. *Burke*, 586 F.3d at 731.

83. *Id.*

84. *Wallis*, 202 F.3d at 1138.

unreasonable.⁸⁵

With respect to imminent danger, the police “must have reasonable cause to believe that harm will occur in the period of time it would take to procure a warrant and remove the child from the home.”⁸⁶ In B.F.’s case, she reported that her stepfather’s sexual abuse occurred sporadically, so Officer Foster could have believed that she would again be sexually abused in the time it took to get a warrant.⁸⁷ The court determined that, had this been the sole basis for believing B.F. was in imminent danger, whether that belief was reasonable would have been for a jury to decide.⁸⁸

The threat of continuing sexual abuse was not the only basis for Officer Foster’s belief, however. B.F. commented during the interview that things would be “worse for her” when she got home if her mother and stepfather knew what she had revealed to the police.⁸⁹ She also described several threats her stepfather had made to beat her, and recounted the beating he administered when she returned home after running away.⁹⁰ This additional threat of violence, combined with the threat of continuing sexual abuse, satisfied the imminent danger requirement, the court held, because no rational jury could conclude that it was unreasonable for Officer Foster to believe that B.F. was in imminent danger of physical harm.⁹¹

*b. Scope of the Intrusion with Respect to B.F.’s Father*⁹²

The question of whether the intrusion was reasonable with respect to B.F.’s biological father’s rights was one of first impression for the Ninth Circuit. The court had previously acknowledged that noncustodial

85. *Burke*, 586 F.3d at 731.

86. *Id.* at 731–32 (citations omitted).

87. *Id.* at 732.

88. *Id.*

89. *Id.*

90. *Id.* at 729. B.F.’s mother confirmed the incident in which B.F.’s stepfather slapped her several times for having run away. *Id.* at 730.

91. *Id.* at 732.

92. The court concluded that the scope of the intrusion with respect to B.F.’s mother had been reasonable. *Id.* at 733. In circumstances in which the source of the abuse is not the biological parent but a stepparent, courts will sometimes place the child with the mother, but out of the presence of the abuser. The Ninth Circuit determined in *Mabe v. San Bernadino County, Dep’t of Pub. Soc. Serv.*, 237 F.3d 1101 (9th Cir. 2001), *overruled by* *Beltran v. Santa Clara County*, 505 F.3d 1006 (9th Cir. 2007), that “where the official reasonably believed that the mother was not protecting the child, ‘removal from the mother was reasonably necessary as well.’” *Burke*, 586 F.3d at 733 (quoting *Mabe*, 237 F.3d at 1110). The court in *Burke* determined that because B.F.’s mother had not taken appropriate steps to stop the abuse of B.F., of which she had knowledge, and because she had accused B.F. of lying about the abuse, she was not protecting B.F., and the removal was therefore reasonably necessary. *Id.* at 733.

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parents' liberty interest in the companionship, care, custody, and management of their children is reduced.⁹³ The court emphasized in *Burke*, however, that "even if [B.F.'s father's] interest in B.F.'s companionship was somehow reduced, he was not without *any* interest in the custody and management of B.F."⁹⁴ As a result, the court extended the holding from *Wallis* to apply to all parents with legal custody, even if they do not possess physical custody of their children.⁹⁵

In the specific case at bar, the court determined that the reasonableness of Officer Foster's intrusion on B.F.'s father's rights was for a jury to decide.⁹⁶ B.F.'s father was not accused of violence or abuse at any point in B.F.'s interview.⁹⁷ B.F. had mentioned to the officers that she did not feel as though she were welcome in her father's home, but never indicated she did not feel safe there or made allegations of abuse.⁹⁸ The officers, however, did not at any point attempt to contact B.F.'s father, and did not explore the option of placing B.F. in his care instead of taking her into protective custody.⁹⁹ In fact, two days passed before B.F.'s father had any knowledge of B.F.'s removal from her mother and stepfather's home.¹⁰⁰ The court held that granting summary judgment in favor of Officer Foster and the county on this aspect was improper because rational juries could differ regarding whether Officer Foster's actions were reasonable under the circumstances.¹⁰¹

c. Officer Foster's Qualified Immunity

Because B.F.'s father had raised a triable issue of fact regarding whether his constitutional rights had been violated by Officer Foster's actions, the court then examined whether Officer Foster was protected by qualified immunity. Even when the actions of an official, acting under the color of state authority, violate the Constitution, the official is entitled to qualified immunity unless the law was so "clearly

93. *Brittain v. Hansen*, 451 F.3d 982, 992 (9th Cir. 2006).

