“THE SPECTER OF PSYCHOLOGICAL ABUSE”: THE DISREGARD FOR EMOTIONAL HARMS IN OREGON JUVENILE DEPENDENCY COURTS

by

JAKOB HOLLENBECK

A THESIS

Presented to the Department of Political Science
and the Robert D. Clark Honors College
in partial fulfillment of the requirements for the degree of
Bachelor of Arts

April 2022

An Abstract of the Thesis of

Jakob Hollenbeck for the degree of Bachelor of Arts
in the Department of Political Science to be taken April 2022

"The Specter of Psychological Abuse": The Disregard for Emotional Harms in Oregon Juvenile Dependency Courts

Approved: *Daniel Tichenor, Ph.D.*
Primary Thesis Advisor

In 2000, the Supreme Court of the United States declared that parents' rights to the "care, custody, and control of their children" were "perhaps the oldest of the fundamental liberty interests recognized by this Court." Yet, U.S. courts have currently established jurisdiction over more than half a million children. These children, the courts determined, have rights to physical and emotional safety that outweigh their parents' right to control them. The weighing of these competing constitutional claims tasks the courts with simultaneously preventing government overreach into citizens' private homes while protecting the country's most vulnerable members from abuse. Recent scholarship has demonstrated that over the past twenty years, the Oregon Court of Appeals has dramatically restricted the state's ability to intervene in the lives of Oregon families. This paper explores how this shift has affected emotional abuse cases. Emotional abuse is one of the most harmful—but underrecognized—forms of abuse, accounting for over a third of estimated instances of child maltreatment. Yet, emotional abuse cases are relatively rare in juvenile dependency courts. This paper examines four decades of Oregon Supreme Court and Court of Appeals decisions to understand both how Oregon courts treat cases of emotional abuse and harm broadly.

With this background, it calls for urgent changes to the way the state approaches emotional abuse cases and child maltreatment in general.

Acknowledgements

I am honored to write this thesis with the support of three professors who have defined my undergraduate experience. I would like to first express my sincerest gratitude to Dr. Daniel Tichenor for his unwavering support and keen insight, not only throughout the thesis process, but across my four years at the UO. There's a reason he's colloquially known as "Dan the Man." I would like to thank Dr. Carol Stabile for demonstrating the transformative potential of academia in practice and challenging me to get out into my community. And to Dr. Tim Williams, thank you for fostering my love of research and always pushing me to produce my best work. My thesis and time at the UO would not have been the same without you. I would also like to thank attorney David Vill. This project would not have been possible without the opportunity you have given me to help serve Oregon families. Your guidance has not only profoundly affected the development of my thesis, but my life generally. Thank you. I am also incredibly indebted to the support of my friends. Thank you for your infinite patience and insight. There is no point in trying to imagine this thesis without you all.

Table of Contents

List of Figures

I. INTRODUCTION

In 2000, the Supreme Court of the United States declared that parents' rights to the "care, custody, and control of their children" were "perhaps the oldest of the fundamental liberty interests recognized by this Court."[1] Yet, U.S. courts have currently established jurisdiction over more than half a million children.[2] These children, the courts determined, have rights to physical and emotional safety that outweigh their parents' right to control them.[3] The weighing of these competing constitutional claims tasks the courts with simultaneously preventing government overreach into citizens' private homes while protecting the country's most vulnerable members from abuse. At times, the courts have disregarded the rights of parents. The country's horrific history of Indian child removal, for example, epitomizes the dangers of this approach.[4] Restricting the government's scope of intervention, though, can leave millions of abused children without legal protection. As a result, the balance that the court strikes has far-reaching implications for the lives of Oregon's families and children.

Emotional abuse presents dependency courts with a unique challenge. In its most basic form, emotional abuse characterizes parenting behavior that conveys to children "that they are worthless, flawed, unloved, unwanted, endangered, or of value

---

[1] DONALD N. DUQUETTE ET AL., CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 369 (National Association of Counsel for Children 3rd edition. ed. 2016).
[2] DUQUETTE ET AL., *supra* note 1.
[3] Carrie Murray, "An Analysis of Recent Oregon Court of Appeals Decisions Regarding Juvenile Dependency & Their Impact on Parental Constitutional Rights," *OREGON LAW REVIEW* 92 (2013): 726.
[4] Mannes M, *Factors and Events Leading to the Passage of the Indian Child Welfare Act*, 74 CHILD WELFARE 264, 267 (Child Welfare League of America Feb. 1995). By 1960, researchers estimate that the state had separated 25-35% of Indian children from their families.

only in meeting another's needs"[5] Experts regard emotional abuse as the "the core issue and most destructive factor across all types of child abuse and neglect."[6] On its own, it is at least as destructive as other forms of abuse.[7] It is also one of the most pervasive forms of abuse, accounting for approximately 36% of all child maltreatment cases.[8] Despite its prevalence, official child welfare agency reports portray emotional abuse as a "relatively rare phenomenon."[9] When documenting reasons for child removal, Oregon's most recent Child Welfare Data Book even omitted the category completely.[10] Child welfare agencies are significantly less likely to investigate reports of emotional abuse than other forms of abuse.[11] They also often fail to identify emotionally abusive behaviors when investigating.[12] This disconnect between the perceived and actual prevalence of emotional abuse suggests that the seriousness of emotional abuse is underrecognized.[13]

Practical considerations, too, explain the relatively few emotional abuse cases in juvenile dependency law. Emotional abuse lacks a standard legal definition and is

---

[5] Tuppett M. Yates, *The Developmental Consequences of Child Emotional Abuse: A Neurodevelopmental Perspective: Childhood Emotional Abuse: Mediating and Moderating Processes Affecting Long-Term Impact*, 7 JOURNAL OF EMOTIONAL ABUSE No. 2, 9, 10 (Haworth 2007).
[6] Sana Loue, *Redefining the Emotional and Psychological Abuse and Maltreatment of Children*, 26 JOURNAL OF LEGAL MEDICINE No. 3, 311, 311 (Routledge Sep. 2005).
[7] Amy M. Smith Slep et al., *Child Emotional Aggression and Abuse: Definitions and Prevalence*, 35 CHILD ABUSE & NEGLECT No. 10, 783, 783 (Oct. 2011).
[8] Joseph Spinazzola et al., *Unseen Wounds: The Contribution of Psychological Maltreatment to Child and Adolescent Mental Health and Risk Outcomes.*, 6 PSYCHOLOGICAL TRAUMA: THEORY, RESEARCH, PRACTICE, AND POLICY S18 (US: Educational Publishing Foundation 2014).
[9] *Id.*
[10] Office of Reporting, Research, Analytics, and Implementation, *2020 Child Welfare Data Book* 40 (Sep. 2021). Under "Reasons for Removal," the categories include everything from neglect to child disability, but not any mention of psychological maltreatment. The CPS data under "Incidents of Child Abuse" reports that "Mental Injury" accounted for just 1.5% of cases of founded abuse
[11] Andrea J Sedlak et al., *Fourth National Incidence Study of Child Abuse and Neglect (NIS–4)* 455, 4 (2010).
[12] Penelope K. Trickett et al., *Emotional Abuse in a Sample of Multiply Maltreated, Urban Young Adolescents: Issues of Definition and Identification*, 33 CHILD ABUSE & NEGLECT 27 (Jan. 2009).
[13] Spinazzola et al., *supra* note 8.

inherently more difficult to substantiate than other forms of abuse.[14] While physical forms of abuse often leave visible marks, even experts can struggle to confidently tie a child's dysfunctional behavior to alleged emotional abuse. Although anxiety, depression, and post-traumatic stress disorder (PTSD) all commonly develop after exposure to emotional abuse, these conditions can arise from any number of sources. Allowing the state to remove children due to these indications of emotional abuse, then, would greatly disrupt the balance between parental and juvenile rights. As a result, in the courtroom, a child's mental instability can suggest the presence of abuse but cannot be used as evidence of it.[15] The Oregon Court of Appeals has also repeatedly emphasized that "bad parenting alone does not justify state intervention," but it is not immediately clear when "bad parenting" becomes emotional abuse.[16] As a result, one of the most destructive and common forms of abuse occupies a nebulous legal space, leaving Oregon's children without clear protections.

This paper is the first scholarly review to clarify the state of emotional abuse cases in Oregon's juvenile dependency courts. To do this, the literature review first explains the psychological definition(s) of emotional abuse, compares the harms of emotional abuse with the harms of child removal, and then offers a brief history of the rights of American children and Oregon juvenile dependency law. The statutory review, then, explains the current statutory scheme governing emotional abuse cases in Oregon

[14] Jessica Dixon Weaver, *The Principle of Subsidiarity Applied: Reforming The Legal Framework To Capture The Psychological Abuse Of Children*, 18 VIRGINIA JOURNAL OF SOCIAL POLICY & THE LAW (Winter 2011).; Amy J. L. Baker et al., *Psychological Maltreatment: Definition and Reporting Barriers among American Professionals in the Field of Child Abuse*, 114 CHILD ABUSE & NEGLECT 104941, 1 (2021).
[15] Jessica Dixon Weaver, *supra* note 14, at 267.
[16] *Matter of K. R. M.*, 296 Or.App. 109 (Or. Ct. App. 2019).

and reveals thinking of the legislators who first codified “mental harm” as a form of abuse in the 1985. From there, it examines four decades of Oregon Supreme Court and Court of Appeals decisions to understand not only how Oregon courts treat cases of emotional abuse but also emotional harm broadly. With this background, it calls for urgent changes to the way the state approaches emotional abuse cases and child maltreatment in general.

II. LITERATURE REVIEW

A. Psychological Understanding

Defining Emotional Abuse

Psychological understanding of child abuse is a recent development. In 1962, Henry Kempe's "The Battered Child" first popularized the fact that abuse severely impacted the development of children.[17] "The Battered Child" catalyzed a wave of research that confirmed Kempe's findings, but emotional abuse initially received far less attention.[18] Difficulties in defining emotional abuse further complicated early research.[19] The standard definition of psychological maltreatment stemmed from the American Professional Society on the Abuse of Children (APSAC). Their 1995 criterion defined the following behaviors as psychological maltreatment "if severe and/or repetitious": spurning, terrorizing, exploiting/corrupting, denying emotional responsiveness, isolating, mental health/medical/legal neglect, and witnessing intimate partner violence.[20] Psychologists have long pointed out that the criterion lacks clear thresholds or specific measures, causing estimates of emotional abuse to differ as well.[21] Psychologists since have refined the definitions, adding subcategories and

[17] DUQUETTE ET AL., *supra* note 1. In 1860, a French physician named Ambrose Tardieu had studied victims of child abuse and documented its effects, but his work was largely overlooked until Kempe.
[18] Yates, *supra* note 5, at 10.
[19] Slep et al., *supra* note 7, at 784.
[20] DUQUETTE ET AL., *supra* note 1, at 36. Spurning refers to belittling or humiliating a child. Terrorizing refers to making a child feel unsafe. Exploiting or corrupting a child refers to encouraging a child to develop inappropriate behaviors. Denying emotional responsiveness refers to failing to express affection to the child. Isolating refers to placing unreasonable limitations on a child's freedom of movement. Additionally, psychological maltreatment encompasses forms of emotional neglect as well as emotional abuse.
[21] Spinazzola et al., *supra* note 8.

examples to reduce ambiguity within the criterion.[22] As a result, definitions of emotional abuse and psychological maltreatment generally have consolidated into reliable criteria.[23]

Child welfare agencies and juvenile courts have largely ignored these advances in the criteria. The Oregon DHS Child Welfare Procedural Manual, for example, spans almost two thousand pages and does not define emotional abuse. The manual does once mention that psychological maltreatment,

> includes cruel or unconscionable acts or statements made, threatened to be made, or permitted to be made by the parent or caregiver that has a direct effect on the child. The parent or caregiver's behavior, intentional or unintentional, must be related to the observable and substantial impairment of the child's: A. Psychological, B. Cognitive, C. Emotional, or D. Social well-being and functioning.[24]

The definition does not indicate what actions are "cruel" or "unconscionable," two subjective measures. It does not provide any examples of what parental behaviors would constitute psychological maltreatment nor any examples of what effects a child would need to exhibit. These vague criteria hamper child welfare agencies from protecting children from emotional abuse.

Indeed, child welfare agencies report far fewer cases of emotional abuse than psychologists estimated through survey data. Psychologists estimate that emotional abuse and neglect apply to 36% and 52% of child maltreatment cases, respectively.[25] Federal data, however, claim that psychological maltreatment—emotional abuse and neglect combined—account for only 7.6% of cases.[26] Worse yet, Oregon data indicate

[22] Trickett et al., *supra* note 12.
[23] Baker et al., *supra* note 14, at 2.
[24] *DHS Child Welfare Procedural Manual* (Mar. 2022).
[25] Spinazzola et al., *supra* note 8.
[26] Sedlak et al., *supra* note 11, at 4.

that "mental injury" only applies to 1.5% of abuse incidents.[27] Psychologists have reviewed child maltreatment records to confirm that the survey method was not at fault for the discrepancy. After reviewing over 300 cases, one study, for example, found that although child welfare workers identified only 9% of reviewed cases as emotional abuse, 50% of all cases actually met the criteria for emotional abuse.[28] This discrepancy means that caseworkers greatly limit cases of emotional abuse before the court can even establish jurisdiction.

As a result, psychologists have developed criteria specifically to increase the accuracy of child welfare investigations. Dr. Slep and colleagues, for instance, designed a new criterion by testing the agreement rate of psychologists and field workers in real-world conditions. They found that using the traditional definition, field workers failed to identify emotional abuse 50% of the time. After multiple iterations, though, they created the following criterion that resulted in 96% agreement between the psychologists and the field workers.

[27] Office of Reporting, Research, Analytics, and Implementation, *supra* note 10.
[28] Trickett et al., *supra* note 12.

Appendix A.

Egregious: Egregious acts show striking disregard for child's well-being. As such, they are not merely examples of inadvisable or deficient parenting, but must clearly fall below the lower bounds of normal parenting.

Threatening: Verbal or nonverbal acts perceived by victim or witness as signifying that victim's physical integrity was at risk at the time or would be in the future.

More than inconsequential fear reaction:
(a) Fear (verbalized or displayed) of bodily injury to self or others

AND

(b) At least one of the following signs of fear or anxiety lasting at least 48 hours:

1. Persistent intrusive recollections of the incident, including recollections as evidenced in the child's play
2. Marked negative reactions to cues *related to incident*, as evidenced by (a) avoidance of cues; (b) subjective or overt distress to cues; or (c) physiological hyperarousal to cues (NOTE: Perpetrator can be a cue)
3. Acting or feeling as if incident is recurring
4. Marked symptoms of anxiety (any of the following):
   - ? Difficulty falling or staying asleep
   - ? Irritability or outbursts of anger
   - ? Difficulty concentrating
   - ? Hypervigilance (i.e., acting overly sensitive to sounds and sights in the environment; scanning the environment expecting danger; feeling keyed up and on edge)
   - ? Exaggerated startle response

Disability: Impairment resulting in some restriction or lack of ability to perform an action or activity in the manner or within the range considered normal.
Significant disruption: Given child's developmental level and trajectory evident before alleged maltreatment, child's current development is substantially worse than would have been expected.
Stress-related somatic symptoms: Some victims show impact through physical, rather than psychological, symptoms. Stress-related somatic symptoms are physical problems that are caused by or worsened by stressful incidents. Such somatic symptoms can include, but are not limited to aches and pains, migraine, gastrointestinal problems, or other stress-related physical ailments.
Psychiatric Disorders: Mental disorders as defined by the latest edition of the Diagnostic and Statistical Manual of Mental Disorders

Child Emotional Abuse Criteria

A. Non-accidental verbal or symbolic act or acts (excluding physical and sexual abusive acts) such as those listed below. *Acts not listed, but of similar severity, are also eligible*.
   - Berating, disparaging, degrading, scapegoating, or humiliating child (or other similar behavior)
   - **Threatening** child (including, but not limited to, indicating/implying future physical harm, abandonment, sexual assault)
   - Harming/abandoning—or indicating that alleged abuser will harm/abandon—people/things that child cares about, such as pets, property, loved ones
   - Confining child (a means of punishment involving restriction of movement, as by tying a child's arms or legs together or binding a child to a chair, bed, or other object, or confining a child to an enclosed area [such as a closet])
   - Coercing the child to inflict pain on him/herself (including, but not limited to, ordering child to kneel on split peas/rice for long periods or ordering child to ingest highly spiced food)
   - Disciplining child (through physical or non-physical means) excessively (i.e., extremely high frequency or duration, though not meeting physical abuse criteria)

B. Significant impact on the child involving any of the following:
   1. Psychological harm, including either
      a. **More than inconsequential fear reaction**
      b. Significant psychological distress (Major Depressive Disorder, Post-Traumatic Stress Disorder, Acute Stress Disorder, or other **psychiatric disorders**, at or near diagnostic thresholds) related to the act(s)
   2. Reasonable potential for psychological harm
      a. The act (or pattern of acts) creates reasonable potential for the development of a **psychiatric disorder** (at or near diagnostic thresholds) related to, or exacerbated by, the act(s). The child's level of functioning and the risk and resilience factors present should be considered.
      b. The act (or pattern of acts) carries a reasonable potential for **significant disruption** of the child's physical, psychological, cognitive, or social development
   3. **Stress-related somatic symptoms** (related to or exacerbated by the acts) that significantly interfere with normal functioning

Child Emotional Abuse—Scoring

- Meets criterion A (non-accidental acts)

and

- Meets criterion B (significant impact; check below which criterion met)
  - B.1a (more than inconsequential fear reaction)
  - B.1b (Significant psychological distress)
  - B.2a (Reasonable potential for psychological harm)
  - B.2b (Reasonable potential for significant disruption of development)
  - B.3 (Somatic symptoms that that significantly interfere with normal functioning

Exclusion

Excluded are generally accepted practices such as child car seats, safety harnesses, swaddling of infants, and discipline involving "grounding" a child or restricting a child to his/her room.

Figure 1: Slep et al. Child Emotional Abuse Criterion.[29]

The criterion begins with the same structure as the definition used by Oregon's caseworkers. It uses an act-plus-impact framework to define emotional abuse, meaning it includes both parental behaviors and the way those behaviors affect the children. The behaviors must be non-accidental but not necessarily malicious. Crucially, though, they define relevant terms and provide examples. For "Harming/abandoning," for instance,

[29] Slep et al., *supra* note 7, at 787.

they clarify that these behaviors also apply to "people/things that child cares about, such as pets, property, loved ones."[30] These examples give field workers increased guidance when encountering emotional abuse.

