IN THE BEST INTERESTS OF NO ONE: HOW NEW YORK'S "BEST INTERESTS OF THE CHILD" LAW VIOLATES PARENTS' FUNDAMENTAL RIGHT TO THE CARE, CUSTODY, AND CONTROL OF THEIR CHILDREN

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INTRODUCTION

The only permanent rule in the game of Calvinball is that you can never play the game with the same rule twice.[1] Calvin, a six-year-old imaginative comic figure from Bill Watterson's famous comic, *Calvin and Hobbes*,[2] created Calvinball with the intention of making a game that could not be more disorganized.[3] Any player may declare a new rule at any point in the game.[4] Zones on the playing field are created "spontaneously and inconsistently by players."[5] Score does not need to be kept with any logical consistency.[6] Penalties may be in any form deemed fit.[7] And, "[a]ny rule that is carried out during the course of the game may never be used again."[8]

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[1] *See* 2 BILL WATTERSON, THE COMPLETE CALVIN AND HOBBES 292 (2005).

[2] *Id.* at 1.

[3] *See id.* at 268–73.

[4] *See id.* at 273.

[5] Calvinball and Calvinball Rules, *The Official Rules of Calvinball*, http://www.insaner.com/calvinball/rules.html (last visited on Jan. 31, 2013). Zones may also disappear and appear whenever a player decides. *See id.*

[6] *See* WATTERSON, *supra* note 1, at 292 (noting that score can be kept with both letters and numbers—"The score is still Q to 12!").

[7] *See* Calvinball and Calvinball Rules, *supra* note 5.

[8] *Id.*

While a game with no rules is exactly the type of fictional game a six-year-old boy wants to play with his talking stuffed animal, it is hardly the type of playing field parents want to engage in when litigating their most fundamental rights. Yet New York family law has adopted the Calvinball approach in determining custody disputes. There is no determinative standard governing the allocation of custody. Judges may declare whatever factors they want to consider and may consider new factors at any point in the litigation. They need not attribute weight to every factor or even allot consistent degrees of weight to each factor. And no two judges need to follow the same approach or come to the same result.

Results in custody disputes, however, go far beyond losing a game of Calvinball, to the infringement of a parent's constitutional right. Parents, whether they were once married or not,[9] have a fundamental constitutional right to the care, custody, and control of their children.[10] An award of sole legal custody assigns one parent the right to make decisions concerning the child,[11] and takes away the other parent's right to engage in "decision-making authority and responsibility about larger issues, most typically healthcare, education and religion."[12] The custodial parent has "final say" over decisions concerning the upbringing of the child, and the non-custodial parent is forced to remain absent from involvement in the child's upbringing,[13] ultimately stripping the non-custodial parent of his or her constitutional right.

The United States Supreme Court has repeatedly recognized that individuals are "entitled to constitutional protection—regarding . . . decisions concerning the upbringing of their children, and the retention of their children through the exercise of custody."[14] Like all other fundamental constitutional rights, a

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[9] *See* Stanley v. Illinois, 405 U.S. 645, 652 (1972).

[10] *See infra* note 14.

[11] *See* Russell I. Marnell, *Joint Custody in New York: A Statute Whose Time Has Come?*, N.Y. L.J., Apr. 26, 1995, at 7, *available at* http://www.marnelllaw.com/downloads/new_york_law_april_1995.pdf.

[12] Joy S. Rosenthal, *An Argument for Joint Custody as an Option for All Family Court Mediation Program Participants*, 11 N.Y. CITY L. REV. 127, 146 (2007).