94. *Burke*, 586 F.3d at 733.

95. *Id.* The court recognized that the *Wallis* test is a flexible one, and the individual circumstances of each case must be considered. For example, if the noncustodial parent lives a great distance away, and the child is in imminent danger of harm, it might be reasonable for the official to remove the child from the custodial parent's home without first attempting to place the child in the noncustodial parent's custody. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

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established” that a reasonable official would have known that his actions violated that right.¹⁰²

The Ninth Circuit determined that, because its previous cases referred only to the removal of a child from “the custody of its parent,”¹⁰³ Officer Foster’s actions were not inherently unreasonable, and he was therefore entitled to immunity.¹⁰⁴ “Custody,” the court said, was never explicitly defined, and is commonly thought of as referring only to physical custody.¹⁰⁵ Given this legal backdrop, the court was unwilling to say that it was clearly unlawful for Officer Foster and the other officials involved in B.F.’s removal to have failed to contact B.F.’s father because he did not have physical custody of B.F.¹⁰⁶ As a result, the court upheld the district court’s grant of summary judgment with respect to Officer Foster.¹⁰⁷

3. B.F.’s Parents’ § 1983 Claims Against Alameda County

The purpose of 42 U.S.C. § 1983 is to remedy violations of constitutional rights by state officials.¹⁰⁸ Section 1983 claims can be brought against both individual state officials and municipalities. In this case, B.F.’s parents sued both Officer Foster and Alameda County for allegedly depriving them of their constitutional rights to familial association by removing B.F. from her mother’s care without a warrant and without notifying B.F.’s father.¹⁰⁹

To establish municipal liability under § 1983, a plaintiff “must show that (1) she was deprived of a constitutional right; (2) the County had a policy; (3) the policy amounted to a deliberate indifference to her constitutional right; and (4) the policy was the moving force behind the constitutional violation.”¹¹⁰ The district court granted summary judgment to Alameda County because it found no constitutional violation.¹¹¹ On appeal, the Ninth Circuit reversed this decision.¹¹² The

102. *Id.*

103. *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000). *See also Mabe v. San Bernadino County Dep’t of Pub. Soc. Servs.*, 237 F.3d 1101, 1106 (9th Cir. 2001), *overruled by Beltran v. Santa Clara County*, 505 F.3d 1006 (9th Cir. 2007).

104. *Burke*, 586 F.3d at 734.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Caballero v. Concord*, 956 F.2d 204, 206 (9th Cir. 1992).

109. *Burke*, 586 F.3d at 730.

110. *Mabe v. San Bernadino County Dep’t of Pub. Soc. Serv.*, 237 F.3d 1101, 1110–11 (9th Cir. 2001) (internal quotation marks and citation omitted), *overruled by Beltran v. Santa Clara County*, 505 F.3d 1006 (9th Cir. 2007).

111. *Burke*, 586 F.3d at 730.

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court determined that B.F.'s father had raised a triable issue of fact regarding whether Officer Foster's failure to contact him was a violation of his constitutional right to familial association.¹¹³ The summary judgment in Officer Foster's favor was upheld because Foster was entitled to immunity, but municipalities are not entitled to qualified immunity.¹¹⁴ The Ninth Circuit therefore vacated the district court's grant of summary judgment and remanded the case to the lower court for a determination regarding whether B.F.'s father's claim against the county satisfied the other requirements of a § 1983 claim.¹¹⁵

IV. THE UNDEFINED LEGAL RIGHTS OF NONCUSTODIAL PARENTS

Although in *Burke* the Ninth Circuit clearly held that the rights of noncustodial parents must be considered in emergency removal situations, it is the only court to have done so. Additionally, *Burke* merely recognized that noncustodial parents have an interest that needs to be protected in such situations; it did nothing in the way of suggesting how to afford that protection. No other court has made such suggestions either, and the lack of guidance from the courts results in uncertainty for state officials who want to respect noncustodial parents' rights but are unsure of how to do so. This Part identifies the lack of identifiable standards and emphasizes the problems that arise in their absence.