Some arbitrariness remains, however. The definition of "egregious," for example, requires the field worker to determine what actions "clearly fall below the lower bounds of parenting"—an inherently subjective measure. The researchers also explicitly omit "milder" forms of emotional abuse such as yelling because yelling occurs globally at a rate of 70 to 85%.[31] The pervasiveness of a behavior, though, does not speak to whether the behavior harms the child. Instead, their exclusion of more controversial behaviors reflects practical, rather than clinical, considerations. Although the criterion is not perfect, it greatly improved upon previous criteria, which caseworkers misapplied in the field half of the time.

Effects of Emotional Abuse

Advancements in the definition of emotional abuse have allowed psychologists to better research the effects of emotional abuse.[32] This research suggests that emotional abuse impairs child development at least as severely as other forms of abuse.[33] These effects endure long after the abuse has ended by shaping the brain. Specifically, exposure to abuse interferes with the crucial ability of the brain to differentiate between safe and dangerous situations. Dr. Bessel Van Der Kolk helpfully conceptualizes the two players guiding the brain's stress response as a smoke detector

[30] Slep et al., *supra* note 7.
[31] *Id.* at 784.
[32] Baker et al., *supra* note 14.
[33] Spinazzola et al., *supra* note 8.

and a watchtower.[34] Normally, the medial prefrontal cortex (MPFC) acts as the watchtower, allowing the brain to step back and make a conscious choice. The watchtower might dissuade a person from driving without a seatbelt, for example. When facing imminent danger, however, the brain does not have time for the watchtower's slow deliberation. Instead, the amygdala acts as the body's smoke detector and sounds the alarm. Without leaving time for conscious thought, the body releases stress hormones such as adrenaline or cortisol. These hormones prepare the body to either fight or flee by raising the body's heart rate, blood pressure, and rate of breath. When the smoke detector goes off appropriately, its quick response time helps the body stay safe. Soon, the danger passes, and the watchtower regains control.

Exposure to emotional abuse upsets the balance between the two. Survivors of abuse often misinterpret various safe stimuli, such as a car honking outside, as dangerous. Normally, the watchtower would step back and realize that the car does not pose any danger. Now, though, the sound sets off the smoke alarm. The adrenaline flows, the chest tightens, the heart pounds. In aggregate, these false alarms can keep survivors in a perpetual state of flight or flight. Indeed, research has demonstrated that children who were emotionally abused within the first year of their life had abnormally high cortisol rates even after controlling for the child's birth conditions.[35] These elevated levels of stress hormones contribute to long-term physical health problems as well as irritability, memory and attention deficits, and sleep disorders.[36] They also

[34] BESSEL A. VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA (New York, New York : Penguin Books 2015).
[35] DAPHNE BUGENTAL ET AL., HANDBOOK OF DYNAMICS IN PARENT-CHILD RELATIONS (SAGE Publications 2002).
[36] VAN DER KOLK, *supra* note 34.

impair survivors' ability to sustain relationships with others. In response to an innocuous comment, for example, the watchtower would normally step back and determine that the person meant no harm. Now, some might erupt in anger while others shut down.[37] In any case, this research suggests that emotional abuse affects the psychology of children by *physically* affecting their brain development.[38]

These effects, in turn, greatly diminish survivors' quality of life. Childhood emotional abuse is associated with devastating long-term physical and emotional outcomes. After reviewing 124 studies of emotional abuse, a robust meta-analysis from the Queensland Children's Medical Research Institute concluded,

> [t]he evidence suggests a causal relationship between non-sexual child maltreatment and a range of mental disorders, drug use, suicide attempts, sexually transmitted infections, and risky sexual behaviour.[39]

Emotional abuse was associated with three times the risk of developing depression compared to non-abused children. This risk was two times higher than physically abused children as well. Additionally, emotionally abused children have three times the risk of suicidal behavior than their non-abused peers. This increased risk profile applies to numerous other outcomes, including developing an anxiety disorder, contracting a sexually transmitted disease, and developing a substance addiction. As a result, exposure to emotional abuse is also associated with poor academic achievement, lower

---

[37] *Id.*
[38] Yates, *supra* note 5.
[39] Rosana Norman et al., *The Long-Term Health Consequences of Child Physical Abuse, Emotional Abuse, and Neglect: A Systematic Review and Meta-Analysis*, 9 PLOS MEDICINE No. 11 (Nov. 2012). The researchers establish causality based on "the strength and consistency of the association, the temporal relationship of the association, evidence of a biological gradient or dose–response relationship, biological plausibility, and consideration of alternate explanations." That said, the observational studies' lack of exogeneity weakens the authors' causal claim.

wages, and health problems.[40] The psychological consensus has, thus, concluded that emotional abuse is "at least as impactful as other kinds of abuse."[41]

While emotional abuse often coincides with other forms of abuse, a growing body of work has demonstrated that emotional abuse causes unique harm. Multiple studies have found that emotional abuse was associated with the development of more psychiatric disorders and more severe symptoms compared to other forms of abuse.[42] Other studies found that emotional abuse exacerbated the negative effects of other forms of abuse.[43] As Dr. Spinazzola concluded,

> Our findings strongly support the hypotheses that [emotional abuse] in childhood not only augment, but also independently contributes to statistical risk for negative youth outcomes to an extent comparable to statistical risks imparted by exposure to physical abuse, sexual abuse, or their combination.[44]

Researchers have also found this relationship in children who have witnessed emotional abuse between their parents. The most recent evidence from Dr. Naughton and colleagues suggests that exposure to emotional abuse between parents was associated with significantly lower psychological well-being and social support satisfaction than exposure to physical abuse. Naughton hypothesizes that one possible cause of the discrepancy lies in the ability of children to identify the abuse and categorize it as unacceptable. The more visible characteristics of physical abuse—not to mention the

---

[40] Yates, *supra* note 5.
[41] Slep et al., *supra* note 7.
[42] Spinazzola et al., *supra* note 8; Chris Hoeboer et al., *The Effect of Parental Emotional Abuse on the Severity and Treatment of PTSD Symptoms in Children and Adolescents*, 111 CHILD ABUSE & NEGLECT 104775 (Jan. 2021); Brandon E Gibb et al., *History of Childhood Maltreatment, Negative Cognitive Styles, and Episodes of Depression in Adulthood*, 25 COGNITIVE THERAPY AND RESEARCH (2001).
[43] Mary Wood Schneider et al., *Do Allegations of Emotional Maltreatment Predict Developmental Outcomes beyond that of Other Forms of Maltreatment?*, 29 CHILD ABUSE & NEGLECT 513 (May 2005).
[44] Spinazzola et al., *supra* note 8.

social stigma that accompanies it—may allow children to more easily share their story and receive social support as a result. The nebulous nature of emotional abuse, on the other hand, may prevent children from processing the trauma themselves or receiving social support from others. This difference may drive the more severe psychological effects of emotional abuse. Experiencing emotional abuse as a child or witnessing it between parents has, thus, been found to be uniquely harmful.

B. Harms of Removal

General Harms to Children

As psychologists began establishing the harms of emotional abuse, they also revealed the harms of removing children from their homes. This research is neatly summarized in Shanta Trivedi's recent article, "The Harm of Child Removal."[45] Her work demonstrated that only two jurisdictions require judges to consider these harms before establishing a wardship.[46] Unfortunately, research suggests that in some cases, removal may result in worse outcomes for the child overall.[47] This startling reality reflects both the inherent trauma of removal and the failures of state child welfare agencies.

First, psychologists have long known that separating children from their families has long-term consequences on the child's brain development. In response to the recent separation of immigrant children from their families, for example, the American

[45] Shanta Trivedi, *The Harm of Child Removal*, 43 NEW YORK UNIVERSITY REVIEW OF LAW & SOCIAL CHANGE 523 (Jan. 2019).
[46] *Id.*
[47] Joseph J. Doyle, *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 THE AMERICAN ECONOMIC REVIEW 1583 (American Economic Association 2007).

Association of Pediatrics warned that family separation "can cause irreparable harm, disrupting a child's brain architecture and affecting his or her short- and long-term health."[48] Animal research suggests that this disruption to the child's brain mirrors that caused by various forms of abuse. When researchers separate rat pups from their mothers, for example, they find that the removal changes the pup's stress response system. Care from a non-relative can mitigate the effects, but the extent to which that occurs depends on the quality of the care.[49] As result, removal can cause the very harm it is meant to prevent.

After removal, children have to maneuver child welfare systems that are often mismanaged, underfunded, and even dangerous. Despite the need for stability post-removal, foster care placements are notoriously precarious. One national study, for example, found that only 52% of children found a stable home within 45 days of removal. 28% did not achieve stability within 18 months.[50] The latest data from ODHS indicate that over the past three years, 15% of Oregon foster care children have moved more than 6 times in a year.[51] The constant moves exacerbate the initial trauma of removal, communicating to the child that they are unwanted or unlovable. Moreover, multiple studies suggest that the rate of maltreatment in foster homes is as much as *four times* higher than the general population.[52] One-third of surveyed children in the Northwest Foster Care Alumni Study, for example, reported maltreatment while in

[48] Colleen Kraft, *AAP Statement Opposing Separation of Children and Parents at the Border* (May 2018).
[49] Yates, *supra* note 5.
[50] David M. Rubin et al., *The Impact of Placement Stability on Behavioral Well-Being for Children in Foster Care*, 119 PEDIATRICS 336 (American Academy of Pediatrics Feb. 2007).
[51] Office of Reporting, Research, Analytics, and Implementation, *supra* note 10.
[52] Trivedi, *supra* note 45.

foster care.[53] While many assume that foster placements will naturally be safe—or safer than home—this is often not the case.

While foster care children endure the traumas of removal, unstable placements, and maltreatment, child welfare agencies consistently fail to provide physical and mental healthcare. A report from the United States General Accounting Office concluded that "an estimated 12 percent of young foster children received no routine health care, 34 percent received no immunizations, and 32 percent had at least some identified health needs that were not met."[54] Access to mental health care is often worse. In fact, the State of Oregon is currently facing a class-action lawsuit, *Wyatt B. v. Brown*, brought by foster care children for ODHS's failure to protect their mental health needs. The complaint noted that the Federal Children's Bureau found that ODHS "'addressed the mental/behavioral health needs of the children' in only 49% of applicable cases'" and that "'although most services are available throughout the state, they are not available to the extent, or at times or the quality, required to meet the identified needs of children and families.'"[55] These shortcomings have resulted in ODHS taking extreme measures. In 2019, *Oregon Public Broadcasting* revealed that the ODHS was increasingly unable to find residential mental health treatment for children with high mental health needs. As a result, it sent children across the country to unregulated and dangerous out-of-state mental health facilities.[56] This practice not only sent children thousands of miles away from home but also often subjected them to

[53] *Id.*
[54] *Id.*
[55] *Wyatt B. v. Brown*, No. 6:19-cv-000556-AA (Dist. Court Sep. 12, 2019).
[56] Lauren Dake, *Oregon Ships Foster Care Children To Other States — And The Number Is Growing*, OPB (Feb. 5, 2019), https://www.opb.org/news/article/oregon-foster-care-child-welfare-mental-health/.

draconian facility conditions. Two Oregonian children, for instance, were sent to a Michigan facility where a staff member killed a patient while restraining them for throwing a sandwich.[57] State failures like these worsen the mental health outcomes of at-risk children. Ironically, the inability to provide adequate medical services justifies the removal of many Oregonian children. Like with the prevalence of maltreatment in foster care, the state often subjects children to conditions that would warrant removal if provided by biological parents.

Harms to Marginalized Communities

This is particularly concerning given the stark class and racial disparities within the child welfare system. These disparities have existed from the beginning. In fact, the predecessor to the modern child welfare system did not remove any children due to parental abuse. It was solely concerned with poverty.[58] In the late nineteenth century, the "child savers" responded to the bleak urban poverty caused by the country's rapid industrialization. These reformers not only believed that poor parents were immoral and unfit to parent but also that growing up in urban poverty would corrupt their children.[59] As a result, the movement removed impoverished children from their families and brought them to poor houses, reformatories, or rural families.[60] These children now faced abusive facilities where beatings and solitary confinement were common.[61] The

[57] Lauren Dake, *Oregon Brings Back All Foster Children Placed Out Of State*, OPB (Jun. 30, 2020), https://www.opb.org/news/article/oregon-brings-back-all-foster-children-placed-out-of-state/.
[58] DUQUETTE ET AL., *supra* note 1, at 213. "There is no evidence that children were placed as a result of caretaker cruelty."
[59] Leroy Pelton, *Not for Poverty Alone: Foster Care Population Trends in the Twentieth Century*, 14 JOURNAL OF SOCIOLOGY AND SOCIAL WELFARE 37 (1987); DUQUETTE ET AL., *supra* note 1, at 209.
[60] DUQUETTE ET AL., *supra* note 1, at 191.
[61] *Id.* at 209.

movement, thus, disregarded the autonomy of children, the value of familial bonds, and the children's wellbeing—all to combat the specter of childhood poverty.

The deplorable classism of the "child savers" still pervades the child welfare system today. Most child welfare cases concern neglect, not abuse.[62] Poverty is still often conflated with neglect as states remove thousands of children because their parents cannot afford housing, food, or childcare. In fact, research indicates that "[i]nadequacy of income, more than any other factor, constitutes the reason that children are removed."[63] In other words, instead of financially supporting families so they can care for their own children, the state subjects children to the trauma of removal and pays foster families staggering amounts of money to care for someone else's kids. Like the "child saver" movement, substantial evidence suggests that this punishment of poor families harms children.

While the child welfare system was first a "White-only institution," throughout the twentieth century, family separation became a tool of White supremacy.[64] In the 1950s, the number of Black children in the foster care system soared. State governments slashed the funding for in-home services and increased funding for foster care, creating a system where states paid White families to care for Black children.[65] By the 1950s, Indian communities had already endured decades of child removal—but not through traditional foster care.[66] Instead, beginning in 1879, the U.S. government sought to

---

[62] Trivedi, *supra* note 45; DUQUETTE ET AL., *supra* note 1. In 2014, for instance, the U.S. Department of Health and Human Services reported that neglect applied to 75% of cases nationwide.
[63] DUNCAN LINDSEY, THE WELFARE OF CHILDREN (Oxford University Press 2nd ed. 2003).
[64] Tanya Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQUETTE LAW REVIEW 65 (2013).
[65] *Id.*
[66] Margaret Jacobs, *Remembering the "Forgotten Child": The American Indian Child Welfare Crisis of the 1960s and 1970s*, 37 AMERICAN INDIAN QUARTERLY 136 (University of Nebraska Press 2013).

eliminate Indigenous cultures through off-reservation boarding schools. These schools forbade the speaking or writing of Indigenous languages, were often sites of horrific violence, and only prepared students for manual labor. By 1931, 15% of all Indian school children attended off-reservation boarding schools.[67] After WWII, though, Indian child removal took the form of foster care. The Bureau of Indian Affairs (BIA) launched a program to adopt away Indian children with a marketing campaign that fabricated an epidemic of unwed Indian mothers. By 1969, 25-35% of Indian children had been separated from their families.[68] Foster care has, thus, long been used as a form of social control and oppression against the poor and people of color.

These racial disparities persist to this day. Scholars have called the child welfare system an "apartheid institution" for its disproportionate contact with Black, Latino, and Indigenous communities.[69] In 2012, Black children accounted for 13.9% of the general population of children but 26% of children in foster care.[70] Similarly, despite the passage of the Indian Child Welfare Act (ICWA), Indian children also accounted for 2% of foster care children while only .9% of children generally. The disparities in Oregon's foster care system are even more severe. When then-Governor Kulongoski established the Child Welfare Equity Task Force in 2009, the task force found unbelievable disparities in Multnomah County, Oregon's most populous county.[71]

---

[67] Denise K. Lajimodiere, *American Indian Boarding Schools in the United States: A Brief History and Legacy*, INSTITUTE FOR THE STUDY OF HUMAN RIGHTS 255 (Columbia University 2015).
[68] Mannes M, *supra* note 4.
[69] Lynn F Beller, *When in Doubt Take Them Out: Removal of Children from Victims of Domestic Violence Ten Years After* Nicholson v. Williams, 22 DUKE JOURNAL OF GENDER LAW & POLICY 205 (2015).
[70] Cooper, *supra* note 64.
[71] *Disproportionality and Disparities in Oregon's Child Welfare System County Level Analysis of Administrative Data: Multnomah County* (Sep. 2009); L. Bates & A. Curry-Stevens, *The African American Community in Multnomah County: An Unsettling Profile* (Portland State University 2014).

While Black children accounted for 10.7% of the child population, they accounted for 21.1% of children in foster care. Worse yet, while Indian children accounted for 1.3% of the child population, they accounted for a whopping *21.7% of children in foster care*.