[13] *Id.*

[14] Holly L. Robinson, *Joint Custody: Constitutional Imperatives*, 54 U. CIN. L. REV. 27, 40 (1985); *see, e.g.*, Troxel v. Granville, 530 U.S. 57, 65–66 (2000); Hodgson v. Minnesota, 497 U.S. 417, 445–46 (1990); Lehr v. Robertson, 463 U.S. 248, 257–59 (1983) (recognizing the Constitutional protection afforded to a parent's right in the

parent's right to the care, custody, and control of his or her child cannot be deprived unless the state has established a compelling interest[15] and there is no less restrictive means of achieving that interest.[16] The state cannot justify infringing on the "the private realm of family life" based on arbitrary legislative action, without any purpose, and without regard to the child's well-being.[17]

Contrary to Supreme Court precedent, New York's Calvinball-like standard for determining custody disputes, absent child abuse, neglect, and domestic violence, works to violate parents' fundamental right to the care, custody, and control of their children without a compelling justification for doing so. New York is a "best interests" state. New York's Domestic Relations Law §240 states that any court considering questions of custody must determine what is in "the best interests of the child."[18] This "statutory mandate is deliberately broad" and provides no concrete guidance as to what a court should consider when determining a child's best interests.[19] The law leaves entirely in the judge's discretion the power to create and modify the general rules that apply to custody disputes.[20] Even in light of the criteria that courts have developed, the "best interests of the child" test permits courts to consider a number of

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custody, care, and upbringing of his or her child); Parham v. J.R., 442 U.S. 584, 602 (1979); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (noting that the primary role of parents in the upbringing of their children "is now established beyond debate as an enduring American tradition").

[15] *See* Robinson, *supra* note 14, at 56; *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977) (requiring a compelling state interest to justify burdens on right to obtain contraceptives); Roe v. Wade, 410 U.S. 113, 154 (1973) (requiring that state show compelling interests to justify interference with women's right to abortion).

[16] *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965); *Roe*, 410 U.S. at 163 (rejecting a statute burdening abortion rights because the statute was not drawn narrowly enough to protect only compelling state interests); *see also* Lois Shepherd, *Looking Forward with the Right of Privacy*, 49 U. KAN. L. REV. 251, 263 (2001) (explaining that once a right is determined to be fundamental, the state is required to show a compelling state interest and that the regulation is narrowly tailored).

[17] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[18] N.Y. DOM. REL. LAW § 240 (West, Westlaw through L.2011, chs. 1–54, 57–495).

[19] Alan D. Scheinkman, *Custody and Visitation*, *in* 12 N.Y. PRAC. NEW YORK LAW OF DOMESTIC RELATIONS § 21:13 (West 2009) [hereinafter *Custody and Visitation*].

[20] *See* Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1171 (1986). That discretion can potentially produce a coherent body of law only if judges were to be instructed on a desirable outcome. *See id.*

non-binding factors, and there are no clear and definite guidelines instructing the courts how to determine what is actually in the best interests of the child.

In theory, a judge, guided by judicially created criteria, will use his or her discretion to determine what custody arrangement is truly the best for each child.[21] The Legislature has determined that the only way for courts to "decide each individual case on its own facts" is through an indefinite standard.[22] But case law suggests that under the imprecise system that the Legislature has allowed to exist, a judge may exercise unrestrained discretion "in a manner that permits decision-making based upon value judgments and bias."[23] A judge, acting under the protective cloak of the "best interests of the child" rule, could not only grant custody to one parent, but, at the same time, could take away a fit parent's custodial right without actually determining that it is in the child's best interest to do so. There is no guarantee that judges will "tailor the decision to justly fit the particular circumstances" of a case.[24] And there is certainly no guarantee that a custody arrangement, driven by whatever the judge considers to be a better familial situation, will promote the child's best interests.[25]

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[21] *See Custody and Visitation*, *supra* note 19 (proposing that the best interests of the child standard does not need to offer much real guidance because the court should, at all times, be concerned with and should strive to do what is best for the child).

[22] *Id.*

[23] Leah A. Hill, *Do You See What I See? Reflections on How Bias Infiltrates the New York City Family Court—the Case of the Court Ordered Investigation*, 40 COLUM. J.L. & SOC. PROBS. 527, 535 (2007); *see also* Robinson, *supra* note 14, at 59 ("Such a standard is extremely susceptible to a judge's personal value judgments regarding what is best for children, since the intended content of the term 'best' is not defined.").