A. Most Jurisdictions Have Not Articulated Standards

In 2006, the Ninth Circuit addressed the rights of noncustodial parents, recognizing that parents who do not have primary custody retain a liberty interest in the companionship, care, custody, and management of their children.¹¹⁶ The court also held that the "interest is unambiguously lesser in magnitude than that of a parent with full legal custody" because it has been reduced by the terms of the custody judgment.¹¹⁷ Other circuits have reached similar conclusions and either explicitly or implicitly found an existing and somewhat reduced liberty interest of noncustodial parents in the care, custody, and management of their children.¹¹⁸

112. *Id.* at 734.

113. *Id.*

114. *Id.* (citing *Hervey v. Estes*, 65 F.3d 784, 791 (9th Cir. 1995)).

115. *Id.*

116. *Brittain v. Hansen*, 451 F.3d 982, 992 (9th Cir. 2006).

117. *Id.*

118. *Zakrzewski v. Fox*, 87 F.3d 1011, 1013–14 (8th Cir. 1996); *Franz v. United States*, 707 F. 2d

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Beyond acknowledging the existence of these rights, however, courts have largely been silent with respect to the specific rights of noncustodial parents. With the exception of the Ninth Circuit's decision in *Burke*, no other court of appeals has expressly recognized the relevance of the rights of noncustodial parents in emergency removal situations. State officials therefore lack specific direction regarding what actions they need to take to protect noncustodial parents' rights.

Like the courts, most legislatures and child protective services agencies have not acknowledged the rights of noncustodial parents or identified the specific steps that must be taken to protect those rights. Only one state statute requires consideration of the noncustodial parent as the primary placement option in emergency removal situations.¹¹⁹ Other statutes call for initially attempting to place children with "qualified relatives" in such situations, but do not mention noncustodial parents.¹²⁰ Similarly, a search revealed that policy manuals for child protective services agencies also fail to specify the actions that officials should take respecting a child's noncustodial parents in emergency removal situations.¹²¹

The lack of clarity regarding the rights of noncustodial parents creates confusion for state officials removing children from their homes in emergency situations. In the absence of direction from legislatures, child protective services agencies, and the courts, the rights of noncustodial parents remain unclear, and therefore state officials are prevented from taking appropriate action to protect those rights in emergency removal situations.

582, 594–602 (D.C. Cir. 1982); *Wise v. Bravo*, 666 F.2d 1328, 1331–33 (10th Cir. 1981); *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 394 (4th Cir. 1990); *Terry v. Richardson*, 346 F.3d 781, 784 (7th Cir. 2003).

119. The Utah Code states, in pertinent part: "The following order of preference shall be applied when determining the person with whom a child will be placed in an emergency placement . . . : (i) a noncustodial parent of the child . . . ; (ii) a relative of the child." UTAH CODE ANN. § 62A-4a-209(4)(a)(i)–(ii) (West 2010).

120. See, e.g., KY. REV. STAT. ANN. § 620.090(1) (West 2010), CAL. WELFARE & INST. CODE § 309 (West 2010); W. VA. CODE ANN. § 49-6-3(a) (West 2010); VA. CODE ANN. § 16.1-251(C) (West 2010).

121. See, e.g., N.C. DEP'T OF HEALTH & HUMAN SERVS., CHAPTER VIII: PROTECTIVE SERVICES, NORTH CAROLINA DEP'T OF HEALTH AND HUMAN SERV. (2010), available at <http://info.dhhs.state.nc.us/olm/manuals/dss/csm-60/man/>; OHIO DEP'T JOBS & FAM. SERVS., CHILD PROTECTIVE SERVICES WORKER MANUAL, available at <http://emanuals.odjfs.state.oh.us/emanuals/GetTocDescendants.do?maxChildrenInLevel=100&nodeId=%23node-id%28167%29>; ALASKA DEP'T HEALTH & SOC. SERVS., OFFICE OF CHILDREN'S SERVS., CHILD PROTECTIVE SERVICES (2008), available at <http://www.hss.state.ak.us/ocs/Publications/CPSManual/cps-manual.pdf>. A search revealed only one manual that contained specific direction regarding actions to be taken respecting noncustodial parents; that manual is discussed in Part V.

2011] *PROTECTING NONCUSTODIAL PARENTS* 1207*B. Problems Arising from the Lack of Standards*

The lack of clearly articulated standards poses several problems. One significant problem is that, although courts have recognized the valid, constitutionally-protected liberty interests of noncustodial parents in familial association with their children, these rights are not being respected in emergency removal situations. This problem stems from the absence of standards articulating the actions officials must take to respect noncustodial parents' rights in such situations.