Group	Multnomah County Population	Multnomah County Foster Care Population
American Indian/Alaskan Native	1.3%	21.7%
American Indian/Alaskan Native ICWA	Unknown	4.4%
Black	10.7%	21.1%
Asian	8.2%	2.0%
Pacific Islanders	Not Included	0.5%
White	79.8%	49.8%
Unknown	—	4.8%
Total		
Hispanic	16.8%	8.8%

Figure 2: Multnomah County Child Population Statistics and Length of Stay in Foster Care by Race and Hispanic Cultural Origin (n = 2,488).[72]

The most recent data indicate that state-wide, Black and Indian children are 1.7 and 3 times as likely to be removed, respectively, compared to their White peers.[73] These disparities have numerous causes, including biased caseworkers, the correlation of removal and poverty, and marginalized communities' increased contact with the state.[74]

Regardless of the causes, the disparities deeply disrupt affected communities and children. As Professor Dorothy Roberts argued, "Family and community disintegration weakens [B]lacks' collective ability to overcome institutionalized discrimination and work toward greater political and economic strength."[75] The persistence of Indian child removal, too, is still a part of the American colonial

[72] *Disproportionality and Disparities in Oregon's Child Welfare System County Level Analysis of Administrative Data: Multnomah County*, *supra* note 71.
[73] Hillary Borrud & David Cansler, *Why a Disproportionate Number of Native American, Black Children Remain in Oregon Foster Care despite Leaders' Efforts at Change*, THE OREGONIAN (Dec. 12, 2021), https://www.oregonlive.com/data/2021/12/why-a-disproportionate-number-of-native-american-black-children-remain-in-oregon-foster-care-despite-leaders-efforts-at-change.html; Office of Reporting, Research, Analytics, and Implementation, *supra* note 10.
[74] Trivedi, *supra* note 45.
[75] *Id.*

project—as is the current effort to undermine ICWA.[76] For foster care children, this means losing not only their parents but often, their community and identity.[77] White foster parents are often ill-equipped to help a foster child navigate issues surrounding race and identity. Additionally, studies suggest that Black and Indian children face significantly higher rates of maltreatment in foster care than their White peers.[78]

The discriminatory nature of the child welfare system is especially important when discussing emotional abuse. The child welfare system affords caseworkers wide discretion when choosing which conditions warrant removal. As a result, a caseworker's conception of a "good parent" often guides the removal process, which disproportionately affects poor and non-White families.[79] In South Dakota, for example, tribal leaders reported to *NPR* that "what social workers call neglect, is often poverty — and sometimes native tradition."[80] Caseworkers, they recounted, perceive neglect if a home's fridge is empty despite the tribe's tradition of eating together at one home. Expanding the state's ability to intervene in perceived instances of emotional abuse would undoubtedly exacerbate these problems. Even psychologists concede that the line between bad parenting and emotional abuse is "somewhat arbitrary."[81] Given the pervasiveness of bias generally and the harms of foster care, encouraging the child

---

[76] Tracy Rector, *Perspective | Why Conservatives Are Attacking a Law Meant to Protect Native American Families*, WASHINGTON POST (Nov. 21, 2018), https://www.washingtonpost.com/outlook/2018/11/21/why-conservatives-are-attacking-law-meant-protect-native-american-families/.
[77] Trivedi, *supra* note 45.
[78] Ashley L. Landers et al., *Abuse after Abuse: The Recurrent Maltreatment of American Indian Children in Foster Care and Adoption*, 111 CHILD ABUSE & NEGLECT 104805 (Jan. 2021).
[79] Trivedi, *supra* note 45.
[80] Laura Sullivan, *Incentives and Cultural Bias Fuel Foster System*, NPR (Oct. 15, 2011), https://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system.
[81] Loue, *supra* note 6.

welfare system to intervene in emotionally abusive homes risks further intrusion into marginalized communities—with little benefit to the children removed.

C. Legal Landscape

The legal rights of children in the United States are a recent development, too. Historically, the United States largely afforded parents the legal freedom to parent as they saw fit. This legal freedom stemmed from English common law, which regarded children as the legal property of the father.[82] While the "child saver" movement challenged parents' ownership, it did not center the rights of children. Instead, the state authorized the intrusion through the English doctrine of *parens patriae*, which conceptualized the state as the ultimate parent of the country's people.[83] In cases of perceived neglect, the state assumed the paternalistic role and the absolute control of the child that accompanied it. It was not until the 1967 *In re Gault* decision that the Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment applied to children, too.[84] The *Gault* decision paved the way for the modern juvenile dependency process, which is characterized by a formal procedure and respect for the individual rights of the child.

While the rights of children have advanced considerably since 1967, the law's treatment of emotional harms has not. As Professor Gewirtzman observed, American law has long conceptualized itself as incompatible with the "passions."[85] The framers of

[82] Steven Neeley, *The Psychological and Emotional Abuse of Children: Suing Parents in Tort for the Infliction of Emotional Distress*, 27 NORTHERN KENTUCKY LAW REVIEW No. 689, 696 (2000).
[83] DUQUETTE ET AL., *supra* note 1, at 210.
[84] *Id.* at 283.
[85] Emily Suski, *Dark Sarcasm in the Classroom: The Failure of the Courts to Recognize Students' Severe Emotional Harm as Unconstitutional*, 62 CLEVELAND STATE LAW REVIEW No. 165 (2014).

the Constitution operated from a strict dualistic framework that set emotion against reason.[86] This belief in the inherent superiority of reason continues to pervade the law, particularly in the belief that judges must rise above their emotions to reach an impartial ruling. As Supreme Court Justice Clarence Thomas put it, "In order to be a judge, a person must attempt to exorcise himself or herself of the passions, thoughts, and emotions that fill any frail human being. He must become almost pure, in the way that fire purifies metal, before he can decide a case."[87] According to this framework, the strong-willed can overcome their emotions with reason.

Scholars have demonstrated that this mindset results in the courts disregarding mental illness as weakness. In public school students' Fourteenth Amendment cases, for example, Emily Suski found that while the courts have deemed physical harm to students unconstitutional, "No federal court of appeals… has found a student's severe emotional harm alone unconstitutional."[88] Suski attributes this discrepancy to the "emotions stigma," which describes a practice of discounting the severity of emotional harms due to the erroneous belief that individuals can control their mental illness. Nancy Levit has identified this pattern, too, when reviewing the evolution of tort law, concluding, "Mental harms are treated [by courts] as individually manufactured illnesses."[89] The physical effects of emotional abuse challenge this dualistic framework. Psychological research has revealed that a child does not have a choice in how their

[86] Doni N Gewirtzman, *Our Founding Feelings: Commitment, and Imagination in Constitutional Culture*, 43 UNIVERSITY OF RICHMOND LAW REVIEW 62 (2009). In the Federalist Papers, for example, James Madison opined, "it is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government."
[87] DAVID M. O'BRIEN, JUDGES ON JUDGING: VIEWS FROM THE BENCH (CQ Press 5th ed. 2017).
[88] Emily Suski, *supra* note 85.
[89] Nancy Levit, *Ethereal Torts*, 61 THE GEORGE WASHINGTON LAW REVIEW No. 136 (Nov. 1992).

brain structure responds to emotional abuse in the same way that a child cannot control their body's response to physical abuse. Despite the advances in the psychological understanding of emotional harms, many forms of law have been slow to catch up.

Juvenile dependency law is no exception. Legal definitions of emotional abuse have barely changed in the past 45 years.[90] Legal scholars have long criticized these definitions as weakening emotional abuse as a basis of jurisdiction.[91] Federal law mandates that states include "serious emotional harm" when defining abuse, but beyond this superficial inclusion, states can freely decide what actions constitute abuse. Robert Shull's seminal review identified four general categories of state emotional abuse statutes: (1) strict injury, (2) loose injury, (3) open, and (4) affirmative definitions.

(1) Strict-injury states focus exclusively on the effect that the abuse has on the child, not the parents' actions themselves. Courts in these states cannot infer the harm based on the likely outcomes of the parents' actions. That is to say, a parent can for all intents and purposes emotionally abuse their child, but if the child continues to be outwardly happy and stable, the state cannot intervene.

(2) Loose-injury states similarly focus on the exhibited harm to the child but also allow for intervention when there is a perceived and likely threat of harm to the child.

(3) Open states list emotional abuse in a long list of types of abuse. These states ostensibly permit intervention in cases of emotional abuse but fail to explain what actions or harms would constitute emotional abuse.

(4) Affirmative-definition states, on the other hand, explicitly allow removal in emotional abuse cases *and* provide standards for what parental behaviors constitute emotional abuse.

[90] Baker et al., *supra* note 14, at 2.
[91] J. Robert Shull, *Emotional and Psychological Child Abuse: Notes on Discourse, History, and Change*, 51 STANFORD LAW REVIEW 1665 (Jul. 1999).

When Shull conducted his review in 1991, New Jersey was the only affirmative-definition state in the country. Loose and strict-injury states, on the other hand, accounted for the majority of statutes. At the time, Shull categorized Oregon as a strict-injury state.[92] This strict-injury approach hampers emotional abuse claims in two ways. First, countless factors outside of parental behavior can cause a child's mental instability.[93] As a result, the state must show by a preponderance of evidence that the parents' emotional abuse caused or worsened the child's mental instability. This becomes a monumental task when the harm stems from a pattern of abuse, not just an acute event, because neither the abuse nor the mental disorders have fixed start and end dates. Second, as Judith McMullen compellingly argues, the injury-focused standards are incompatible with the psychological consensus on emotional abuse. Common coping strategies for children who suffer from emotional abuse include repressing the memories of the abuse, blaming themselves, or even denying the abuse altogether.[94] As a result, establishing a causal relationship—let alone establishing harm—becomes increasingly improbable.

This inconsistent patchwork of laws means that children in a state like Oregon are not afforded the same constitutional protections as children in New Jersey. In states that lack clear standards, caseworkers are often discouraged from reporting emotional abuse due to the difficulty of proving the allegations.[95] In fact, there is a 523-fold difference between the state with the highest rate of emotional abuse reporting and the

[92] J. Robert Shull, *supra* note 91.
[93] Jessica Dixon Weaver, *supra* note 14, at 267.
[94] Judith McMullen, *The Inherent Limitations of After-the-Fact Statutes Dealing with the Emotional and Sexual Maltreatment of Children*, 41 DRAKE LAW REVIEW No. 483, 497 (1992), https://scholarship.law.marquette.edu/facpub/584.
[95] J. Robert Shull, *supra* note 91, at 1675.

state with the lowest. In contrast, the states with the highest rate of physical and sexual abuse reporting are only 20 and 30 times higher than the states with the lowest rates, respectively.[96] When Jessica Weaver revisited Shull's framework in 2011, they found that over two-thirds of states still required that emotional abuse claims be tied to other forms of abuse to warrant removal.[97] Their survey of 35 years of emotional abuse cases across the country revealed a striking reticence of the court to intervene when the harm is not immediately attributable to the parents.[98]

This pattern is especially concerning in Oregon, as Carrie Murray's 2014 review demonstrates that the Oregon Court of Appeals has limited the reach of the dependency court in recent decades.[99] The Oregon Supreme Court's 1993 ruling in *Department of Lane County v. Smith* established the bedrock standard of constitutional intervention in Oregon. The *Smith* standard allowed the state to intervene due to past actions so long as, given the totality of circumstances, "the juvenile court finds that there is a reasonable likelihood of harm to the welfare of the child."[100] The behavior need not directly involve the child so long as it creates a harmful environment for the child. A series of subsequent decisions limited the *Smith* standard. Most notably, *Department of Human Services v. A.F.* clarified that the threat of danger to the child must exist at the time of the jurisdictional hearing.

Murray, then, reviewed changes in how the Oregon Court of Appeals decided the following case types: (1) harm to one child as a basis for jurisdiction over another

[96] Baker et al., *supra* note 14, at 1.
[97] Jessica Dixon Weaver, *supra* note 14, at 247.
[98] *Id.* at 280.
[99] Murray, *supra* note 3.
[100] *State ex rel. Juvenile Dept. of Lane County v. Smith*, 316 Or. 646 (Or. 1993).

child; (2) history of sex abuse; (3) exposure to domestic violence; (4) substance abuse; (5) poor parenting decisions; and (6) the inability to parent independently. For all six fact patterns, they find a clear trend of the Court of Appeals limiting the state's scope of intervention.[101] In total, they find that "[o]ver half of the cases that the Oregon Court of Appeals has reviewed in the last twenty years resulted in reversal based on insufficient evidence."[102] When weighing parental and juvenile rights, then, the Oregon Court of Appeals has markedly shifted the standards to protect parental rights. Given the ambiguous nature of emotional harm, it is unclear how this trend has affected children who suffer from emotional abuse.

[101] Murray notably omits an explicit analysis of emotional abuse cases, only obliquely including some emotional abuse case law in their analysis of "poor parenting decisions."
[102] Murray, *supra* note 3, at 752.

III. STATUTORY HISTORY

In 1985, amendments to the Oregon juvenile code introduced "mental injury" to its definition of abuse for the first time. Previously, the statute defined abuse only in terms of intentional physical injury. Oregon's Children's Services Division (CSD), though, requested that the legislature grapple with a new concept: emotional harm.[103] In the House, Representative Michael Kopetski indicated that he intended "mental injury" to signify "something beyond a stress level" that created "a dysfunction of mental ability."[104] The Senate Judiciary Committee focused on the importance of establishing a cause-and-effect relationship between the parent's behavior and the child's mental injury. Eventually, the committee limited "mental injury" to "only observable and substantial impairment of the child's mental or psychological ability to function caused by cruelty to the child, with due regard to the culture of the child." The committee included "cruelty" to spotlight seriously harmful behaviors such as shouting at a child "every day," not yelling at a child "occasionally."[105] In defining "mental injury," then, the committee was careful to limit the scope of the state's intervention. In fact, a witness from CSD suggested that the inclusion of "caused by cruelty to the child" would create too "narrow" of a definition that would not capture other injurious conduct. Senator William Frye reaffirmed that the phrase was necessary to establish the causal relationship between the parent's behavior and harm to the child. Senator

[103] Children's Services Division is now the Department of Human Services (DHS), Child Welfare Division
[104] *Schmidt v. Archdiocese of Portland in Oregon*, 218 Or.App. 661 (Or. Ct. App. 2008). (quoting Minutes, Senate Judiciary Committee, June 6, 1985, 23–24).
[105] *Id.* (quoting Tape Recording, Senate Floor Debate, HB 2160, Jun. 12, 1985, Tape 185, Side A).

Hendrikson, too, responded that the phrase *intentionally* narrowed the scope of mentally injurious conduct.[106]

After thirty-seven years, the juvenile code's definition of "mental injury" has not changed. The statute, ORS 419B.005(1)(a)(B), indicates that "abuse" includes, among other things, "[a]ny mental injury to a child, which shall include only observable and substantial impairment of the child's mental or psychological ability to function caused by cruelty to the child, with due regard to the culture of the child."[107] Not only must the parent substantially impair the child's ability to function, but that harm must be caused by the parent's cruelty. Under Shull's framework, then, Oregon would appear to still be a strict-injury state.[108]

When establishing jurisdiction over a child, however, the court does not rely on the legislature's definitions of abuse; those definitions govern mandatory reporters like DHS caseworkers. Instead, under ORS 419B.100, the legislature authorizes the court to establish jurisdiction in any case involving a child "whose condition or circumstances are such as to endanger the welfare of the [child].[109] The code does not further define "endanger[ing] the welfare of the child," nor does it explicitly authorize the court to establish jurisdiction in emotional abuse cases. Instead, the court looks to other sections of the code to clarify its limits. In particular, the court has drawn from ORS 419B.090(2)(a)(C)'s declaration that children have the right to be free of "physical, sexual or emotional abuse or exploitation" and the aforementioned definitions of abuse

---

[106] *Id.* (quoting Minutes, Conference Committee on HB 2160, June 17, 1985, 6, 8–11).
[107] § 419B.005(1)(a)(B) (2021).
[108] The code does not formally define emotional abuse. The only appearance of the term appears when listing the rights of children, which include "freedom from physical, sexual or emotional abuse or exploitation." § 419B.090(2)(a)(B) (2021).
[109] § 419B.100 (2021).

in ORS 419B.005(1)(a).[110] The code, thus, gives the court guidance on factors they could consider but does not bind them to any particular interpretation of what circumstances or conditions endanger the welfare of the child. As a result, Oregon is best characterized as a loose-injury state because the court can intervene when there is a likely threat of harm.

In doing so, the code severs the definitions of abuse used by mandatory reporters from the standards used by the court. The court does not necessarily have to establish jurisdiction in cases with a founded allegation of abuse. Proponents of this system would argue that it allows DHS to cast a wider net when investigating claims of abuse. Then, the court can decide whose circumstances actually warrant the full intrusion of the state. Unfortunately, judges are not trained social workers or psychologists. Their subjective experiences and backgrounds—not guidelines from the legislature—inform which cases they find severe enough to warrant intervention. As a result, different judges decide similar cases in different ways. Furthermore, given that judges are a disproportionately older subsection of the population, this statutory scheme anchors the standards of protection to often outdated notions of child endangerment. These outdated notions are particularly prevalent in emotional abuse cases, where even psychologists have been slow to acknowledge the harm.[111]

---

[110] *G.A.C. v. State ex rel. Juvenile Department of Polk County*, 219 Or.App. 1 (Or. Ct. App. 2008). ("Thus, although the dependency jurisdiction statute, ORS 419B.100, does not itself employ terms such as 'abuse' or 'physical injury,' ORS 419B.090(2)(a)(B) recognizes a child's right to be free from 'physical * * * abuse.' It is logical therefore to infer that the existence of physical abuse is a circumstance endangering a child's welfare. At the same time, the statute also recognizes the right of parents to discipline a child. A related statute, ORS 419B.005(1)(a)(A), supports that understanding.")

[111] Yates, *supra* note 5; Baker et al., *supra* note 14.

IV. CASE LAW

In the absence of legislative guidelines, the *A.F.* standard governs when the court can establish jurisdiction. According to the standard, the court must find a "reasonable likelihood of harm to the welfare of the child" at the time of the hearing.[112] The court divides the inquiry into two parts. First, the court asks if the potential harm to the child warrants jurisdiction. In *Shugars I*, Justice Haselton looked to *Webster's Dictionary* for clarity and established that endangering the child required that the child be "threatened with *serious loss or injury*" (emphasis added).[113] The standard of "threat of serious loss or injury" burdens the state with identifying the "type, degree, and duration" of the harm.[114] As a result, the court can decline involvement in cases in which it feels that the harm is too frivolous to warrant intervening in the parent-child relationship. The court then inquires if there is a reasonable likelihood that this harm will be realized. In doing so, the state must establish a "nexus between the parent's allegedly risk-causing conduct and the harm to the child."[115] The standard calls for a particularized inquiry into the wellbeing of every child. As the court reiterated in *Department of Human Services v. J. J. B., Jr.,* "The focus must always be on the child."[116] As a result, few behaviors constitute bases of jurisdiction *per se*. Instead, the court must determine if the parent's behavior threatens the child with serious loss or harm.

---

[112] *State ex rel. Juvenile Dept. of Lane County v. Smith*, 316 Or. 646 (Or. 1993).
[113] *State ex rel. Dept. of Human Services v. Shugars*, 202 Or.App. 302 (Or. Ct. App. 2005).
[114] *Department of Human Services v. T. L. H. S.*, 292 Or.App. 708 (Or. Ct. App. 2018).
[115] *Id.*
[116] *Department of Human Services v. J. J. B., Jr.*, 291 Or.App. 226 (Or. Ct. App. 2018).