[24] *See Custody and Visitation*, *supra* note 19.

[25] In fact, there is more of a guarantee that the wide discretion afforded to judges in custody disputes limits a parent's ability to get a tenuous decision overturned. *See* discussion *infra* Part III.A.3. The ill-defined "best interests of the child" standard works to protect a trial court's decision, regardless of whether the decision is driven by personal value judgments and biases and is really not in the best interests of the child.

The problem of potentially biased decision-making, whether it is intentional or unintentional,[26] is aggravated by the challenge of gathering and analyzing complete information about each child's situation in New York custody proceedings. There is a myriad of problems with the process of deciding custody disputes in both New York family and supreme courts.[27] The Matrimonial Commission ("Commission"), in its report to the Chief Judge of the State of New York, noted that many improvements need to be made in administering divorces, including several areas that affect custody disputes.[28] The Commission recognized the "extremely heavy caseloads" in matrimonial parts and the close monitoring required in all matrimonial matters and supported the need for additional assistance and resources in these parts.[29] The Commission acknowledged that the "administration, resource and facilities issues . . . are not limited to matrimonial parts"; rather, family courts toil with these problems as well.[30] In light of all the constraints affecting the court systems and the conditions under which judges determine issues of custody, judges face a huge obstacle in evaluating and deciding what is truly in the best interests of the child.

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[26] A judge's use of personal biases and value judgments is not always necessarily an intentional action; rather, because of the ambiguity of the "best interests of the child" rule, a judge is put in a position where he or she may have to rely on personal value judgments to fill the gaps of the "best interests" rule.

[27] Family courts have exclusive jurisdiction over cases involving custody, visitation, child support, guardianship of children, abuse and neglect, support, paternity, foster care, and termination of parental rights to guardianship and custody of children. *See* N.Y. FAM. CT. ACT § 115 (West, Westlaw through L.2006). Proceedings brought to annul a marriage, for separation, or for divorce are heard in New York State supreme courts. *See* N.Y. DOM. REL. LAW § 240 (West, Westlaw through L.2011). Therefore, parents who are unmarried must litigate disputes regarding their children in family court, while parents who are married must litigate disputes regarding their children, stemming from a divorce, separation, or annulment, in supreme court.

[28] Sondra Miller, *Appendix A: Matrimonial Commission of the State of New York, Report to the Chief Judge of the State of New York*, 27 PACE L. REV. 987, 987 (2007) [hereinafter *Matrimonial Commission Report*] (recommending many changes in several areas including the selection and education of judges, the administration of the legal process, the appointment and regulations of experts and law guardians, access to the justice system, the pursuance of research in the area of family law, and the increase in public awareness and education regarding the rights of parties engaged in divorce and custody matters).

[29] *Id.* at 1018–19.

[30] *Id.* at 1020.

Custody disputes, however, would be better and more consistently decided if a joint custody presumption was adopted in New York. New York "remains one of a rapidly diminishing number of states without a statute for joint custody."[31] A statute requiring a presumption of joint custody is exactly what New York needs—one that protects parents' right to the care, custody, and control of their children, all the while adequately ensuring a child's best interests. Under this joint custody presumption, judges would have to presume that joint legal custody must be awarded unless the state has a compelling justification not to grant joint custody. A state, acting under the doctrine of *parens patriae*, has an obligation to protect the interests and welfare of children.[32] A state, however, cannot protect a child's right to the extent that it infringes on another individual's fundamental right without a compelling justification for doing so.[33] There must be a finding of some detriment or harm to the child as a result of joint custody in order to justify granting exclusive custody to one parent and stripping the other parent of all custodial and decision-making rights.