As the Ninth Circuit recognized in *Burke*, "even if [B.F.'s father's] interest in B.F.'s companionship was somehow reduced [because he is a noncustodial parent], he was not without *any* interest in the custody and management of B.F."¹²² Constitutional violations are not viewed in terms of the value of the right or the strength of the liberty interest involved; there is either a violation of a constitutionally-protected right or there is not. In the case of noncustodial parents, the right to make decisions with respect to the care, custody, and management of their children, however diminished, is violated whenever they are not afforded due process in emergency removal situations. Articulated standards are necessary to ensure that the rights of all concerned parties are protected.

A second and closely related problem stemming from the lack of clear standards of action in cases involving noncustodial parents is that officials are uncertain regarding what actions to take. One option, of course, is to continue executing emergency removals according to existing procedures. This is problematic, however, because in many situations the existing procedures ignore the rights of noncustodial parents entirely.

In the alternative, officials concerned with protecting the rights of all parties involved, including noncustodial parents, may hesitate before taking necessary action to remove a child from imminent danger. That is, officials may delay removal until the noncustodial parent can be contacted, in which case the child will likely be placed back in the custody of the custodial parent, where the risk of harm originally arose. Such a result, as previously discussed, is not in the best interests of the community. The entire purpose of emergency removal is to protect children from harm; if officials hesitate in executing such removals for fear of violating noncustodial parents' rights, that purpose is not being served. If clear standards were articulated, however, officials would not have to concern themselves with violating any party's rights because they would be following procedures designed to protect the interests of

122. *Burke v. County of Alameda*, 586 F.3d 725, 733 (9th Cir. 2009).

all involved.

A third and final problem that arises from the lack of articulated standards relates back to the issue of qualified immunity. Individuals whose constitutional rights have been violated by persons acting under color of state law can bring claims for remedies under § 1983.¹²³ Naturally, then, if noncustodial parents have constitutional rights to their children that are violated in emergency removal situations, a § 1983 suit should provide them with a remedy. The problem, however, is that individual state actors are entitled to the defense of qualified immunity.

As discussed in previous subparts, an official is entitled to qualified immunity unless the right violated was clearly established. With the exception of the Ninth Circuit in *Burke*, courts have not clearly held that noncustodial parents are entitled to the same due process protections in emergency removal situations as custodial parents. As a result, noncustodial parents bringing claims under § 1983 would have difficulty proving that their rights were “clearly established.” If officials cannot be held liable for their actions (or, in most cases, inactions) toward noncustodial parents, a § 1983 claim cannot function as it was intended.

The lack of clearly articulated standards in this area of the law presents several problems. Noncustodial parents have important interests in the “care, custody, and management” of their children, especially when a child is being removed from the custodial parent’s home. These rights are largely ignored, however, in emergency removal situations. The alternative, that officials delay action due to the uncertainty regarding noncustodial parents, is no better. Additionally, § 1983 cannot protect the rights of noncustodial parents against violations by state officials if the law is never “clearly established” enough to support a § 1983 claim against the individual state actors. The issue of noncustodial parents is not likely going away any time soon, and these problems need to be addressed.

V. PROPOSED STANDARDS FOR PROTECTING NONCUSTODIAL PARENTS’ RIGHTS

Articulated standards provide law enforcement and child welfare officials with guidance in emergency situations. A lack of standards, correspondingly, creates confusion in those situations for officials. This Part proposes changes that can be made and procedures that can be implemented in emergency removal situations in order to protect noncustodial parents’ liberty interests in the care, custody, and

123. *Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992).

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management of their children. These changes should occur in every branch of government—judicial, legislative, and executive.

As an initial step, courts should follow the Ninth Circuit's lead in *Burke*, and unequivocally hold that noncustodial parents have the same due process rights in emergency removal situations as custodial parents.¹²⁴ Several courts of appeals have acknowledged, either explicitly or implicitly, that noncustodial parents have a protected liberty interest in the care, custody, and management of their children.¹²⁵ These courts have also held, however, that this interest is reduced by virtue of the parent's noncustodial status.¹²⁶ Although they have touted the existence of this reduced liberty interest, courts have largely been silent with respect to defining noncustodial parents' rights further. To begin to alleviate the confusion surrounding noncustodial parents' rights, other courts should explicitly declare that the rights of noncustodial parents in emergency removal situations are the same as those of custodial parents. Clear definition by the courts of the constitutional rights of noncustodial parents will likely prompt the other branches of government to take steps to ensure protection of those rights.