If the state clears these two hurdles, then the wardship remains open until a party moves to dismiss the case or the state terminates the parents' rights. As the appellate court clarified in 2016, the standards to open and close a wardship are identical. If a parent moves to dismiss, the court must still "(a) determine whether the jurisdictional bases pose a current threat of serious loss or injury to the ward, and, if so, (b) whether that threat is reasonably likely to be realized."[117] The standard changes, however, when the state seeks to terminate parental rights (TPR). Though the court can terminate parental rights under five different statutes, this review will focus on the most common avenue: parental unfitness.[118] In *State ex rel. State Office for Services to Children and Families v. Stillman*, the Oregon Supreme Court noted that termination by way of unfitness requires the state to meet three conditions. First, the state must prove that termination is in the child's best interest. Second, the state must prove that the parent is "unfit by reason of conduct or condition seriously detrimental to the child." Third, the state must prove that reunification can occur "within a reasonable time."[119] If and only if the state proves all three by clear and convincing evidence, the court can terminate parental rights.

Although the TPR standard is more stringent than the *A.F.* standard, both ask the court to use its discretion. This section will examine how the Oregon appellate court has applied this discretion in three areas related to emotional harm: (a) frightening or belittling a child, (b) exposing a child to domestic violence, and (c) sudden or forced removal from foster placement.

---

[117] *Department of Human Services v. T.L.*, 279 Or.App. 673 (Or. Ct. App. 2016).
[118] § 419B.504 (2021).
[119] *State ex rel. State Office for Services to Children and Families v. Stillman*, 333 Or. 135 (Or. 2001).

A. Frightening or Belittling a Child

A pattern of frightening or belittling a child typifies emotionally abusive parenting.[120] Despite the significant impairments that emotional abuse causes, the appellate court has rarely upheld jurisdiction when a parent frightens or belittles a child. In fact, a review of cases from the past twenty years reveals an unmistakable pattern of the court disregarding the harms of emotional abuse. In some cases, references to emotional abuse genuinely confused the court. In others, the court claimed that the state had not proven serious harm. The holdings diverged from the court's treatment of physical abuse and called for more evidence, such as psychological evaluations or child testimony. When subsequent cases offered such evidence, however, the court shifted the goalposts again and asked for more. The court's refusal to acknowledge the harm of emotional abuse—even when substantiated by a child's own words or an expert's opinion—suggests that the emotions stigma pervades the appellate court's treatment of emotional abuse.

The 2006 *State ex rel. Dept. of Human Services v. Shugars* encapsulates the court's difficulty deciding emotional abuse cases. In *Shugars I*, a caseworker obtained a protective custody order to remove three children, T, K, and J, from a father's care due to T's unexplained injuries. When the caseworker arrived, the father put K, a child with "special needs," in his van and attempted to evade the police in a high-speed chase.[121] The pursuit ended with the father pulling over at gunpoint and releasing a "hysterical" K to the officers.[122] The state characterized the incident as the "emotional abuse" of K

[120] DUQUETTE ET AL., *supra* note 1. In the psychological jargon of the APSAC criterion, frightening or belittling a child would refer to terrorizing and spurning, respectively.
[121] *State ex rel. Dept. of Human Services v. Shugars*, 202 Or.App. 302 (Or. Ct. App. 2005).
[122] *Id.*

and therefore an appropriate basis of jurisdiction for all three children. The appellate court struggled with this characterization. "ORS 419B.100(1), the predicate for the petition's allegations, does not use the term 'emotional abuse,'" Justice Haselton wrote. "Nor, with one exception, does the Juvenile Code use that term."[123] Without a legal definition, Haselton unsuccessfully attempted to define the term himself, writing,

> Further, 'emotional abuse'—as distinguished from 'emotional distress'—is an imprecise and amorphous term. Does 'abuse' require a certain quality of harm to the victim, a particular mental state by the actor, or both? And, if the actor's mental state is material, is the requisite mental state one of intent, or of recklessness—or could merely negligent infliction of emotional trauma on a child be sufficient? It is revealing—and perhaps ironic—that resort to dictionary definitions is unenlightening. *See Webster's Third New Int'l Dictionary* 8 (unabridged ed 2002) (defining 'abuse' as, inter alia, 'the act of violating sexually' or 'physically harmful treatment' but providing no more generally applicable pertinent definition of 'abuse').[124]

The court's confusion is understandable, especially in this instance. Emotional abuse usually requires a pattern of behavior, not a singular event, which complicates the state's usage of the term. In any case, though, it is revealing that when encountering one of the most harmful and pervasive forms of abuse, the court had no legal or psychological definition at its disposal. Instead, it attempted to decide the fate of three children using a standard dictionary definition that omitted any mention of emotional harm. Without legislative guidance, the court struggled to evaluate the alleged emotional abuse.

---

[123] *Id.* ("Those references to 'emotional abuse' are, initially, troubling. ORS 419B.100(1), the predicate for the petition's allegations, does not use the term 'emotional abuse'; instead, it refers, generally, to 'condition[s] or circumstances [that] are such as to endanger the welfare of the [child].' Nor, with one exception, does the Juvenile Code use that term.")

[124] *Id.*

In the end, the court avoided the question, holding that it only needed to determine if the father's behavior harmed the child—not if the behavior constituted emotional abuse. It found that the father's behavior did warrant jurisdiction of K, *but not T or J*. In doing so, Justice Haselton distinguished emotional abuse from sexual and physical abuse cases, where the court has found that "harm to one child means a risk to the others."[125] Instead, the court determined that father's conduct toward K did not present a "substantial risk of future similar conduct with respect to T and J."[126] The case established the relative weakness of emotional abuse as a basis of jurisdiction. It is axiomatic that one instance of physical abuse to one child constitutes risk to the others; one instance of emotional abuse, on the other hand, requires the court to examine the "particularized nature" of every child. This standard involves a great deal of subjectivity. Indeed, beyond observing that T and J were not present for the chase, the court did not justify why it found that K was at risk of future emotional distress but T and J were not. *Shugars I,* thus, not only underscored the court's confusion regarding emotional abuse, but also established the differential treatment of physical and emotional abuse cases.

Shugars I stands out, though, because the court *did* establish jurisdiction. In the vast majority of reviewed cases, the appellate court did not. *Department of Human Services v. M.A.H.*, for example, involved another defined period of frightening a young child. The mother in this case struggled with the transition to motherhood. From May to July of 2014, mother sent the child's grandparent a number of concerning text

[125] *Id.*; *State ex rel. Juvenile Dept. of Lane County v. Brammer*, 133 Or.App. 544 (Or. Ct. App. 1995).
[126] *Shugars*, 202 Or.App. 302.

messages, threatening harm to the child.[127] The messages culminated in voicemails of the one-year-old girl crying and mother telling her,

> Nobody's cares, nobody answers, there's nobody there for you little girl. Nobody. Nobody. Not your poppa, not your momma, not your grandpa, grandma, nobody, not DHS, not the police department. You're just gonna have to sit there and cry it out.[128]

The grandmother reported the messages to DHS, who removed the child. The jurisdictional trial took place four months after the initial intervention, and the trial court held that these instances of emotional abuse posed a substantial risk of harm to the child. The court relied on the voicemails, claiming that mother had "subjected her to horrible, intense emotions, and left her—she wasn't screaming just because she wanted to annoy you, that was really unhappy wailing, really unhappy, scared, who knows what all emotions she was feeling, but I suspect she was feeling probably pretty scared, pretty abandoned[.]"[129]

The appellate court disagreed. First, it pointed to M's physical health to note that the state had not proven that these instances had harmed M in any "nonspeculative way."[130] Next, it clarified that the court's task is to determine if the mother's behavior posed a risk to the child *at the time of the trial*, which due to the state's postponements, took place four months after the state removed M. In that time, the mother's attorney requested a psychological evaluation, which concluded that the mother would only put M at risk of harm in the form of verbal abuse if mother did not continue with

---

[127] *Department of Human Services v. M.A.H.*, 272 Or.App. 75 (Or. Ct. App. 2015). ("'My dog has leprosy & I am a serial killer (or violent schizophrenic) we're dangerous to both u & my daughter & I might just sacrifice her.'")
[128] *Id.*
[129] *Id.*
[130] *Id.*

counseling. Because mother sought counseling between July and November, the appellate court concluded that DHS had failed to establish a nexus between mother's behavior in July and risk to the child in November.

Like *Shugars I, M.A.H* distinguished emotional abuse from other forms of abuse. First, it differentiated emotional abuse because it claimed that DHS had not proven that the behavior harmed the child in any "nonspeculative way" because the medical records showed the child was physically healthy.[131] This reasoning suggests that emotional harm to the child is speculative unless the harm manifests itself in observable physical harm. Moreover, physical abuse cases do not require an expert to explain that the abuse harmed the child. In fact, the court has found it to be "axiomatic."[132] The psychological research demonstrates that experiencing emotionally abusive behaviors, such as the frequent yelling exhibited here, before the age of one greatly derails a child's brain development.[133] A standard check-up, however, is unlikely to detect these effects. Beyond hiring a witness to speak to the general effect of such behavior, then, what could the state have done to prove that the mother had harmed M? Being just over one year old, M did not have the ability to speak to an expert.

Second, the appellate court clarified that there are cases "in which the child's circumstances four months earlier will permit the conclusion that the child's welfare is presently endangered."[134] Specifically, the court has consistently upheld jurisdiction due

---

[131] *Id.*
[132] *G.A.C. v. State ex rel. Juvenile Department of Polk County*, 219 Or.App. 1 (Or. Ct. App. 2008).
[133] BUGENTAL ET AL., *supra* note 35.
[134] *M.A.H.*, 272 Or.App. 75.

to a parent's past physical or sexual abuse of a child.[135] Here, in contrast, the court held that if the trial had taken place in July, the parent's behavior *might have* permitted jurisdiction. Since the mother had engaged in therapy for four months, the state had not established risk at the time of the trial. Crucially, though, from the July removal to the November trial, M lived with her grandmother and father, meaning that mother had no ability to emotionally abuse M in those months. In other words, the court held that by protecting the child from the parent's behavior, the state had limited its ability to establish present harm. A year earlier, the appellate court admonished this line of argumentation, holding that "the fact that [the child] is currently receiving protection because of the juvenile court's jurisdiction cannot be used by mother to argue that the asserted additional jurisdictional bases do not present a current risk of harm to [the child]."[136] Instead, in *M.A.H.,* the appellate court reversed the establishment of jurisdiction, leaving the child vulnerable to mother's behaviors.

The appellate court has repeated this holding with older children, too. In *Department of Human Services v. C. L. R.*, mother appealed the establishment of jurisdiction over her 12-year-old daughter, E. Mother had a long history of mental health challenges, including diagnoses of bipolar disorder, PTSD, and ADD. One evening, mother had a mental "breakdown," in which she imagined an intruder in her apartment. Mother "went in attack mode," throwing objects at the imagined intruder. She then took E to a neighbor, where E was described as "tired, upset, and crying."[137]

---

[135] *State ex rel. Juvenile Dept. of Klamath County v. T.S.*, 214 Or.App. 184 (Or. Ct. App. 2007). ("It is easy to infer the likelihood of harm to a child by past physical or sexual abuse of other children in the home.")
[136] *Department of Human Services v. S.R.C.*, 263 Or.App. 506 (Or. Ct. App. 2014).
[137] *Department of Human Services v. C. L. R.*, 295 Or.App. 749 (Or. Ct. App. 2019).

Mother called 911 and falsely claimed that she had slit her own throat to expedite the police's arrival. E called her father, who testified that E was "crying, and she was scared."[138] The police checked mother into a hospital, and she received psychiatric treatment for 2-3 weeks. At trial, mother's nurse practitioner testified that this was the only incident that mother reported hallucinating and that "that nothing but speculation would lead him to believe that mother will in fact again decompensate in the way that she did on April 2."[139] Mother's attorney argued that the nurse practitioner's testimony demonstrated that mother posed no *current* threat of harm to E. DHS responded that the incident traumatized E, which continued to strain her relationship with her mother. The trial court agreed with DHS and asserted jurisdiction over E.

The appellate court reversed. Justice Hadlock opined that DHS had failed to prove that mother posed a *current* threat of harm to E. Pointing to the nurse practitioner's testimony, Hadlock reasonably concluded that DHS had not presented evidence that a similar breakdown was likely to occur again. Hadlock went further, though, holding that DHS presented no evidence that E suffered "significant or persistent psychological harm" from the incident or would be at risk of harm "if a similar episode occurred in the future."[140] Decided in 2019, *C.L.R.* follows a long tradition of appellate judges going out of their way to diminish the effects of frightening a child. The court did not need to elaborate beyond holding that DHS had not established current harm to reverse the trial court. Instead, Hadlock held that even if

[138] *Id.*
[139] *Id.*
[140] *Id.*

mother frightened E by habitually hallucinating imaginary intruders, the court could not take jurisdiction without more evidence of the child's psychological state.

As *C.L.R.* suggests, the court is not more protective in cases in which a parent frightens or belittles their child habitually. In *J.P.G. v. T.N.,* for instance, the court held that repeatedly causing a child to be "very upset, scared, or frightened does not, without more, establish 'such a significant psychological harm that the juvenile court jurisdiction is justified.'"[141] In this case, mother suffered from mental health challenges that resulted in her expressing a desire to harm her three-year-old, J.[142] Throughout the case, many visits ended poorly, yet in July of 2019, mother moved to dismiss jurisdiction. In fact, during the visit before the hearing, mother took offense to something J had said. She stormed off and told her toddler, "This may be the last time you see me."[143] The trial court denied mother's motion to dismiss, but the appellate court reversed, finding that DHS had not demonstrated that mother's conduct resulted in *serious* harm to the child. Without an expert to quantify the harm that these behaviors posed to the child, the court only found "some evidence of a risk."[144] The holding underscores the importance of a child's psychological evaluation for a successful emotional abuse case. Even with mother telling the child that she "wished he was never born" and frequently erupting into anger on visits, the court claimed it could not infer serious harm to a three-year-old child.[145]

---

[141] *Matter of J. P. G.*, 303 Or.App. 183 (Or. Ct. App. 2020).
[142] *Id.* ("Mother's aunt reported that mother would get upset when J was ignoring mother or went to the aunt for attention. Mother would 'just shut down' and say, 'I'm out of here. You can F-ing have her,' and leave. Mother would tell J that she wished J 'was never born. Her life would be easier if she had never been born.'")
[143] *Id.*
[144] *Id.*
[145] *Id.*

T.N. follows a line of precedent starting with the seminal 2009 case, *D.A.C. v. D.T.C.* By the time the trial court established jurisdiction in 2008, the case had already opened and closed twice. This time, DHS had to remove the children from mother's care but still sought a wardship due to father's past alcohol abuse. On appeal, father argued that he had been sober for a year and therefore presented no threat to his children. The state responded that father refused to go to treatment and pointed to the high risk of harm to the children if he were drinking. After the children's second removal, they report that their father "ha[d] been drinking heavily to the point where he passes out on the couch on a regular basis and is upset and angry, yells a lot[,] and is not able to parent them" and that "father 'acts out' when he is drinking, which frightens them."[146] The appellate court reasonably agreed with father that DHS failed to prove that father posed a current risk to the children due to his extended period of sobriety. Like in *T.N.*, though, the court went further, holding that there was little evidence that father's alcoholism harmed the children in the first place. Justice Schuman concluded,

> Obviously, that is not ideal parenting. However, without more, it is not inherently or necessarily more harmful or dangerous than other varieties of parenting that would, by no stretch of the imagination, justify state intervention into the parent-child relationship.[147]

Shuman did not state the source of this concern. Perhaps, he was concerned about the logistical challenge of the juvenile system accommodating a flood of new cases. A year before Shuman ruled in *D.T.C.,* a federal report found that Oregon DHS (ODHS) failed

[146] *State ex rel. Dept. of Human Services v. D.T.C.*, 231 Or.App. 544 (Or. Ct. App. 2009).
[147] *Id.*

11 of 13 federal child care assessment categories. By 2016, ODHS failed in all 13.[148] Incorporating more children into juvenile court would threaten to collapse an already broken system. Alternatively, perhaps Shuman did not view drunkenly yelling at a child as particularly harmful. This explanation would align with Suski's emotions stigma.[149] Lastly, perhaps Shuman feared broadening the scope of intervention because it would infringe upon parents' rights. Indeed, the Oregon legislature recognizes a parent's right to "[d]iscipline their children," and parents commonly discipline their children by yelling.[150]

In any case, the holding diverges from the court's treatment of "serious harm." Schuman treats "serious harm" as a relative measure. Since a substantial number of parents emotionally abuse their children, the court cannot establish jurisdiction because the harm is not serious *relative* to the general population. The legislature, though, explicitly calls for the court to examine *absolute* harm to the child in the form of impairment of the "child's mental or psychological ability to function."[151] Indeed, the authors of the bill repeatedly remarked that they intended the definition to apply to parents who frequently yell at their children—the very behavior described in *D.T.C.*[152] Without the testimony of the children or their therapist on how this behavior affected them, it is unlikely that the state could have cleared the absolute harm standard in this

[148] Gordon Friedman, *Report: Ore. DHS Fails All Federal Child Care Standards*, STATESMAN JOURNAL (Apr. 20, 2016), https://www.statesmanjournal.com/story/news/politics/2016/04/20/feds-oregon-dhs-fails-child-safety-standards-years/83304606/; *Child and Family Services Reviews: Statewide Assessment Instrument*, Nos. 0970–0214 (Mar. 2016).
[149] Emily Suski, *supra* note 85.
[150] Juvenile court; jurisdiction; policy § 419B.090(C)(4)(c) (2021).
[151] § 419B.005(1)(a)(B) (2021).
[152] *Schmidt v. Archdiocese of Portland in Oregon*, 218 Or.App. 661 (Or. Ct. App. 2008).

case. Nevertheless, it is striking that the court went out of its way to weaken emotionally abusive behaviors as bases of jurisdiction.

Two years later, in *Department of Human Services v. D.S.F,* the appellate court clarified that *D.T.C.* established that to take jurisdiction, the state had to prove "risk of serious emotional harm or *any* risk of physical harm" (emphasis added).[153] The court's clarification explicitly differentiated the standards for establishing jurisdiction in emotional and physical abuse cases for the first time. Whereas *any* risk of physical abuse warrants jurisdiction, emotional abuse cases require *serious* risk.[154]

Twenty cases have cited *D.T.C.* since 2009. Some have narrowed other parts of the holding but have largely left the emotional abuse standard unscathed. *K.R.M.* reaffirmed *D.T.C.* in 2019. In this case, father appealed the establishment of the wardship over his fourteen-year-old daughter, claiming that DHS had not proven a nexus between father's alcoholism and harm to the child. The child and DHS cross-appealed, arguing that the trial court had erred in dismissing the uncontested allegation of father's sexual abuse of his children. The appellate court agreed with both parties, replacing alcoholism with father's history of sexual abuse as the basis of jurisdiction. Father sexually abused both his fourteen-year-old daughter and her adult sister but had stopped five years before the trial. The trial court found that this did not constitute evidence of "present-day risk."[155] The appellate court pointed to father's ongoing inappropriate comments to reverse.