This Note argues that New York State's procedure for determining custody disputes allows a judge to abridge parents' fundamental right to the care, custody, and control of their children without evidence of a compelling justification. Specifically, this Note argues that because of New York's nebulous standard for determining what is the best interest of the child, more often than not, a judge is forced to substitute personal value judgments and biases to compensate for the lack of clear guidance provided to judges in order to determine what is in the child's best interests. A judge, after attempting to overcome the systemic barriers resulting from custody courts, can decide to grant sole custody to one parent over another based on certain considerations that genuinely do not affect the best interests of the child.

Part I discusses a parent's fundamental constitutional right to the care, custody, and control of his or her child and the requisite justification to infringe on that right. Part II defines

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[31] Marnell, *supra* note 11.

[32] *See infra* notes 100, 183–85 and accompanying text.

[33] *See* Santosky v. Kramer, 455 U.S. 745, 758–59 (1982) (noting that a state's countervailing interests must be weighed against the loss a parent would suffer as a result of the state's infringement on his or her fundamental right).

New York's "best interests of the child" rule. Part III analyzes the ways in which the "best interests of the child" rule actually operates in determining custody disputes when there is no allegation of child abuse, neglect, or domestic violence. This Part addresses all the shortcomings in implementing New York's "best interests of the child" test, including the administrative burdens a judge faces in determining what custodial arrangement would most benefit the child's interests. Lastly, Part IV advocates for a solution that would address all the impediments of New York's "best interests of the child" test—a default presumption in favor of a joint custodial relationship. Part IV argues that a presumption in favor of joint legal custody, absent any proof of detriment or harm to the child, would operate to both protect a parent's fundamental right to the care, custody, and control of his or her child and protect the child's best interests.

I. PARENTHOOD IS A FUNDAMENTAL CONSTITUTIONAL RIGHT

When deciding issues of custody, most judges refer to their decisions as the "awarding" or "granting" of custody.[34] Contrary to its implication, an "award" of custody is not a reward of a right above and beyond what each parent is entitled to; it confirms a fundamental right already vested in the parent. Parents' interests in the care, custody, and control of their children are "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court]" and protected by the Fourteenth Amendment from unjustified infringement by the state.[35] The Supreme Court has established "extensive precedent" regarding the cardinal rights of parents over their children.[36] Stemming from the Court's decision in *Meyer v. Nebraska*,[37] it is now recognized that parents, by virtue of their

[34] *See, e.g.*, Dewitt v. Sheiness, 42 A.D.3d 776, 777–78, 840 N.Y.S.2d 208, 209–10 (3d Dep't 2007) (finding that the trial court had sound and substantial basis for granting ex-husband custody of child); Allain v. Allain, 35 A.D.3d 513, 514, 826 N.Y.S.2d 411, 412 (2d Dep't 2006) (finding that the lower court's "determination awarding sole custody of the parties' son to the father has a sound and substantial basis in the record."); Smulczeski v. Smulczeski, 18 A.D.3d 734, 735, 797 N.Y.S.2d 97, 98 (2d Dep't 2005) ("The record supports the Supreme Court's conclusion that awarding the defendant custody of the parties' two children was in the best interest of the children . . . .").

[35] Troxel v. Granville, 530 U.S. 57, 65 (2000).

[36] *Id.* at 66.

[37] 262 U.S. 390 (1923).

status as a parent,[38] "possess a fundamental liberty interest—entitled to constitutional protection—regarding . . . decisions concerning the upbringing of their children, and the retention of their children through the exercise of custody."[39] Absent "powerful countervailing interest[s]" concerning the child's well-being, a parent's right to the care, custody, and control of his or her child cannot be taken away or infringed upon.[40]

A. Parents' Well-Established Constitutional Right to the Care, Custody, and Control of Their Children

Early Supreme Court cases dealing with the issue of parental rights focused on a parent's constitutional right to make decisions regarding his or her child's upbringing and well-being.[41] In *Meyer*, the Court invalidated an act that forbade the teaching of languages other than English to students that had not passed the eighth grade.[42] The Court reasoned that the "liberty" interests protected by the Fourteenth Amendment include the rights of parents to "bring up [their] children"[43] and "control the education of their own."[44] The Court recognized that a parent retains a constitutional right to be the arbiter of questions that concern his or her child's well-being. If a parent wants to enroll his or her child in a certain school, or teach the child a different language, the parent is entitled to do so as long as his or her decision is not harmful to the child.[45] This liberty interest "may