In addition to the need for court recognition of noncustodial parents' rights, state legislatures need to statutorily acknowledge the propriety of considering placement of children removed in emergencies with their noncustodial parents before considering other placement options. A survey of state statutes revealed that Utah is the only state to currently have such a provision.¹²⁷ Utah's statute lists the "order of preference" for placement of children in emergency situations, and lists noncustodial parents as the first option.¹²⁸ Other state legislatures should include in their statutes similar provisions stating a preference for placement with noncustodial parents in emergency removal situations. Leadership from the legislature on this issue may even prompt the other branches of government to make necessary changes as well.

Finally, in the executive branch, child protective services agencies

124. *Burke*, 586 F.3d at 733.

125. *Zakrzewski v. Fox*, 87 F.3d 1011, 1013–14 (8th Cir. 1996); *Franz v. United States*, 707 F. 2d 582, 594–602 (D.C. Cir. 1982); *Wise v. Bravo*, 666 F.2d 1328, 1331–33 (10th Cir. 1981); *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 394 (4th Cir. 1990); *Terry v. Richardson*, 346 F.3d 781, 784 (7th Cir. 2003).

126. *Swipies v. Kofka*, 419 F.3d 709, 714 (8th Cir. 2005) ("[T]he interest [of noncustodial parents] is subject to a *de minimis* exception . . ."); *Brittain v. Hansen*, 451 F.3d 982, 992 (9th Cir. 2006) ("Such an interest is unambiguously lesser in magnitude than that of a parent with full legal custody."); *Zakrzewski*, 87 F.3d at 1014 ("Zakrzewski's liberty interest in the care, custody, and management of his son has been substantially reduced by the terms of the divorce decree" under which he is a noncustodial parent.).

127. UTAH CODE ANN. § 62A-4a-209(4)(a)(i) (West 2010).

128. *Id.*

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need to establish concrete policies that accommodate the due process rights of noncustodial parents. As alluded to in Part IV, many training manuals for child protective services agencies fail to indicate the actions that need to be taken with respect to noncustodial parents.¹²⁹ Many of these manuals direct social services officials to first attempt to place children with relatives before considering outside placements such as foster care, but do not specifically direct the officials to contact any noncustodial parent of the child. Iowa's Department of Human Services Social Services Policy Manual, however, clearly directs state officials to consider any noncustodial parent as the first placement option when there is an emergency need for the child to be removed from the custodial parent's home.¹³⁰ The manual then directs state officials to attempt to locate other qualified family members as a second placement option.¹³¹ Other child protective services agencies should similarly direct officials to first consider noncustodial parents as a placement option in emergency removal situations.

States should follow the lead of the Ninth Circuit Court of Appeals, the Utah legislature, and the Iowa Department of Human Services Social Services Agency in order to secure protection for the rights of noncustodial parents in emergency removal situations. More specifically, states should consider noncustodial parents as the first placement option following an emergency removal. Officials would of course have to take into account the specific facts of each case, such as the feasibility of immediate placement with a geographically distant noncustodial parent or the relative safety of placing the child with a noncustodial parent in lieu of another placement option.¹³² If the

129. See, e.g., N.C. DEP'T OF HEALTH & HUMAN SERVS., CHAPTER VIII: PROTECTIVE SERVICES, NORTH CAROLINA DEP'T OF HEALTH AND HUMAN SERV. (2010), available at <http://info.dhhs.state.nc.us/olm/manuals/dss/csm-60/man/>; OHIO DEP'T JOBS & FAM. SERVS., CHILD PROTECTIVE SERVICES WORKER MANUAL, available at <http://emanuals.odjfs.state.oh.us/emanuals/GetTocDescendants.do?maxChildrenInLevel=100&nodeId=%23node-id%28167%29>; ALASKA DEP'T HEALTH & SOC. SERVS., OFFICE OF CHILDREN'S SERVS., CHILD PROTECTIVE SERVICES (2008), available at <http://www.hss.state.ak.us/ocs/Publications/CPSManual/cps-manual.pdf>.