---

[153] *Department of Human Services v. D.S.F.*, 246 Or.App. 302 (Or. Ct. App. 2011).
[154] *Id.*
[155] *Matter of K. R. M.*, 296 Or.App. 109 (Or. Ct. App. 2019).

The trial court instead established jurisdiction due to father's frightening behaviors when inebriated. The child testified that her parents drink half a bottle of whiskey every night, argue often, and physically fight around once a month. The child testified that she has "always been scared of [her father]."[156] On one occasion, her father repeatedly slammed her dog's head into the dryer until the child intervened. Father then chased the child into her room, where she locked herself in for the night. On another occasion, the child described that father "ripped" her sister's door "apart" while her sister cried inside. The child testified that she fears her father and that she self-harmed as a result of the past sexual abuse and other unspecified trauma. The caseworker testified that the child was doing poorly in school and "may be suffering from depression" and anxiety.[157] Given the totality of the evidence, the behaviors clearly fulfill Slep's act-plus-impact criterion for emotional abuse. Father's actions appear on the criterion verbatim, including harming a child's pet or implying future physical harm.[158] The "impact" portion of the criterion requires that the acts "create reasonable potential for the development of a psychiatric disorder (at or near diagnostic thresholds) related to, or exacerbated by, the act(s)."[159] The testimony of the child and caseworker demonstrate the impact these actions could reasonably cause given the child's mental health conditions and fear of father.

The appellate court, though, held that the caseworker's testimony did not sufficiently address the "type, degree, and duration" of the emotional harm.[160] The court

---

[156] *Id.*
[157] *Id.*
[158] Slep et al., *supra* note 7.
[159] *Id.*
[160] *Matter of K. R. M.*, 296 Or.App. 109.

also noted that the child had not connected father's actions to her mental health but acknowledged that this was an unrealistic expectation. Still, the court held that absent a professional opinion, the state had not proven serious harm to the child. Citing *D.T.C.*, Justice Ortega wrote,

> Although we take seriously child's expressed fear of father, that fear alone likewise is not sufficient to support dependency jurisdiction… We do not mean to suggest that a record of a serious risk of harm to a child from prolonged exposure to abuse of alcohol and domestic violence could not be made under these circumstances… However, we have repeatedly recognized that bad parenting alone does not justify state intervention… [T]he evidence does not persuade us that there is a nonspeculative and serious risk of harm to child from exposure to father's domestic violence and abuse of alcohol.[161]

It is difficult to believe that the court can take the child's fear of her father seriously while claiming that there is insufficient evidence that father's behavior harmed the child. The child's testimony highlighted her father's erratic, violent behavior. To a grown appellate judge, perhaps the incidents do not evoke terror. To a child living with her sexual abuser, on the other hand, it is difficult to imagine the effect of her father's behavior. It is telling that the court found present harm in sexual abuse that had stopped five years prior but not the ongoing terror that the child reported. Clearly, both threatened the child with harm. Instead, *K.R.M.* called for more explicit child testimony on the effects of the parent's actions or an expert opinion.

The court has, however, repeatedly disregarded child testimony addressing the effects of their parent's actions. In *Department of Human Services v. M.E.*, for example, a mother appealed the establishment of jurisdiction over her twin daughters, M.I. and M.A. The case opened after M.A. told a school counselor that she felt her mother "did

[161] *Id.*

not like her and treated her differently from M.I." M.A. also revealed that her sister, M.I., disclosed that mother's husband had touched her inappropriately in the past. Mother denied the abuse, and the trial court found that "mom's whole approach is that [M.A.] was a liar."[162] Soon after removal from her mother, M.A. disclosed that she had been cutting herself with an X-Acto knife and that she was "feeling 'stressed' about mother."[163] Specifically, M.A. revealed that her mother "sometimes told her that she was stupid" and that she felt that her mother preferred M.I. over her.[164] After the twins' first visit with mother, they both came home crying and reiterated to their caseworker that "they felt that mother was targeting M.A. by saying things to make her feel bad."[165] Three months before the jurisdictional trial, M.A. was brought to the emergency room due to her expressed suicidal ideations. At the trial, M.A. testified that her mother "sometimes blames me for things or gets upset with me because I'm like my dad or something like that" and that mother has called her a "brat or stupid or something like that."[166] She, then, explicitly tied her self-harm to the way her mother treats her.[167] Given the testimony, the trial court established jurisdiction due to the stepfather's sexual abuse and mother's negative comments towards M.A.

The appellate court reversed. Addressing the basis of jurisdiction that concerned the sex abuse, the court pointed to the expert testimony of the psychologist who performed the stepfather's psychosexual evaluation. The results, the psychologist

[162] *Department of Human Services v. M.E.*, 255 Or.App. 296 (Or. Ct. App. 2013).
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*

concluded, suggested that the stepfather posed "no risk" to the children.[168] Justice Armstrong then undermined the second basis of jurisdiction, asserting that mother's comments did not put M.A. at risk of serious loss. Armstrong claimed that the state failed to specify the "nature of the physical or emotional injury."[169] To do this, Armstrong dismissed the uncontroverted record of M.A.'s self-harm, asserting that the "extent of that behavior [self-harm] is undisclosed in the record."[170] Armstrong did not address M.A.'s visit to the emergency room due to her "suicidal ideations" either. Instead, the opinion focuses on mother's "appropriate" response to learning of M.A.'s self-harm when she requested M.A. receive therapy. Mother's response, the court concluded, indicated that although mother's parenting has "not been ideal," there is insufficient evidence that it poses a threat of serious harm to M.A.[171]

The decision underscores the need for a psychological evaluation for the state to successfully establish jurisdiction when a child suffers from emotional harm. In *M.E.*, the child explicitly testified that mother's behavior caused her self-harm. The child reported throughout the case that her mother disparaged her. The child's sister confirmed that on a visit mother "targeted" M.A. by "saying things that made her feel bad."[172] Beyond cutting herself with an X-Acto knife, the child even had to be taken to the emergency room due to fears that the child would take her own life. As a result, the record demonstrated that mother's conduct (belittling her child) caused a serious threat of harm to the child (self-harm and suicidal ideation), clearly fulfilling the act-plus-

[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*

impact framework. Without a psychologist to reaffirm the child's testimony and the profound danger of self-harm, however, the court defaulted to its understanding of emotional harms as lesser harms.

A psychologist cannot simply state that the actions will harm the child, however. In multiple cases, the appellate court has held psychologists to the legal standard, requiring the professional to explicitly state that the parent's actions *seriously* harm the child. *Department of Human Services v. B. J. J.,* for example, concerned a father who engaged in "aggressive" parenting of his three children. In foster care, the two boys, EM and EJ, exhibited signs of trauma, which included: "rocking, banging [their] head[s] against the wall, [and] screaming when being read to."[173] Father admitted that he "yelled too much, was impatient, and that he sometimes scared his children" and that he "took discipline too far at times but claims that he was never physically abusive."[174] Two of his former partner's children confirmed that their father spanked them for small infractions and that they "did not want to live in mother's home if father were there as well."[175] The caseworker observed this behavior on a visit firsthand. After one child pushed another, father became angry and said, "Boy, you'll get your butt tore up for that."[176] The parenting coach informed father that this was "not an appropriate form of discipline," to which father responded that he "believes that spankings are a reasonable way to discipline children."[177] After two years of father expressing open hostility to DHS services, the state filed a petition to terminate his parental rights.

---

[173] *Department of Human Services v. B. J. J.*, 282 Or.App. 488 (Or. Ct. App. 2016).
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*

At trial, the state argued that father's anger issues and refusal to engage with services endangered the children and foreclosed the possibility of reunification. The trial court agreed, holding,

> While father did not follow through with his threat to tear up [EM's] 'butt' (while under the supervision of DHS), it is the type of behavior he testified he thought it would be appropriate to spank an older child for. *Aggressive parenting is the absolute opposite type of parenting the experts testified these children need and would likely harm the children's social and emotional wellbeing* (emphasis added).[178]

The appellate court disagreed, dismissing the danger that father posed as the "specter of physical and psychological abuse."[179] Despite the trial court finding that the experts testified that father's aggressive behavior is the "absolute opposite type of parenting" the children need, Justice Duncan wrote,

> The mental health experts who testified about the needs of EM, EJ, and X did not testify about the seriously detrimental effect that physical discipline would have on those children, and the record does not include evidence from which we could infer that spankings—even if not a preferred method of parenting these children—affects them so differently than the many thousands of children [who] are being raised under basically the same circumstances in Oregon… In short, the record lacks highly persuasive and child-specific evidence that father's use of physical discipline would be seriously detrimental to EM, EJ, and X (internal quote omitted).[180]

Justice Duncan, like Justice Schuman in *D.T.C.,* treated serious harm as a relative measure. Because thousands of children suffer from physical discipline, father's behavior did not seriously harm the children *relative to the general population*. The record also did suggest that the EM and EJ would respond differently to father's excessive discipline due to their special needs—not to mention the fact that the experts

[178] *Id.*
[179] *Id.*
[180] *Id.*

testified that "aggressive parenting is the absolute opposite type of parenting… these children need."[181] Despite this, the appellate court reversed the termination of father's parental rights. The holding demonstrates that the state needs more than just expert testimony to establish harm to the child. The experts need to examine every child with one question in mind: does the parent's behavior cause *serious* harm to this specific child.

Clearing these hurdles by the jurisdiction trial is largely unfeasible. Psychologists do not usually know the legal standards, nor do many DHS caseworkers who write the referral questions. This informational asymmetry allows children to fall through the cracks. Moreover, the trial to establish jurisdiction happens with sixty days after removal, during which time the court has no ability to order any party to undergo a psychological evaluation.[182] DHS would have to independently choose to schedule an evaluation, but DHS is already failing to connect foster care kids to their behavioral health services.[183] Mandating a psychological evaluation for every child would only exacerbate this problem. Lastly, psychological evaluations have limitations. Wait times for evaluations can take months, and in most cases, the evaluator will only observe the child for a day or two. Many children who have experienced trauma do not cooperate with the evaluation. Common problems include denial of the abuse, intellectual and verbal limitations, distrusting the evaluator, and outright refusal to answer questions. It is unrealistic to expect an evaluator to glean all of the necessary information to form an informed opinion directly following the trauma of removal. In all, then, establishing

---

[181] *Id.*
[182] Killian Douglas & Scott Harris, *Chapter 8: Preadjudication Procedure and Shelter Hearings*, *in* JUVENILE LAW: DEPENDENCY (2017 EDITION) 944 (Oregon State Bar 2017).
[183] *Wyatt B. v. Brown*, No. 6:19-cv-000556-AA (Dist. Court Sep. 12, 2019).

jurisdiction due to emotional harm requires an accurate, timely, and legally informed psychological evaluation. Psychological evaluations, though, cannot consistently divine the child's mental state, can take months to schedule, and lack the legal expertise to speak to the court's stringent standards. The current standards, thus, largely exclude children who suffer from emotional abuse.

B. Exposure to Domestic Violence

According to the APSAC criterion, witnessing domestic violence between parents constitutes psychological maltreatment.[184] Indeed, in most cases where a parent has exposed a child to domestic violence, the state can rarely prove that a child's physical safety was endangered. Instead, the courts rely on the mental injury that children sustain. The review of appellate decisions in the past twenty-five years demonstrates that the court is far more protective when a child is exposed to domestic violence compared to when a parent emotionally abuses a child. The court has long considered the emotional toll that witnessing domestic violence takes on a child. As a result, the court has held that witnessing even one violent altercation between parents furnishes an appropriate basis of jurisdiction—even without the testimony of the child or an expert.

The contested 1998 *State ex rel. State Office for Services to Children & Families v. Frazier* established that domestic violence could seriously harm a child even if the child was not physically harmed. The relevant portion of the case involved multiple incidents where father violently attacked mother in front of the infant, Rose, including

[184] DUQUETTE ET AL., *supra* note 1.

one where father attempted to strangle mother and put a gun to mother's head.[185] The majority opinion held that although father's violence was not directed at the child, he still put the child at risk of serious harm. First, Chief Justice Deits reasoned that because father did not curb his violence in front of the child, he threatened the child's physical safety. Second, Justice Deits noted that the intake worker at the domestic violence shelter described the child as "nonresponsive" after one of father's attacks—a common reaction to witnessing domestic violence.[186] The court reasoned that this reaction evidenced serious emotional harm to the child. In dissent, Justice Edmonds disputed the harm to the child, arguing that "Although father's conduct could have put [the child] in danger of harm, it was not directed at her."[187] Edmonds substantiated his claim by pointing to a home nurse who testified that father and daughter had a "close bond."[188]

The fissure between Deits and Edmonds encapsulates the larger debate regarding emotional harm. Like M in *M.A.H.*, Rose was too young to speak. The state could not prove that the incidents harmed Rose. Edmonds pointed to the grave constitutional implications of "sever[ing] the fundamental liberty of natural parents to care for and have the custody of their children" to hold the state to a high standard when attempting to terminate a parent's rights.[189] Under this standard, the state could not prove that these interactions seriously injured Rose. Deits, on the other hand, acknowledged the limitations of divining emotional harm from a young child. Instead, Deits inferred harm using the psychological understanding of how those incidents

---

[185] *State ex rel. State Office for Services to Children & Families v. Frazier*, 152 Or.App. 568 (Or. Ct. App. 1998).
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.*

would affect the average child. As the previous section demonstrated, in typical cases of emotional abuse, Edmonds' approach has largely won out. In cases of exposing a child to domestic violence, however, Deits' approach has largely become standard.

The appellate court's 2017 holding in *Department of Human Services v. C. M.* demonstrates the durability of the Deits' logic. Unlike *Frazier*, *C.M.* only concerned one incident of domestic abuse where the child was not immediately involved. In this case, father "tackled mother to the floor, and began to choke her with both hands."[190] After mother's daughter, K, announced that she was calling the police, father knocked the phone out of K's hands and pushed her, "hitting her in the face in the process."[191] K left the house and stayed with a friend while her parents continued to argue. The couple's four-year-old child, D, was in the room during the altercation but was asleep on the recliner. The trial court asserted jurisdiction over D because the parents exposed him to domestic violence.[192]

Father appealed, arguing that D had not witnessed the domestic violence, and therefore father never exposed D to risk of serious harm. The appellate court disagreed, finding that even one incident could furnish a basis of jurisdiction. First, the court adopted DHS' argument that *Webster's Third International Dictionary* defined "exposed" as "not shielded or protected: so situated as to invite or make likely an attack, injury, or other adverse development."[193] Using this definition, the court concluded that D was exposed to domestic violence even while asleep. Justice Dehoog, then, reiterated both of Deits' arguments in *Frazier*. First, father could have physically harmed D

[190] *Department of Human Services v. C. M.*, 284 Or.App. 521 (Or. Ct. App. 2017).
[191] *Id.*
[192] *C.M.* did not concern K because she was not biologically related to D's father.
[193] *C. M.*, 284 Or.App. 521.

inadvertently during the altercation. Second, Dehoog reaffirmed that exposure to domestic violence emotionally harms children, writing "[t]here was evidence that father attacked mother without any apparent regard for the *emotional or psychological impacts that his behavior might have on D*" (emphasis added).[194] As a result, the single episode established sufficient risk of serious harm to warrant jurisdiction.

Again, the appellate court's approach in *C.M.* starkly contrasts its approach when a parent frightens or belittles a child. In domestic violence cases, the court does not require an expert to testify that exposure to domestic violence can harm a child. In *C.M.*, it accepted the caseworker's unevidenced—but accurate—statement that "the threat of harm to children is significant whenever they are present for domestic violence."[195] In cases where the parent directs their anger at the child, on the other hand, the appellate court asks for more than just the caseworker's opinion. In *In re T.P.*, for example, the caseworker testified that the child had "special needs" and father's aggressive behavior harmed the child.[196] The court wrote,

> Although ample evidence supports the finding that father was angry, frustrated, difficult to work with, intemperate, and immature… the evidence in support of the court's finding that these traits create a current threat of serious harm is, indeed, extremely thin: the unelaborated testimony of one witness, *uncorroborated by the opinion of any qualified expert in child development* (emphasis added).[197]

The juxtaposition between *C.M.* and *T.P.* highlights that a justice's "common sense" largely dictates when they perceive sufficient danger to warrant removal. Psychologists have found that both witnessing domestic violence and experiencing emotional abuse

---

[194] *Id.*
[195] *Id.*
[196] *In re T.P.*, 255 Or.App. 51 (Or. Ct. App. 2013).
[197] *Id.* The court did not decide using this conclusion because father's counsel had not preserved the error in trial.

devastate child development.[198] Yet, the court's "common sense" suggests that exposing a child to domestic violence endangers the child while frightening or belittling a child does not. This discrepancy means the court requires an expert to inquire into the specificities of the frightened or belittled child but not the child who has witnessed domestic violence.

The appellate court, however, has carved out an important exception: exposure to emotional abuse. In the 2010 *State v. S.T.S.* decision, the court foreshadowed that it would treat exposure to physical and emotional abuse differently. The case itself involved a child who had been exposed to both physical and verbal abuse between his parents. The appellate court concluded that "although record is slim" on how father's abuse of mother affected the child, the state had met the "low any-evidence standard."[199] The decision aligned with the *Frazier* precedent, but interestingly, the court explicitly refused to say whether father's verbal abuse of mother alone would cause sufficient harm to the child.[200] Six years later, in *Matter of V. R. F.*, the appellate court held that it was not. The trial court assumed jurisdiction of two children, A and B, who were 11 years and 18 months old, respectively. The case began after mother disclosed to her therapist, Cleary, that father regularly threatened suicide and homicide, a textbook example of emotionally abusive behavior.[201] At the jurisdictional hearing,

---

[198] Catherine M. Naughton et al., *Exposure to Domestic Violence and Abuse: Evidence of Distinct Physical and Psychological Dimensions*, 35 JOURNAL OF INTERPERSONAL VIOLENCE 3102 (SAGE Publications Aug. 2020); Norman et al., *supra* note 39.
[199] *State v. S.T.S.*, 236 Or.App. 646 (Or. Ct. App. 2010).
[200] *Id.* ("Given that there is evidence of both physical and verbal abuse, we need not decide whether the latter, standing alone, would suffice.")
[201] Slep et al., *supra* note 7. Defining emotional abuse as "[n]on-accidental act or acts…such as [t]hreatening to harm child indirectly (including, but not limited to, threatening suicide; threatening to, hurt, destroy, or abandon loved one, pet, or property)."