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[38] *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972) (emphasizing the importance of the family and the essential "basic civil rights of man" to "conceive and to raise one's children" (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)) (citing Meyer v. Nebraska, 262 U.S. 390 (1923))).

[39] Robinson, *supra* note 14.

[40] *Stanley*, 405 U.S. at 651.

[41] Although early on the Court had not specifically coined the term "care, custody, and control," the Court was implicitly referring to a parent's fundamental right to maintain custody over his or her child by declaring that parents have a constitutional right to make decisions concerning their child's well-being. It is only through the exercise of legal custody that a parent would be involved in making decisions concerning the child's well-being. *See supra* note 11 and accompanying text. Therefore, the Court's early holdings regarding a parent's right to make decisions concerning his or her child's upbringing can be read in accordance with the Court's belated adoption of the term "care, custody, and control" to describe a parent's fundamental parental right.

[42] *See* 262 U.S. at 397, 402.

[43] *Id.* at 399.

[44] *Id.* at 401.

[45] *See id.* at 400 (finding that within the protected liberty of the Fourteenth Amendment parents have a fundamental right to undertake their "natural duty" as

not be interfered with . . . by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect."[46]

Two years later, in *Pierce v. Society of Sisters*, a case involving the validity of a state statute that required parents to send their children to public school,[47] the Court confirmed that the liberty of parents includes the right "to direct the upbringing and education of children under their control."[48] The Court explained that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[49] A parent's right to engage in his or her child's upbringing includes the right to impress on his or her child moral standards, religious beliefs, and attributes of a good citizen.[50]

Since *Pierce*, the Court has firmly established that parents have a fundamental right over the care, custody, and control of their children, which encompasses a parent's right to the upbringing of his or her child. In *Prince v. Massachusetts*, the Court declared it a cardinal principle "that the custody, care and nurture of the child reside first in the parents."[51] A parent's "primary function and freedom include[s] preparation for obligations the state can neither supply nor hinder."[52] When it comes to regulating parental rights, a state's paramount concern is whether a parent's nurturing and care presents a "clear and present danger" to the child.[53] Absent a showing of clear and present danger, which warrants protection by the state, a parent has a fundamental right, free from governmental interference, to retain custody over and raise his or her child.[54]

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parents and enroll their children in any schooling that "cannot reasonably be regarded as harmful").

[46] *Id.* at 399–400.

[47] 268 U.S. 510, 533–34 (1925).

[48] *Id.* at 534–35.

[49] *Id.* at 535.

[50] Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).

[51] 321 U.S. 158, 166 (1944).

[52] *Id.*

[53] *Id.* at 167.

[54] *See id.*

The Court again stressed the importance of a parent's fundamental right in the care, custody, and control of his or her child in *Stanley v. Illinois*.[55] In *Stanley*, the Court held unconstitutional an Illinois statute that presumed that every father of a child born out of wedlock was unfit to have custody of his children, making the child an automatic ward of the state upon his or her mother's death.[56] In *Stanley*, there was nothing in the record to indicate that the father had not cared for or neglected his children.[57] For that reason, the Court considered the effect of the statute on the children—taking the children from their suitable father and placing them in the hands of the state—emphasizing "the importance of the family" and the essentialness of a parent's right to "raise one's children."[58] It was evident to the Court in *Stanley* that a parent's right to the "care, custody, and management of his or her children" is a substantial right that "undeniably warrants deference" and protection.[59] Accordingly, the statute's automatic destruction of the father's custodial right without the court considering his fitness, violated the Due Process Clause of the Fourteenth Amendment.[60]

The notion that parents' rights require firm deference was affirmed in *Santosky v. Kramer*.[61] The Court's rationale was based on the "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."[62] This fundamental liberty interest does not evaporate simply because a parent has not been a model parent.[63] Rather, parents faced with the "dissolution of their parental rights have a . . . critical need for procedural protections."[64] The state's countervailing interests must be weighed against the loss the parent would suffer as a result of the infringement on his or her fundamental parental

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[55] 405 U.S. 645 (1972).