130. IOWA DEP'T OF HUMAN SERVS., CHILD WELFARE SERV., EMPLOYEES' MANUAL: ADDITIONAL ASSESSMENT INFORMATION (2006), available at http://www.dhs.state.ia.us/policyanalysis/PolicyManualPages/Manual_Documents/Master/17-b4.pdf.

131. *Id.*

132. In *Burke*, the Ninth Circuit was careful to note that

the test in *Wallis* is flexible and must take into account the individual circumstances. For example, if the parent without physical custody does not reside nearby, and a child is in imminent danger of harm, it is probably reasonable for a police officer to place a child in protective custody without attempting to place the child with the geographically distant parent.

Burke v. County of Alameda, 586 F.3d 725, 733 (9th Cir. 2009). When determining the propriety of placement with a noncustodial parent, child protective services agencies would have to perform the

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necessary change occurs in all facets of state governments, noncustodial parents will be the first consideration for emergency placements, and as a result their rights will be protected in these situations.

VI. CONCLUSION

At a time when divorce is remarkably commonplace and the concept of family has become fluid, it can no longer be assumed that all children reside with their biological parents, or even that both of a child's biological parents are involved in the child's life. The constitutional rights of noncustodial parents with respect to their children are not the same as those of custodial parents, but despite the reduced interest in the "care, custody, and management" of their children, noncustodial parents are not completely without legally cognizable rights. This is especially true in situations in which the state, acting as *parens patriae*, has determined that the custodial parent is unfit to care for—and is therefore unfit to retain custody of—the child. In such situations, it would seem the noncustodial parent undoubtedly has a right to assume such custody of the child.

While this may seem to be a logical conclusion, however, it is not as simple as it may appear, particularly given the numerous complexities related to the removal of children from their homes. More specifically, in instances of emergency removal, in which a police officer or child welfare official believes that a child is at an imminent risk of serious harm in the home of the custodial parent, officials may need to make rapid decisions in the interest of the child's safety. The rights of the noncustodial parent may be overlooked in the face of these emergency situations.

This Comment has argued that, absent clearer standards from government entities, the rights of noncustodial parents will continue to

same background investigations to ensure that the placement is safe for the child. See, e.g., N.C. DEP'T OF HEALTH & HUMAN SERVS., CHAPTER VIII: PROTECTIVE SERVICES, NORTH CAROLINA DEP'T OF HEALTH AND HUMAN SERV. (2010), available at <http://info.dhhs.state.nc.us/olm/manuals/dss/csm-60/man/>; OHIO DEP'T JOBS & FAM. SERVS., CHILD PROTECTIVE SERVICES WORKER MANUAL, available at <http://emanuals.odjfs.state.oh.us/emanuals/GetTocDescendants.do?maxChildrenInLevel=100&nodeId=%23node-id%28167%29>; ALASKA DEP'T HEALTH & SOC. SERVS., OFFICE OF CHILDREN'S SERVS., CHILD PROTECTIVE SERVICES (2008), available at <http://www.hss.state.ak.us/ocs/Publications/CPSManual/cps-manual.pdf>. These investigations would have to include not only criminal background checks but also the noncustodial parent's history with the child, such as whether the noncustodial parent had ever been abusive toward the child. A search revealed only one manual that contained specific direction regarding actions to be taken respecting noncustodial parents. See IOWA DEP'T OF HUMAN SERVS., CHILD WELFARE SERV., EMPLOYEES' MANUAL: ADDITIONAL ASSESSMENT INFORMATION (2006), available at http://www.dhs.state.ia.us/policyanalysis/PolicyManualPages/Manual_Documents/Master/17-b4.pdf.

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be ignored in emergency removal situations. The right of the state to conduct emergency removals is vitally important, as no child should have to suffer further abuse while officials are waiting to obtain a court order. This Comment in no way advocates diminishing the state's authority to act in that capacity. What it does argue, however, is that the state should make reasonable efforts to place the child with the noncustodial parent. Courts should therefore follow the Ninth Circuit's decision in *Burke v. County of Alameda*¹³³ and clearly state the rights of noncustodial parents; legislatures should indicate an order of preference for placements in emergency removal situations that begins with the noncustodial parents; and child protective services agencies should create clear procedures that direct officials to consider noncustodial parents as the first placement option in those situations.

133. *Burke*, 586 F.3d at 725.