Cleary testified that after hearing about father's behavior, she "became concerned that mother is a victim of emotional abuse."[202] The caseworker concurred, testifying that mother "has the standard, typical amount of denial as a domestic abuse victim."[203] A testified that she had never heard father threaten homicide, but she had heard him threaten to commit suicide once but did not believe he was serious. A had, however, developed a "safety plan," preparing for the event she would need to leave home due to her parents' arguments. The trial court drew from Cleary's testimony and A's "safety plan" to hold that father was emotionally abusing mother, and exposure to this domestic abuse threatened the children with serious harm.

The appellate court reversed.[204] Citing *D.T.C.*, the court held that DHS had presented insufficient evidence that the emotional abuse threatened the children with *serious* harm. Justice Duncan wrote,

> [A]lthough there is evidence that father has been emotionally abusive of mother and that the parents' conflict has affected the children, apart from Kozicky's description of the general effect that domestic abuse can have on a child, there is no evidence of a present risk of serious harm that is reasonably likely to occur.[205]

In *C.M.,* the caseworker's testimony that "the threat of harm to children is significant whenever [children] are present for domestic violence" sufficed to establish jurisdiction.[206] Now, the caseworker's testimony was not enough. Additionally, in *S.T.S.*, the court acknowledged that the evidence of how the domestic violence affected

[202] *Matter of V. R. F.*, 282 Or.App. 12 (Or. Ct. App. 2016).
[203] *Id.*
[204] Though it should not affect the legal standard, it is important to know that the children appealed as well.
[205] *Matter of V. R. F.*, 282 Or.App. 12.
[206] *Department of Human Services v. C. M.*, 284 Or.App. 521 (Or. Ct. App. 2017).

the children was "slim" but held that it met the "low any-evidence standard."[207] In *V.R.F.*, on the other hand, the court acknowledged that the conflict *had* affected the children, but the "low any-evidence standard" no longer applied. The court now required an expert to speak to the particularized condition of each child.

V.R.F. aligns with the pattern identified in the previous section: when the case involves emotional harm, the appellate court shifts the goalposts by requiring the state to offer more evidence. The court has held that "[c]ases of physical or sexual abuse require little, and many times no, analogue or aggravating circumstances" while cases of emotional abuse—or exposure to emotional abuse—do.[208] One would hope that scientific understanding of child psychology informed when judges require additional proof of harm. Unfortunately, psychologists consistently find that emotional abuse is at least as destructive as other forms of abuse.[209] Indeed, the studies that differentiate the effects of witnessing emotionally abusive domestic violence from witnessing physically abusive domestic violence find that exposure to emotional abuse is associated with significantly lower psychological well-being and social support satisfaction than exposure to physical abuse.[210] Perhaps, establishing that a child has been exposed to emotional abuse is more difficult, but in *V.R.F.,* mother's therapist and the caseworker testified that father emotionally abused mother. The court, on its own, decided that exposure to emotional abuse presented a lesser threat of harm to the child. This pattern supports the emotions stigma as the predominant explanation for the frequent failure of emotional abuse cases.

---

[207] *State v. S.T.S.*, 236 Or.App. 646 (Or. Ct. App. 2010).
[208] *State ex rel. Juvenile Dept. of Klamath County v. T.S.*, 214 Or.App. 184 (Or. Ct. App. 2007).
[209] Slep et al., *supra* note 7.
[210] Naughton et al., *supra* note 198.

At the same time, the court's treatment of children who witness physical abuse reveals an area of the law where the court consistently takes the psychological harm of children seriously. Like with physical abuse, they do not require the child or an expert to quantify the harm. Instead, the "any-evidence" standard allows the court to intervene when the court believes the average child would suffer. These standards provide a potential path forward for emotional abuse cases generally, as educating judges on the harms of emotional abuse could reduce the discrepancy.

C. Sudden or Forced Removal from Foster Placement

Despite the court's refrain that the "focus must always be on the child," the previous two sections have demonstrated that a child's input is often not enough. Instead, the court focuses first on the parents' actions and *then* on how those actions affect the child. As *D.T.C.* reaffirmed, parents can be less than "ideal."[211] As long as they are not *seriously* harmful, the child must return home even if the child opposes the move. In numerous cases, parties have argued that regardless of the parents' current state, forced or sudden reunification would psychologically endanger the child. After years in foster care, children are often very bonded to their foster families. They also often have attachment disorders or post-traumatic stress disorder (PSTD), which would result in serious harm to the child regardless of if the parents pose a current threat of harm. In other words, these cases ask the court to focus on the child first. A review of fifty years of cases demonstrates that at the termination phase, the approach varies

[211] *State ex rel. Dept. of Human Services v. D.T.C.*, 231 Or.App. 544 (Or. Ct. App. 2009).

wildly judge by judge. This incoherent body of law, however, has precluded the court from seriously considering the effects of forced removal at the jurisdictional stage.

In 1971, *State v. McMaster* first addressed the harms of sudden removal. By the time of the trial, the child had lived with her foster parents for the majority of her six years. Her biological parents lacked the means to support her and subjected her to a volatile home life. The caseworker testified that the foster parents were "the complete antithesis—stable, consistent and mutually supportive."[212] The state attempted to terminate the parents' rights to protect the child's stability. The caseworker testified that removing the child from her foster placement would seriously harm the child.[213] This, however, was not due to the parents' current conduct but rather the "resentment" of being forced to leave her preferred home. Writing for the appellate court, Justice Denecke held that the detriment reunification would cause did not rise to the level of detriment envisioned by the legislature to terminate parental rights. The McMaster family, Denecke observed, is "duplicated in hundred of thousands of American families,—transiency and incapacity, poverty and instability."[214] The legislature, the court maintained, only allowed the court to terminate parental rights when the conduct was abnormally severe. As Denecke concluded,

> The best interests of the child are paramount; however, the courts cannot sever the McMaster's parental rights when many thousands of children are being raised under basically the same circumstances as this child.[215]

As a result, they dismissed the state's petition.

---

[212] *State v. McMaster*, 259 Or. 291 (Or. 1971).
[213] *Id.*
[214] *Id.*
[215] *Id.*

The opinion epitomized the tension of Oregon juvenile dependency law. The best interests of the child are purportedly paramount, but often, parental rights take priority. This approach exists because establishing the best interest of the child is perhaps even more nebulous than establishing serious harm. Would living with a wealthy foster parent who can access more opportunities for the child be in the child's best interest? Would the calculus then have to include a comparison between the foster home and the parents' home? The "best interest" standard offers the state far too much power to disrupt Oregon families. Still, Denecke tried to assuage any fears of harm to the child by emphasizing that the holding would not return the child to her parents. This would require the court to dismiss jurisdiction. Instead, the appellate court left the child's placement vulnerable, as her biological parents could at any time move to dismiss the wardship and take the child with them. He addressed the anxiety that this would cause the foster parents but notably omitted the harm this uncertainty would cause the child. Reunification, thus, happens at the pace of the parents, not the child.

In 1993, the legislature amended the legal standards to allow the state to terminate parental rights in similar situations where a parent lacks the effort to make reunification possible.[216] Still, when the Oregon Supreme Court established the current test for termination in the 2001 *Stillman* opinion, they cited *McMaster* heavily. Like in *McMaster*, the children in this case had lived with their current foster parents for years. Their father suffered from substance abuse and at the time of the termination trial, had approximately four months remaining of his incarceration. During his incarceration, father had made substantial progress with his sobriety. At trial, he suggested that he

[216] *State ex rel. State Office for Services to Children and Families v. Stillman*, 333 Or. 135 (Or. 2001).

would be able to care for his children a year after his release. The state argued that after three years of foster care, another year was too long for the children to wait. The therapist testified, "They need permanency, they need safety, they need to know where they are going to be next week, next month, next year, and where they're going to be coming home from vacations."[217] The caseworker echoed that this instability would stunt the children's development. Indeed, they testified that before the trial, the eldest child exhibited "parentified" behavior and gained a significant amount of weight.[218] To endure more uncertainty, the state contended, would subject the children to significant harm.

Like in *McMaster,* the Oregon Supreme Court held that this harm did not rise to the level envisioned by the legislature. First, Justice Gillette emphasized that the state had only spoken about how instability harms foster care children generally. As in *V.R.F.*, the court required psychological evaluations that spoke to the *particularized* condition of the children. The caseworker and therapist were not enough. Second, Gillette revisited the *McMaster* holding, acknowledging that both the facts of the case and the law had changed. Still, Gillette opined, "the evidence concerning the resulting detriment to the children, viz., anxiety relating to an impending transition, was similar."[219] The court held that this anxiety was not "extraordinary" to a child involved in a termination proceeding.[220] As a result, the court dismissed the state's petition to terminate the father's rights. In doing so, *Stillman* strengthened the rights of parents by limiting the court's ability to consider the child's preferred placement.

---

[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] *Id.*

Five years later, in *State ex rel. Dept. of Human Services v. Simmons*, the Supreme Court affirmed this high standard. The case concerned a six-year-old child who witnessed her mother's OxyContin addiction and volatile arguments between mother and the child's caregiver. At the time of removal, the child suffered from PTSD and enuresis and felt personally responsible for her mother's actions. From December 2001 to the TPR trial in October 2003, the child lived with her paternal aunt's family, where her mental health improved greatly. By the time of the trial, mother had not abused drugs for 20 months and had many supervised visits with the child that demonstrated the clear bond between the two. Still, the child's therapist, Dr. Portland, testified that the court needed to protect the child from mother's parenting. According to Dr. Portland, placing the child with her mother would entail the following risks:

> [S]he may feel that she is not listened to, she may have poor self-esteem, and she may have a hard time trusting others. And…if child continues to be parentified, she is at a high risk in adolescence for depression and anxiety, drug use, and even for acquiring HIV and AIDS.[221]

Additionally, Dr. Sweet, a psychologist, evaluated mother and testified that mother suffered from a personality disorder that "would make it difficult for mother to get along with others or to place child's needs above her own."[222] The trial and appellate courts held that mother's substance abuse and mental health conditions warranted the termination of her parental rights.

The Supreme Court reversed, holding that *at the time of the trial*, mother did not exhibit conduct or suffer from conditions that were "seriously detrimental to the child."[223] The court pointed to mother's extended sobriety and mother's personal

[221] *State ex rel. Dept. of Human Services v. Simmons*, 342 Or. 76 (Or. 2006).
[222] *Id.*
[223] *Id.*

psychological evaluation from Dr. Condon, which disagreed with Dr. Sweet's diagnosis of a personality disorder. The court, then, pointed to the marked improvements in the child's mental health, suggesting that child could withstand mother's unideal parenting. The court concluded,

> None of the evidence that the state presented pertaining to mother's parenting after child was removed… shows clearly and convincingly that mother's parenting is so inadequate as to be seriously detrimental to child… [T]he state is attempting to impose a standard of parenting on mother that the statute does not contemplate.[224]

The court's decision aligns with the legislature's statutory scheme, which requires the state to prove that the parent's conduct or conditions seriously threaten the welfare of the child at the time of the trial.

Still, as in *M.A.H.*, this holding suggests that the state limited its ability to establish present harm by protectively moving the child to another home. Mother did not have the ability to parent the child for two years due to the state's invention, and the child's psychologist tied this intervention to the marked improvement of the child's mental health. This improvement should indicate, as Dr. Portland suggested, that remaining in foster care is in the child's best interest—the court's first consideration in a TPR trial. Moreover, even if mother's behaviors had dramatically improved, the effects of trauma complicate this interpretation of the current harm standard. For children with trauma, past actions continue to affect the present, even if these actions have ceased.[225] Encountering a reminder of the traumatic event—let alone living with

[224] *Id.*
[225] VAN DER KOLK, *supra* note 34.

the perpetrator—can trigger extreme emotional distress.[226] As a result, reunification can still endanger the child even if the parent has ameliorated their problematic behaviors. By ignoring the lingering effects of trauma, the court ensures reunification occurs at the parent's pace, not the child's.

Two years later, in *State ex rel. Juvenile Dept. of Multnomah County v. F.W.*, the appellate court clarified that the *Simmons* holding did not necessarily apply to children with substantial mental health needs. *Simmons* and *F.W.* share a number of facts. In *F.W.*, the state attempted to terminate father's parental rights of his two children, F and E. Like mother in *Simmons,* father suffered from severe substance abuse and a personality disorder.[227] Like in *Simmons,* father had sustained sobriety for an extended period before the trial, and different psychologists disagreed about the extent of the disorder. The children had significant mental health needs as well. The psychologist, Dr. Borg, diagnosed E with a severe early childhood reactive attachment disorder and F with adjustment disorder with mixed anxiety and depressed mood. Like Dr. Portland in *Simmons*, Dr. Borg testified that reunification would severely harm the children's development. At trial, though, father relied on *Simmons* to successfully argue that the state had still not met its burden.

The appellate court reversed, holding that the trial court had misinterpreted *Simmons*. Writing for the majority, Justice Brewer differentiated *F.W.* from *Simmons* by emphasizing that the child in *Simmons* was "well adjusted and happy" at the time of the

[226] Ian A. Clark & Clare E. Mackay, *Mental Imagery and Post-Traumatic Stress Disorder: A Neuroimaging and Experimental Psychopathology Approach to Intrusive Memories of Trauma*, 0 FRONT. PSYCHIATRY (Frontiers 2015).
[227] *State ex rel. Juvenile Dept. of Multnomah County v. F.W.*, 218 Or.App. 436 (Or. Ct. App. 2008).

hearing. F and E, on the other hand, had "serious emotional problems."[228] Reunification would, thus, more severely affect F and E. Despite the offered difference, the opinion overlooked Dr. Portland's testimony that the child continues to suffer from PTSD and only feels "happy and sad in extremes" as a result of mother's parenting.[229] Moreover, the therapist warned that if returned to mother, the child's mental state would deteriorate. It seems rather brazen for a judge to declare that the child in a separate case was "well adjusted and happy" despite the extensive record of expert testimony indicating otherwise. This carveout to the *Simmons* standard charges untrained judges with the task of deciding which children have "serious emotional problems." The subjectivity of this question has created a nebulous case law.

A mere eight months later, in *State ex rel. Dept. of Human Services v. A.T.*, for instance, the appellate court contradicted Brewer's logic in *F.W.* In *A.T.*, the father had parented his three-year-old child, N, for one year. He, like the parents in *Stillman, Simmons,* and *F.W.*, had a substantial history of drug abuse that was in remission by the time of the trial. Similarly, N was diagnosed with an adjustment disorder with anxiety. At the time of the trial, N had been in DHS custody for half her life but had "done well in foster care."[230] Notably, though, the record lacked psychological evaluations for N or father. The trial court resultantly dismissed the state's petition to terminate father's parental rights, opining,

> [I]n my review of the case law, in circumstances similar to that of [father's], much of the bases for supporting a termination of parental rights is substantially—was substantially more medical and

[228] *Id.*
[229] *Simmons*, 342 Or. 76.
[230] *State ex rel. Dept. of Human Services v. A.T.*, 223 Or.App. 574 (Or. Ct. App. 2008).

> psychological evaluations and attempts on the part of DHS to reintegrate the child back into a home. It just simply didn't happen here.[231]

The appellate court reversed, holding that the state had offered clear and convincing evidence that father was unfit as a result of his history of drug abuse. Like in *Stillman*, father was just beginning a period of sobriety and had just returned from prison. Despite his progress while incarcerated, the court heard testimony that drug treatment in prisons is "very, very, very different from treatment outside of prison" because the "stresses of everyday living" drive formerly incarcerated people back to substances. At the time of the trial, father had only been released for one week. Unlike in *Stillman* where the court afforded father the ability to prove his ability to be sober outside of prison, here the court held that father's risk of relapse was substantial despite his "commendable" efforts.[232] The court highlighted that with N's adjustment disorder, the risk of father's relapse would present a serious threat of harm. Unlike in *Stillman,* the court held that the wardship could not be extended to monitor father's progress either. Despite having no expert opinion to rely on, the court held that "six months to a year is too long for N to wait" due to her adjustment disorder.[233] Lastly, the court held that the fact that N had done "extremely well" in foster care suggests that termination was in the child's best interest.[234]

Though arriving at the same conclusion as *F.W.*, the case contradicts the logic of the preceding three cases. In *Simmons*, the court held that reunification would not harm the child—despite expert testimony to the contrary. In *A.T.*, the court held that it would

[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] *Id.*

without expert testimony at all. Moreover, *F.W.* clarified that in *Simmons,* reunification was permissible because the child was "well adjusted."[235] Similarly, in *A.T.*, the child had done "extremely well" in foster care, but that finding now spoke to the child's need for continued placement.[236] The numerous contradictions between the four similar cases reveals the court's discretion to terminate parental rights as it sees fit. A justice's subjective notion of parental unfitness largely guides when a child will be removed from their preferred foster placement. This subjectivity has created an ambiguous case law regarding the emotional harm of reunification at the termination stage.

Moreover, the court's interpretation of the legislature's intent regarding the termination of parental rights requires that the harm is extreme *relative to the general population*. This standard makes more sense at the TPR stage than when establishing jurisdiction because terminating parental rights is an extreme step, and a failed petition to terminate parental rights does not result in the child returning home. The court can continue to protect the child through a guardianship or prolonged or permanent foster care. The relative harm standard, however, undermines the court's insistence that the "focus must always be on the child."[237] Instead, *Stillman* tasked the court with establishing what conditions are "more serious and uncommon detriment than that caused by the conduct of parents" as a whole without a particularized inquiry into the child's conditions.[238]

---

[235] *State ex rel. Juvenile Dept. of Multnomah County v. F.W.*, 218 Or.App. 436 (Or. Ct. App. 2008).
[236] *A.T.*, 223 Or.App. 574.
[237] *Department of Human Services v. J. J. B., Jr.*, 291 Or.App. 226 (Or. Ct. App. 2018).
[238] *State ex rel. State Office for Services to Children and Families v. Stillman*, 333 Or. 135 (Or. 2001). (quoting State v. McMaster, 259 Or. 291 (Or. 1971)).