[56] *Id.* at 658. The Court held that the father was entitled to a hearing on the issue of his fitness as a parent before he could be deprived of his children. *Id.*

[57] *Id.* at 655.

[58] *Id.* at 651.

[59] *Id.*

[60] *Id.* at 658 (concluding that "Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody").

[61] 455 U.S. 745, 753 (1982).

[62] *Id.*

[63] *Id.*

[64] *Id.*

right.[65] A parent's right to custody is a powerful interest that can only be terminated with clear and convincing proof that the parent is unfit.[66] The clear and convincing evidence standard aims to protect fundamental fairness by minimizing the risk of erroneous decisions and providing litigants with a means of estimating risk of error.[67] Therefore, even though the Court recognized that parental rights are not without limitations,[68] *Santosky* fortified the boundaries of parental rights, and limited the state's authority to impose on those rights.

B. A State Cannot Deprive Parents of Their Fundamental Right Without a Compelling Justification

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[69] The Supreme Court has long recognized that the Fourteenth Amendment's Due Process Clause provides heightened protection against government interference with fundamental liberty interests.[70] The Due Process Clause does not permit a state to infringe on the fundamental right of parents "simply because a state judge believes a 'better' decision could be made."[71] The state must demonstrate that deprivation of the right in question is necessary to accomplish a compelling state interest,[72] and that there is no less restrictive method of protecting that interest.[73]

A parent's right to the care, custody, and control of his or her child is so fundamental that nothing short of a detrimental impact on the child's well-being could trump the parent's fundamental right. A heightened level of scrutiny must be applied in all cases considering any sort of infringement on

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[65] *See id.* at 758.

[66] *See id.* at 747–48.

[67] *See id.* at 757, 757 n.9, 767–68.

[68] The Court noted that the state has "a *parens patriae* interest in preserving and promoting the welfare of the child." *Id.* at 766.

[69] U.S. CONST. amend. XIV, § 1.

[70] *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) (explaining that the Fourteenth Amendment's Due Process Clause not only guarantees fair process, it includes a substantive component that requires heightened protection against government interference with an individual's fundamental rights and liberty interests).

[71] *Id.* at 72–73.

[72] *See supra* note 14.

[73] *See supra* note 15.

fundamental parental rights. The Court demonstrated the importance of parental rights in *Troxel v. Granville*, where it found that even a limited infringement involving a close relative's right to visit with a child does not overcome the parent's fundamental decision-making right without a compelling justification.[74] In *Troxel*, a case involving a dispute between a mother and her daughters' paternal grandparents who were seeking visitation,[75] the Court found that a Washington State law granting grandparents visitation rights was unconstitutional as applied to the facts of the case.[76] In finding that the Washington superior court improperly awarded visitation to the children's grandparents, the Court reasoned that the visitation order was "not founded on any special factors that might justify the State's interference with [the mother's] fundamental right to make decisions concerning the rearing of her two daughters."[77] The superior court, instead of attributing any weight to the mother's position that visitation was not in her children's best interests,[78] based its decision on two "slender findings" regarding the potential—and far-fetched—benefits the grandparents may provide in the "areas of cousins and music."[79] The superior court even considered the judge's own personal experiences growing up and "spend[ing] . . . a week with one set of grandparents and [then] another set of grandparents."[80] However, two slender findings in support of visitation and a judge's own childhood experiences visiting her grandparents, without any consideration

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[74] *Troxel*, 530 U.S. at 63.