Moreover, subsequent cases have muddled to whom the court should compare the severity of the conduct. In *Department of Human Services v. C.R.P.*, for example, the appellate court used the logic of *Stillman* to hold that "difficulty adjusting to a placement move is not extraordinary *in the juvenile system* (emphasis added)."[239] This difficulty, Justice Ortega emphasized, is not extraordinary for other children either, including "those whose parents are engaged in military service abroad."[240] The case, however, did not involve a military family but rather a child with an adjustment disorder whose mother would be incarcerated for almost three years after the trial. For a number of reasons, the particularities of this case would likely have supported Ortega's decision.[241] Instead of relying on these facts, though, Ortega set the precedent that *in general*, difficulty adjusting to a placement was not a severe enough harm to terminate parental rights.

As a result, cases with stronger fact patterns still result in the parents' favor. A year later, for instance, Ortega reiterated in *Department of Human Services v. J.N.* that difficulty adjusting to a new placement was not "unlike the circumstances in most dependency cases where a change in placement will be difficult for the child."[242] Now, like in *C.R.P.*, the difficulty must be extreme relative to those in the juvenile system, not the general population, creating a much higher standard of harm. Though Ortega

---

[239] *Department of Human Services v. C.R.P.*, 244 Or.App. 221 (Or. Ct. App. 2011).
[240] *Id.*
[241] The court heard evidence that DHS, not mother, had caused the adjustment disorder by moving the child from a stable foster home. A psychological evaluation determined that mother was free of personality disorders and addictions to drugs or alcohol and could safely parent her child when released. Mother also expressed that if her rights were not terminated, she would only pursue reunification gradually as to not harm the children.
[242] *Department of Human Services v. J.N.*, 253 Or.App. 494 (Or. Ct. App. 2012). She did not cite *C.R.P.* but used identical reasoning.

applied the logic of *C.R.P.*, the circumstances in *J.N.* differed substantially. First, the child, M, only learned the identity of her biological father when she was seven years old. Father lived across the country and wanted M to move to North Carolina to live with him. M did not want to go, so the state sought a permanent guardianship with her current placement. At the time of the trial, M lived with her half-siblings, A and Q, with A's paternal grandparents. She had already experienced "many moves and losses" but had always lived with her older sister, A, who was M's primary attachment figure.[243] DHS argued that it was not possible to reunify M with her father in a reasonable time without severely harming M. M testified that she wanted to stay at her current placement and introduced "letters from two of her teachers, a clinical summary of an assessment of her by a licensed marriage and family therapist, and a memorandum prepared by the Court Appointed Special Advocate (CASA)."[244] After hearing the evidence, the trial court found that reunification could not happen in a reasonable time because it would likely cause "severe mental and emotional harm."[245]

On appeal, DHS joined father to argue that no party had proven that the move would cause "severe mental and emotional harm."[246] The appellate court agreed and reversed the change of plan. The opinion quotes an individual and sibling assessment by a licensed clinical social worker, Mr. Strickland, at length. Strickland observed that M suffered from "significant trauma from 'moves and losses' in her eight years," which would make any transition difficult for M.[247] He noted that M did not seem to have any

[243] *Id.*
[244] *Id.*
[245] *Id.*
[246] *Id.*
[247] *Id.*

mental health challenges at the time, but that she is "vulnerable to developing anxiety or depression if she is not told fairly soon about what will be her permanent plan."[248] He recommended that this permanent plan respect M's wishes to stay at her current placement, warning that,

> [M] probably is not able to imagine being in a family without her older sister. It would be hard at her age to process the loss of a sister who has been a primary attachment figure, in addition to the loss of a birth mother, the loss of a foster family of two years, and the loss of psychological grandparents who have cared for her as parents for one year. [M] would likely have a complicated grieving process if she were to move far away by herself, and working through her past relationships could significantly impact her ability to make new attachments.[249]

If M were to live with her father, Strickland opined that M would need "consistent weekly therapy," and her father need to have "appropriate expectations and patience" to build a trusting relationship.[250] Justice Ortega pointed to father's psychological evaluation to suggest that father had the requisite skills and approach to safely parent M. The evaluation found that based on father's commitment to easing the transition for M, he could "meet the needs of a child transitioning from a familiar family environment into his home."[251] Ortega concluded that, "[n]othing in this record" suggested that placement with father would cause M "severe mental and emotional harm."[252] Instead, the difficulty that M would experience was "not unlike the circumstances in most dependency cases where a change in placement will be difficult for the child."[253]

---

[248] *Id.*
[249] *Id.*
[250] *Id.* The child's therapist echoed that removing M from her placement would have ""unfavorable psychological effects upon [M]" and would require "mental health counseling and support services."
[251] *Id.*
[252] *Id.*
[253] *Id.*

Again, this comparison to the general foster care population creates an extremely high bar to clear to establish "severe harm." A 2013 study, for example, found that 50.9% of foster children meet the criteria for at least one DSM-IV disorder with nearly 20% suffering from a reactive attachment disorder.[254] This standard would, then, require M to show that her harm is extreme compared to the extreme harm endured by many foster care children. Indeed, in this case, the clinical social worker, the child's therapist, and the child herself testified that moving to North Carolina would harm the child. The clinical social worker even concluded that it would be "hard at her age to process the loss of a sister who has been a primary attachment figure" and that this grief could, "significantly impact her ability to make new attachments."[255] Though cloaked in academic jargon, this outcome itself is a serious threat of harm. The ability to sustain healthy relationships with others is crucial to living a healthy life. Psychologists have demonstrated that "children with insecure attachments have a greater likelihood for physical health morbidities and impaired social, psychological, and neurobiological functioning."[256] However, because these harms are common in the foster care population, Ortega concluded that they were not severe enough to change the plan to guardianship. Instead, Ortega focuses instead on the psychological evaluation of father, which without having interviewed M, concluded that father could meet the child's needs. As a result, in this case, the general precedent that "difficulty adjusting to a

[254] Stine Lehmann et al., *Mental Disorders in Foster Children: A Study of Prevalence, Comorbidity and Risk Factors*, 7 CHILD ADOLESC PSYCHIATRY MENT HEALTH 39 (Nov. 2013).
[255] *J.N.*, 253 Or.App. 494.
[256] Gail Hornor, *Attachment Disorders*, 33 JOURNAL OF PEDIATRIC HEALTH CARE 612 (Sep. 2019).

placement move is not extraordinary in the juvenile system" superseded the findings of two professionals and the child herself.[257]

Given a generous reading, this high bar recognizes that establishing a permanent plan other than reunification "severs the fundamental liberty of natural parents to care for and have the custody of their children."[258] At the same time, a failed change of plan or termination petition does not send the child back to their parents. Indeed, in *J.N.*, Justice Ortega simultaneously reversed the judgment changing the plan and dismissed father's motion to dismiss the wardship. As a result, the court can still protect the child with an open wardship without infringing on parental rights. This precedent, though, has infiltrated the jurisdictional stage as well. A year after *J.N.*, for example, the appellate court applied *Stillman* and *C.R.P.* to a jurisdictional trial in *In re A.D.I.* When the child, A, was fourteen, the state removed her from her father's care and placed her with her familiar relatives.[259] The state sought jurisdiction with respect to mother because the child had not seen her mother in eight years, and mother planned to immediately take A to her residence in Washington. The state argued that this would "psychologically damage" the child.[260] The caseworker testified that the child did not want to go to her mother's and that based on her 18 years of experience as a caseworker, she "opined that it would 'likely' be 'damaging to [A] psychologically' to be immediately placed in mother's care."[261] Mother acknowledged that A might feel "angry" and "anxious" if she were immediately transferred but assured the court that

[257] *Department of Human Services v. C.R.P.*, 244 Or.App. 221 (Or. Ct. App. 2011).
[258] *State ex rel. State Office for Services to Children & Families v. Frazier*, 152 Or.App. 568 (Or. Ct. App. 1998).
[259] *In re A.D.I.*, 259 Or.App. 116 (Or. Ct. App. 2013).
[260] *Id.*
[261] *Id.*

she would find counselors for A and that she would "try to communicate with her."[262] The trial court held that "Mother had no real plan" to safely transition A to her home, and as a result, assumed jurisdiction to avoid the "risk of psychological or emotional adverse impact to the child."[263]

The appellate court reversed. Writing for the majority, Justice Duncan conceded that the state established the move would create risk of harm to A but held that the state had not proven the severity of the harm. Duncan wrote,

> The caseworker did not testify as to what she meant by the term 'psychological damage.' The caseworker also did not explain how, to what extent, or for how long A would be 'psychologically damaged' by immediately moving into mother's home. 'Although we can imagine that an expert might be able to testify to that effect, the state did not present any such testimony.'[264]

Like in *Shugars I*, the suggestion of psychological damage confused the court. Like in *V.R.F.*, the court called for expert testimony beyond the caseworker's. The court, however, cannot order any party to undergo a psychological evaluation before jurisdiction is established. Additionally, given that the jurisdictional trial occurs approximately six weeks after removal, acquiring an expert by the time of the trial often presents a logistical impasse. Nevertheless, without this expert testimony, Duncan cited *Stillman* and *C.R.P.* to hold that "[t]he state provided no evidence that the harm to A would be any greater than the customary distress that a child experiences when she is uprooted from her community and must form social bonds in a new place."[265] As a result, the appellate court reversed.

---

[262] *Id.*
[263] *Id.*
[264] *Id.*
[265] *Id.*

Crucially, *Stillman* and *C.R.P.* concerned whether difficulty adjusting rose to the level of harm needed to terminate parental rights, not establish jurisdiction. Indeed, in cases like *McMaster* or *J.N.*, the appellate court affirmed jurisdiction while denying termination of parental rights or a change in plan. In *A.D.I.*, though, Duncan used this high standard in a jurisdictional case. Despite not wanting to live with a parent she had not seen since she was six, the appellate court held that the "customary distress" of uprooting a child's life did not warrant jurisdiction.[266] In totality, then, a review of the case law demonstrates that the appellate court does not take the psychological harm of removing a child from their preferred placement seriously. Many of these children have endured "many moves and losses" over their years and must continue to endure the ongoing anxiety that they will be removed against their will.

[266] *Id.*

V. CONCLUSION

A. Summary of Findings

This review has demonstrated that at nearly every stage of the process, Oregon law fails to protect children from emotional abuse—one of the most pervasive and harmful forms of child maltreatment. When caseworkers first investigate abuse, they follow a manual that draws from the legislature's vague definition of mental injury. These vague definitions discourage caseworkers from intervening, which helps explain why Oregon reports that mental injury characterized the abuse of only 1.5% of abused children.[267] The emotional abuse cases that make it to the court face an even steeper challenge. The nature of emotional abuse often frustrates efforts to substantiate allegations. Emotional abuse leaves no obvious physical marks, and the onset of the psychological symptoms is often delayed.[268] Children's trauma responses further complicate this process, as "most children will instinctively hide maltreatment from others, or even from themselves."[269] The frequent lack of both physical evidence and child testimony complicates the state's ability to prove the presence of emotional abuse.

Oregon courts stand in the way of cases that overcome these natural barriers. Comparing the court's disparate treatment of emotional and physical cases exposes its disregard for the severity of emotional abuse. Whereas *any* risk of physical harm warrants jurisdiction, emotional abuse cases must prove a "risk of *serious* emotional harm" (emphasis added).[270] The courts have made proving this risk of serious emotional

[267] Office of Reporting, Research, Analytics, and Implementation, *supra* note 10; J. Robert Shull, *supra* note 91.
[268] McMullen, *supra* note 94.
[269] *Id.*
[270] *Department of Human Services v. D.S.F.*, 246 Or.App. 302 (Or. Ct. App. 2011).

harm nearly impossible. The appellate court frequently disregards the opinions of caseworkers—even when the caseworker testifies about clearly damaging behavior, such as a mother telling a toddler that she wished he had never been born.[271] The appellate court also disregards child testimony—even when the child ties the parent's disparaging comments to her self-harming.[272] This standard of evidence, thus, requires expert testimony even though acquiring such testimony before the jurisdictional hearing is often not possible. When the state does offer expert testimony in later stages of a case, though, the appellate court frequently disregards it, too, claiming that the expert did not assert that the child would be *seriously* harmed.[273] This perpetually changing standard keeps the courts' protection out of reach for many Oregon children.

By diminishing the severity of emotional harm, the court also shifts control of the case to the parents. As E expressed in *C.L.R.*, a parent's past behavior can interfere with a child's ability to feel safe at home even if the parent has changed.[274] Indeed, for the many foster care children who suffer from PTSD, reminders of the traumatic experience triggers episodes where they relive their most distressing moments.[275] These episodes feel "real" because as neuroimaging reveals, the brain fires as though it is actually experiencing the event.[276] To children struggling with these symptoms, the

---

[271] *Matter of J. P. G.*, 303 Or.App. 183 (Or. Ct. App. 2020). In the APSAC framework, this behavior falls under "denying emotional responsiveness."
[272] *Department of Human Services v. M.E.*, 255 Or.App. 296 (Or. Ct. App. 2013). In the APSAC framework, this behavior falls under "spurning."
[273] *Department of Human Services v. B. J. J.*, 282 Or.App. 488 (Or. Ct. App. 2016); *State ex rel. Dept. of Human Services v. Simmons*, 342 Or. 76 (Or. 2006); *Matter of V. R. F.*, 282 Or.App. 12 (2016); *Department of Human Services v. J.N.*, 253 Or.App. 494 (Or. Ct. App. 2012); *State ex rel. State Office for Services to Children and Families v. Stillman*, 333 Or. 135 (Or. 2001).
[274] *Department of Human Services v. C. L. R.*, 295 Or.App. 749 (Or. Ct. App. 2019).
[275] Ann Hackmann et al., *Characteristics and content of intrusive memories in PTSD and their changes with treatment*, 17 JOURNAL OF TRAUMATIC STRESS 231 (2004).
[276] Clark & Mackay, *supra* note 226; VAN DER KOLK, *supra* note 34.

harm is current even if the parent's action is in the past. Yet, the court has repeatedly dismissed this injury as not meeting the required standard of harm.[277] In termination proceedings, due to the gravity of the decision, the legislature has asked the court to consider the severity of harm relative to the general population.[278] Yet, the court has not only raised the standard by requiring the harm to be extraordinary compared to the foster care population but also applied that standard to the jurisdictional setting.[279] In doing so, the court has greatly diminished a child's ability to control their placement throughout their case.

B. Recommendations

The court's disregard for emotional harm belies the right of Oregon children to live a life free of emotional abuse.[280] The state must substantively rethink the way it approaches emotional abuse in the courtroom but also child welfare in general. First, I urge the legislature to make juvenile dependency proceedings more child-centered. Jessica Weaver offers a simple yet important suggestion: require the court to seek the child's input directly. Given the heavy workload of many lawyers, she writes, "it can be a huge injustice to assume the adults charged with fulfilling their roles actually do so."[281] She proposes that the court ask each child to answer a standard set of questions to answer, including:

> If given the choice, who do you want to live with right now? Why?

---

[277] *Simmons*, 342 Or. 76.
[278] *State v. McMaster*, 259 Or. 291 (Or. 1971).
[279] *Department of Human Services v. C.R.P.*, 244 Or.App. 221 (Or. Ct. App. 2011); *State ex rel. State Office for Services to Children and Families v. Stillman*, 333 Or. 135 (Or. 2001).
[280] § 419B.090(2)(a)(B) (2021).
[281] Jessica Dixon Weaver, *supra* note 14.

> If you could not live with this person, is there someone else (grandmother, grandfather, aunt, uncle, cousin) you would like to stay with for right now?
>
> How do you feel about visiting with your mother / your father if you do not go back home?
>
> Is there anything that makes you feel scared? Explain what makes you feel this way.
>
> Is there anything that makes you feel worried? Explain what makes you feel this way.
>
> Is there anything that makes you feel nervous? Explain what makes you feel this way.
>
> Is there anything else you want to tell the judge about what is going on in your life right now?[282]

The child could provide their answers in a written affidavit, verbally in front of the court, privately in the judge's chambers, or not at all. A child's preference would not be final, but encouraging the court to include the child's input would beget more informed decisions.

Second, the adoption of more child-centered bases of jurisdiction would allow children to reunify at their own pace. Most bases of jurisdiction focus on the parents ("The father's erratic and/or volatile behaviors present a threat of harm to the child"). The parent can move to dismiss the wardship as soon as they have ameliorated this basis of jurisdiction. In cases involving substantial trauma, however, reunification can endanger the child even when the parent has ameliorated their basis of jurisdiction. As a result, framing the basis of jurisdiction around the child's needs would afford the child the ability to reunify on safer terms ("The child fears the father due to his erratic and/or volatile behaviors, and reunification against the child's wishes would significantly impair the child's ability to function"). This reform would require the legislature to

[282] *Id.*

change the settlement conference process, which produces the bulk of the state's bases of jurisdiction. In some counties like Lane County, the attorneys for the state and the parent often settle on language without consulting the child's attorney. This reduces the child's ability to influence their case. Other counties, like Coos County, require the child's attorney to approve the bases of jurisdiction with their signature before the court can adopt it. Codifying this common-sense solution across the state would grant children more control throughout their cases.

Third, after thirty-seven years, it is beyond time for the legislature to update the state's definition of emotional abuse. The current definition is vague and provides caseworkers and the court with little guidance. As a result, mental injury cases reported by ODHS only account for a fraction of the estimated incidents of emotional abuse in the state. The court, too, has repeatedly expressed confusion regarding emotional abuse and harm.[283] Oregon children are suffering as a result. The legislature must consult with relevant experts and stakeholders, such as child development psychologists and former foster children, to provide the court with a clearer, actionable definition. The criterion developed by Dr. Slep and colleagues would provide a helpful starting place, as it uses the same act-plus-impact framework as Oregon's current definition while providing more specific thresholds and examples.[284]

Without broader changes, however, these suggestions threaten to do more harm than good. Increasing the scope of intervention—especially in the nebulous realm of emotional harm—will disproportionately affect marginalized Oregonians. It risks

[283] *In re A.D.I.*, 259 Or.App. 116 (Or. Ct. App. 2013); *State ex rel. Dept. of Human Services v. Shugars*, 202 Or.App. 302 (Or. Ct. App. 2005).
[284] Slep et al., *supra* note 7.

removing children from safe homes and putting them into an already overburdened foster care system—one that failed all thirteen federal care standards at its last CFSR review.[285] Implementing Shanta Trivedi's recommendations could allow the state to protect children from emotional abuse while providing a necessary check on excessive intervention. Specifically, Trivedi advocated for states to require the court to consider the harm of removal when establishing jurisdiction.[286] Putting her proposed factors in conversation with existing Oregon law would allow the court to establish jurisdiction in any case involving a child

> whose condition or circumstances are such as to endanger the welfare of the [child], with due consideration of: (i) whether a kinship resource is available to take the children; (ii) if a foster home been identified; (iii) where the identified foster home is in relation to the child's home; (iv) whether the foster parent can accommodate the proposed visitation schedule; (v) if siblings will be placed together; (vi) if the child will have to transfer schools; (vii) whether the child's services or extra-curricular activities be disrupted; (viii) if the child has special needs and if so, whether the identified placement is able to accommodate those needs; and (ix) whether the child will be able to observe religious or cultural practices that are important to them in the identified placement.[287]

This language would encourage the court to consider the harms of removal, which would counteract the danger of expanding the state's scope of intervention.