[75] *Id.* at 60–61. The grandparents petitioned for visitation soon after the death of their son—the children's father. *Id.*

[76] *Id.* at 73 (finding that because the Washington statute did not place any limits on the persons who may petition for visitation or the circumstances in which the petition may be granted, the statute was unconstitutional). The Washington statute provided: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances. " *Id.* at 61 (citing WASH. REV. CODE § 26.10.160(3) (1994)). The statute does not require that a court accord a parent's decision any weight whatsoever. *Id.* at 67. On the other hand, the statute "places the best-interest determination solely in the hands of the judge." *Id.*

[77] *Id.* at 68.

[78] *See id.* at 72.

[79] *Id.* (quoting Joint Appendix at 70a, In re Troxel, 530 U.S. 57 (2000) (No. 99-138), 1999 WL 35032656, at *70a).

[80] *Id.* (quoting Verbatim Report of Proceedings at 220–21, *In Re Troxel*, No. 93–3–00650–7 (Wash. Super. Ct. Dec. 14, 19, 1994)).

of the fit custodial parent's admonition, proved to be insufficient state interests to infringe on the mother's right to the care, custody, and control of her daughters.[81]

In contrast, the Court has found a compelling justification to abridge parental rights when issues have arisen concerning a child's well-being. A state "is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."[82] A state may burden the childrearing right of parents to protect the physical, mental, and emotional health of children. For example, in *Prince v. Massachusetts*, the Court recognized that a state could require a compulsory vaccination for a child in order to protect the child's health and safeguard the child from exposure to some communicable disease.[83] When balancing the state's interests against the rights at stake, it is evident that there is certainly a "powerful countervailing interest"[84] for the state to protect a child from an apparent and substantial detriment to the child's health and well-being. But, as stressed in the Court's opinion in *Santosky*, there is a difference between a parent that is not per se a "model parent" and a parent that is unfit and may be detrimental to the child's well-being.[85] The Court has never construed the state's power to include the authority to infringe on a parent's right when the parent has demonstrated sufficient

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[81] *See id.* at 75.

[82] Parham v. J.R., 442 U.S. 584, 603 (1979); *see also* Wisconsin v. Yoder, 406 U.S. 205, 233–34 (1972) (finding that the power of a parent to raise his or her child may be subject to limitation if it appears that the parent's decisions "will jeopardize the health or safety of the child, or have a potential for significant social burdens").

[83] 321 U.S. 158, 166–67 (1944) (explaining that even a parent's freedom of conscience and religious practice claim does not nullify a state's right to intervene and protect the child's health); *see also* Reynolds v. United States, 98 U.S. 145, 166–67 (1878) (holding that the family is not beyond regulations in the public interest against a claim of religious liberty); *see, e.g.*, Wright v. DeWitt Sch. Dist. No. 1, 385 S.W.2d 644, 645–46 (1965) (finding that the plaintiffs, members of a religious organization, did not have a right to resist on religious grounds the enforcement of a health care regulation that required all children to be vaccinated against smallpox before attending the defendant's school).

[84] Stanley v. Illinois, 405 U.S. 645, 651 (1972).

[85] *See* Santosky v. Kramer, 455 U.S. 745, 753 (1982).

commitment to his or her child's well-being, regardless if the court does or does not necessarily agree with the parent's parenting decisions.[86]

The state may also take certain measures to ensure that other aspects of a child's well-being, aside from health, are adequately provided for. In order "to guard the general interest in youth's well being, the state . . . may restrict the parent's control by requiring school attendance [and] regulating or prohibiting the child's labor."[87] The state has a highly ranked interest in educating its citizens and, accordingly, can impose reasonable regulations for the control of basic education.[88] That being said, even the state's paramount responsibility of educating its citizens has been "made to yield to the right of parents" to enroll their children in privately-operated schools if they so choose.[89] A parent's right to engage in the rearing of his or her child, specifically "the values of parental direction of the religious upbringing and education of their children," continues to maintain a high place in our society even relative to a state's compelling interests.[90]