At the same time, Trivedi joins a rich scholarship calling for expanded investment in in-home services to avoid the need for removal in the first place. The state removes far too many children from their homes because their families are poor or lack access to important services. Unfortunately, many of these services are only offered

[285] Friedman, *supra* note 148; *Child and Family Services Reviews: Statewide Assessment Instrument*, *supra* note 148.
[286] Trivedi, *supra* note 45.
[287] *Id.*; § 419B.100 (2021).

after removal.[288] Reprioritizing in-home services with increased state and federal funds would allow the state to address the root of the problem, instead of pouring money into a broken foster care system. In-home services would also ease the common burdens that services place on low-income families, such as finding transportation or reliable childcare. Moreover, this would give child welfare agencies a better picture of family dynamics. Weaver similarly advocates that in non-emergency situations, before filing a lawsuit, child welfare agencies conduct a Psychosocial Assessment in the home.[289] This would require social workers with more advanced training to conduct a more thorough assessment to "prevent over-inclusion of children in the CPS system" while protecting children from emotional abuse.[290]

The state of Oregon's foster care system demands these drastic changes because the alternative sees the potential of countless Oregon children cut short through no fault of their own. Oregon cannot continue to operate a foster care system that simultaneously over-includes children from marginalized communities and outright excludes victims of emotional abuse. Referring to the *Webster's Dictionary* to define emotional abuse can never again be acceptable in an Oregon court.[291] We must listen to

[288] Trivedi, *supra* note 45.
[289] Jessica Dixon Weaver, *supra* note 14. "Psychosocial Assessments differ from traditional psychological or other mental health evaluations in that they (1) focus on functional competencies of parents and adaptive behaviors; (2) screen both strengths and weaknesses in functioning to provide useful guidelines for treatment planning; (3) emphasize current functioning as most relevant to behavioral competence; (4) occur in familiar surroundings - i.e., the home - in order to take into account the natural childcare environment; (5) occur with the child present, in order to allow for observation of parent-child interactions; (6) employ methodologically sound procedures to obtain comprehensive information; and (7) follow a systematic assessment protocol tailored to adolescent parents to allow for comparison of findings across adolescents."
[290] *Id.*
[291] *State ex rel. Dept. of Human Services v. Shugars*, 202 Or.App. 302 (Or. Ct. App. 2005).

the experts and the children themselves to develop a better approach for Oregon's children and families. To fail to do so now is to perpetuate this public health crisis.

Bibliography

§ 419B.005(1)(a)(B) (2021).

§ 419B.090(2)(a)(B) (2021).

§ 419B.090(C)(4)(c) (2021).

§ 419B.100 (2021).

§ 419B.504 (2021).

Baker, Amy, Marla Brassard, and Janet Rosenzweig. 2021. "Psychological Maltreatment: Definition and Reporting Barriers among American Professionals in the Field of Child Abuse." *Child Abuse & Neglect* 114. https://doi.org/10.1016/j.chiabu.2021.104941.

Bates, L., and A. Curry-Stevens. 2014. "The African American Community in Multnomah County: An Unsettling Profile." Portland, Oregon: Portland State University.

Beller, Lynn. 2015. "When in Doubt Take Them Out: Removal of Children from Victims of Domestic Violence Ten Years After *Nicholson v. Williams*." *Duke Journal of Gender Law & Policy* 22: 205–39.

Borrud, Hillary, and David Cansler. 2021. "Why a Disproportionate Number of Native American, Black Children Remain in Oregon Foster Care despite Leaders' Efforts at Change." *The Oregonian*, December 12, 2021. https://www.oregonlive.com/data/2021/12/why-a-disproportionate-number-of-native-american-black-children-remain-in-oregon-foster-care-despite-leaders-efforts-at-change.html.

Bugental, Daphne, Deborah Olster, and Gabriela Martorell. 2002. *Handbook of Dynamics in Parent-Child Relations*. SAGE Publications.

"Child and Family Services Reviews: Statewide Assessment Instrument." 2016. 0970–0214.

Clark, Ian, and Clare Mackay. 2015. "Mental Imagery and Post-Traumatic Stress Disorder: A Neuroimaging and Experimental Psychopathology Approach to Intrusive Memories of Trauma." *Frontiers in Psychiatry* 6 (104). https://doi.org/10.3389/fpsyt.2015.00104.

Cooper, Tanya. 2013. "Racial Bias in American Foster Care: The National Debate." *Marquette Law Review* 97 (2): 215–77.

Dake, Lauren. 2019. "Oregon Ships Foster Care Children To Other States — And The Number Is Growing." *OPB*, February 5, 2019.

https://www.opb.org/news/article/oregon-foster-care-child-welfare-mental-health/.

———. 2020. “Oregon Brings Back All Foster Children Placed Out Of State.” *OPB*, June 30, 2020. https://www.opb.org/news/article/oregon-brings-back-all-foster-children-placed-out-of-state/.

Department of Human Services v. B. J. J., 282 Or.App. 488 (Or. Ct. App. 2016).

Department of Human Services v. C. L. R., 295 Or.App. 749 (Or. Ct. App. 2019).

Department of Human Services v. C. M., 284 Or.App. 521 (Or. Ct. App. 2017).

Department of Human Services v. C.R.P., 244 Or.App. 221 (Or. Ct. App. 2011).

Department of Human Services v. D.S.F., 246 Or.App. 302 (Or. Ct. App. 2011).

Department of Human Services v. J. J. B., Jr., 291 Or.App. 226 (Or. Ct. App. 2018).

Department of Human Services v. J.N., 253 Or.App. 494 (Or. Ct. App. 2012).

Department of Human Services v. M.A.H., 272 Or.App. 75 (Or. Ct. App. 2015).

Department of Human Services v. M.E., 255 Or.App. 296 (Or. Ct. App. 2013).

Department of Human Services v. S.R.C., 263 Or.App. 506 (Or. Ct. App. 2014).

Department of Human Services v. T. L. H. S., 292 Or.App. 708 (Or. Ct. App. 2018).

Department of Human Services v. T.L., 279 Or.App. 673 (Or. Ct. App. 2016).

“Disproportionality and Disparities in Oregon’s Child Welfare System County Level Analysis of Administrative Data: Multnomah County.” 2009. Oregon Child Welfare Equity Task Force.

Douglas, Killian, and Scott Harris. 2017. “Chapter 8: Preadjudication Procedure and Shelter Hearings.” In *Juvenile Law: Dependency (2017 Edition)*. Oregon State Bar.

Doyle, Joseph. 2007. “Child Protection and Child Outcomes: Measuring the Effects of Foster Care.” *The American Economic Review* 97 (5): 1583–1610.

Duquette, Donald, Ann M. Haralambie, Vivek S. Sankaran, and National Association of Counsel for Children. 2016. *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases*. 3rd edition. Aurora, Colorado: National Association of Counsel for Children.

Friedman, Gordon. 2016. “Report: Ore. DHS Fails All Federal Child Care Standards.” *Statesman Journal*, April 20, 2016. https://www.statesmanjournal.com/story/news/politics/2016/04/20/feds-oregon-dhs-fails-child-safety-standards-years/83304606/.

G.A.C. v. State ex rel. Juvenile Department of Polk County, 219 Or.App. 1 (Or. Ct. App. 2008).

Gewirtzman, Doni. 2009. “Our Founding Feelings: Commitment, and Imagination in Constitutional Culture.” *University of Richmond Law Review* 43: 623–83.

Gibb, Brandon, Lauren Alloy, Lyn Abramson, Donna Rose, Wayne Whitehouse, Patricia Donovan, Michael Hogan, Judith Cronholm, and Sandra Tierney. 2001. “History of Childhood Maltreatment, Negative Cognitive Styles, and Episodes of Depression in Adulthood.” *Cognitive Therapy and Research* 25 (4): 425–46.

Hackmann, Ann, Anke Ehlers, Anne Speckens, and David Clark. 2004. “Characteristics and content of intrusive memories in PTSD and their changes with treatment.” *Journal of Traumatic Stress* 17 (3): 231–40. https://doi.org/10.1023/B:JOTS.0000029266.88369.fd.

Hoeboer, Chris, Carlijn de Roos, Gabrielle van Son, Philip Spinhoven, and Bernet Elzinga. 2021. “The Effect of Parental Emotional Abuse on the Severity and Treatment of PTSD Symptoms in Children and Adolescents.” *Child Abuse & Neglect* 111. https://doi.org/10.1016/j.chiabu.2020.104775.

Hornor, Gail. 2019. “Attachment Disorders.” *Journal of Pediatric Health Care* 33 (5): 612–22. https://doi.org/10.1016/j.pedhc.2019.04.017.

In re A.D.I., 259 Or.App. 116 (Or. Ct. App. 2013).

In re T.P., 255 Or.App. 51 (Or. Ct. App. 2013).

Jacobs, Margaret. 2013. “Remembering the ‘Forgotten Child’: The American Indian Child Welfare Crisis of the 1960s and 1970s.” *American Indian Quarterly* 37 (1–2): 136–59. https://doi.org/10.5250/amerindiquar.37.1-2.0136.

Kraft, Colleen. 2018. “AAP Statement Opposing Separation of Children and Parents at the Border.” https://docs.house.gov/meetings/IF/IF14/20180719/108572/HHRG-115-IF14-20180719-SD004.pdf.

Lajimodiere, Denise. 2015. “American Indian Boarding Schools in the United States: A Brief History and Legacy.” *Institute for the Study of Human Rights*, Indigenous Peoples’ Access to Justice, Including Truth and Reconciliation Processes, , 255–61. https://doi.org/10.7916/D8JH3K27.

Landers, Ashley, Sharon Danes, Avery Campbell, and Sandy White Hawk. 2021. "Abuse after Abuse: The Recurrent Maltreatment of American Indian Children in Foster Care and Adoption." *Child Abuse & Neglect* 111 (7). https://doi.org/10.1016/j.chiabu.2020.104805.

Lehmann, Stine, Odd Havik, Toril Havik, and Einar Heiervang. 2013. "Mental Disorders in Foster Children: A Study of Prevalence, Comorbidity and Risk Factors." *Child and Adolescent Psychiatry and Mental Health* 7 (1). https://doi.org/10.1186/1753-2000-7-39.

Levit, Nancy. 1992. "Ethereal Torts." *The George Washington Law Review* 61 (136).

Lindsey, Duncan. 2003. *The Welfare of Children*. 2nd ed. New York: Oxford University Press.

Loue, Sana. 2005. "Redefining the Emotional and Psychological Abuse and Maltreatment of Children." *Journal of Legal Medicine* 26 (3): 311–37. https://doi.org/10.1080/01947640500218315.

Mannes, M. 1995. "Factors and Events Leading to the Passage of the Indian Child Welfare Act." *Child Welfare* 74 (1): 264–82.

Matter of J. P. G., 303 Or.App. 183 (Or. Ct. App. 2020).

Matter of K. R. M., 296 Or.App. 109 (Or. Ct. App. 2019).

Matter of V. R. F., 282 Or.App. 12 (Or. Ct. App. 2016).

McMullen, Judith. 1992. "The Inherent Limitations of After-the-Fact Statutes Dealing with the Emotional and Sexual Maltreatment of Children." *Drake Law Review* 41 (483). https://scholarship.law.marquette.edu/facpub/584.

Murray, Carrie. 2013. "An Analysis of Recent Oregon Court of Appeals Decisions Regarding Juvenile Dependency & Their Impact on Parental Constitutional Rights." *Oregon Law Review* 92 (3).

Naughton, Catherine M., Aisling T. O'Donnell, and Orla T. Muldoon. 2020. "Exposure to Domestic Violence and Abuse: Evidence of Distinct Physical and Psychological Dimensions." *Journal of Interpersonal Violence* 35 (15-16): 3102–23. https://doi.org/10.1177/0886260517706763.

Neeley, Steven. 2000. "The Psychological and Emotional Abuse of Children: Suing Parents in Tort for the Infliction of Emotional Distress." *Northern Kentucky Law Review* 27.

Norman, Rosana, M. Byambaa, A. Butchart, J. Scott, and T. Vos. 2012. "The Long-Term Health Consequences of Child Physical Abuse, Emotional Abuse, and Neglect: A Systematic Review and Meta-Analysis." *PLoS Med* 9 (11). https://doi.org/10.1371/journal.pmed.1001349.

O'Brien, David M. 2017. *Judges on Judging: Views from the Bench*. 5th ed. Chatham, N.J.: CQ Press.

Office of Reporting, Research, Analytics, and Implementation. 2021. "2020 Child Welfare Data Book."

Pelton, Leroy. 1987. "Not for Poverty Alone: Foster Care Population Trends in the Twentieth Century." *Journal of Sociology and Social Welfare* 14 (2): 37–62.

Rector, Tracy. 2018. "Perspective | Why Conservatives Are Attacking a Law Meant to Protect Native American Families." *Washington Post*, November 21, 2018. https://www.washingtonpost.com/outlook/2018/11/21/why-conservatives-are-attacking-law-meant-protect-native-american-families/.

Rubin, David, Amanda O'Reilly, Xianqun Luan, and A. Russell Localio. 2007. "The Impact of Placement Stability on Behavioral Well-Being for Children in Foster Care." *Pediatrics* 119 (2): 336–44. https://doi.org/10.1542/peds.2006-1995.

Schmidt v. Archdiocese of Portland in Oregon, 218 Or.App. 661 (Or. Ct. App. 2008).

Schneider, Mary Wood, Anita Ross, J. Christopher Graham, and Angiela Zielinski. 2005. "Do Allegations of Emotional Maltreatment Predict Developmental Outcomes beyond That of Other Forms of Maltreatment?" *Child Abuse & Neglect* 29 (5): 513–32. https://doi.org/10.1016/j.chiabu.2004.08.010.

Sedlak, Andrea, Jane Mettenburg, Monica Basena, Ian Petta, Karla McPherson, Angela Greene, and Spencer Li. 2010. "Fourth National Incidence Study of Child Abuse and Neglect (NIS–4)."

Shull, J. Robert. 1999. "Emotional and Psychological Child Abuse: Notes on Discourse, History, and Change." *Stanford Law Review* 51 (6): 1665-1701.

Slep, Amy, Richard Heyman, and Jeffery Snarr. 2011. "Child Emotional Aggression and Abuse: Definitions and Prevalence." *Child Abuse & Neglect*, Special Issue on Emotional Maltreatment, 35 (10): 783–96. https://doi.org/10.1016/j.chiabu.2011.07.002.

Spinazzola, Joseph, Hilary Hodgdon, Li-Jung Liang, Julian Ford, Christopher Layne, Robert Pynoos, Ernestine Briggs, Bradley Stolbach, and Cassandra Kisiel. 2014. "Unseen Wounds: The Contribution of Psychological Maltreatment to Child and Adolescent Mental Health and Risk Outcomes." *Psychological Trauma: Theory, Research, Practice, and Policy* 6 (S1). https://doi.org/10.1037/a0037766.

State ex rel. Dept. of Human Services v. A.T., 223 Or.App. 574 (Or. Ct. App. 2008).

State ex rel. Dept. of Human Services v. D.T.C., 231 Or.App. 544 (Or. Ct. App. 2009).

State ex rel. Dept. of Human Services v. Shugars, 202 Or.App. 302 (Or. Ct. App. 2005).

State ex rel. Dept. of Human Services v. Simmons, 342 Or. 76 (Or. 2006).

State ex rel. Juvenile Dept. of Klamath County v. T.S., 214 Or.App. 184 (Or. Ct. App. 2007).

State ex rel. Juvenile Dept. of Lane County v. Brammer, 133 Or.App. 544 (Or. Ct. App. 1995).

State ex rel. Juvenile Dept. of Lane County v. Smith, 316 Or. 646 (Or. 1993).

State ex rel. Juvenile Dept. of Multnomah County v. F.W., 218 Or.App. 436 (Or. Ct. App. 2008).

State ex rel. State Office for Services to Children & Families v. Frazier, 152 Or.App. 568 (Or. Ct. App. 1998).

State ex rel. State Office for Services to Children and Families v. Stillman, 333 Or. 135 (Or. 2001).

State v. McMaster, 259 Or. 291 (Or. 1971).

State v. S.T.S., 236 Or.App. 646 (Or. Ct. App. 2010).

Sullivan, Laura. 2011. "Incentives and Cultural Bias Fuel Foster System." *NPR*, October 15, 2011. https://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system.

Suski, Emily. 2014. "Dark Sarcasm in the Classroom: The Failure of the Courts to Recognize Students' Severe Emotional Harm as Unconstitutional." *Cleveland State Law Review* 62 (1).

Trickett, Penelope K., Ferol E. Mennen, Kihyun Kim, and Jina Sang. 2009. "Emotional Abuse in a Sample of Multiply Maltreated, Urban Young Adolescents: Issues of Definition and Identification." *Child Abuse & Neglect* 33 (1): 27–35. https://doi.org/10.1016/j.chiabu.2008.12.003.

Trivedi, Shanta. 2019. "The Harm of Child Removal." *New York University Review of Law & Social Change* 43 (3): 523–80.

Van der Kolk, Bessel. 2015. *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma*. New York: Penguin Books.

Weaver, Jessica. 2011. “The Principle of Subsidiarity Applied: Reforming the Legal Framework to Capture the Psychological Abuse of Children.” *Virginia Journal of Social Policy & the Law* 18 (2).

Wyatt B. v. Brown, No. 6:19-cv-000556-AA (Dist. Court Sep. 12, 2019).

Yates, Tuppett M. 2007. “The Developmental Consequences of Child Emotional Abuse: A Neurodevelopmental Perspective: Childhood Emotional Abuse: Mediating and Moderating Processes Affecting Long-Term Impact.” *Journal of Emotional Abuse* 7 (2): 9–34.