II. NEW YORK'S "BEST INTERESTS OF THE CHILD" RULE DEFINED

The "best interests of the child" rule is both codified in New York statute and expanded upon in New York case law. The "best interests of the child" standard gained prominence in New York in 1925 following Judge Cardozo's pioneering custody opinion in *Finlay v. Finlay*,[91] but became the "focal point" of custody disputes in 1962 when Domestic Relations Law §240 was enacted.[92] Today, section 240 governs the way custody should be

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[86] *See, e.g.*, Hodgson v. Minnesota, 497 U.S. 417, 447 (1990) ("A natural parent who has demonstrated sufficient commitment to his or her children is thereafter entitled to raise the children free from undue state interference.").

[87] *Prince*, 321 U.S. at 166. The *Prince* Court upheld a state statute limiting child labor, despite claims that the state could not exercise control over child labor because of constitutionally protected parental authority. *See id.* at 168–70.

[88] Wisconsin v. Yoder, 406 U.S. 205, 213 (1972).

[89] *Id.* (discussing the Court's holding in *Pierce*).

[90] *See id.* at 213–14. However important a state's interest is in universal education, it is not "free from a balancing process" when it impinges on the traditional interests of parents to engage in the upbringing of their own. *See id.* at 214.

[91] 240 N.Y. 429, 148 N.E. 624 (1925).

[92] *See* Joel R. Brandes, *Judging the "Best Interests of the Child"*, N.Y. L.J., Feb. 23, 1999, at 3.

decided in all cases.[93] The statute states that a court shall "enter orders for custody . . . in the court's discretion . . . having regard to the circumstances of the case and of the respective parties and to the best interests of the child."[94] Although the statute requires courts to consider both the circumstances of the case and the parties involved, courts have latched on to the "best interests of the child" requirement, and, currently, the "best interests of the child" has become the sole overriding criterion cited in custody decisions.[95]

Section 240 does not on its own offer much detail as to "best interests of the child" test. The statute only makes it clear that a determination of custody is in the judge's sole discretion.[96] The statute provides no direction as to how a judge should or should not exercise his or her discretion aside from requiring the judge to consider the child's best interests.[97] Therefore, most custody decisions rely on case law in trying to resolve how to decide custody.[98]

Over the years, New York courts have attempted to come up with some general recommendations on how to evaluate the best interests of the child. Not steadfast rules, these

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[93] Section 240 and section 651 of the Family Court Act dictate the rules of custody disputes in New York; however, section 240 actually articulates the standard in custody cases. *See* N.Y. FAM. CT. ACT § 651(a)–(b) (West, Westlaw through L.2011, chs. 1–54, 57–495).

[94] N.Y. DOM. REL. LAW § 240 (West, Westlaw through L.2010).

[95] *See* Brandes, *supra* note 92 ("As we enter the 21st century, the 'best interests' of the child is the sole criterion for initial and modified custody awards."); *see also* Mohen v. Mohen, 53 A.D.3d 471, 472–73, 862 N.Y.S.2d 75, 77 (2d Dep't 2008) (stating that "[t]he essential consideration in making an award of custody is the best interests of the child").

[96] *See* N.Y. DOM. REL. LAW § 240(1)(a); *see also Custody and Visitation*, *supra* note 19.

[97] By statutory mandate, however, a court must consider the effect of domestic violence upon the best interests of the child if a party makes a sworn allegation that "the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party . . . and such allegations are proven by a preponderance of the evidence." N.Y. DOM. REL. LAW § 240(1)(a). But even when there are allegations of domestic violence, the statute simply instructs that the court must consider "the effect of such domestic violence upon the best interests of the child." *Id.* The statute on its face, once again, does not set forth any guidelines instructing how or to what extent a judge should consider the domestic violence.

[98] *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1327 (1980) (noting that states rely on case-by-case adjudication to give content to the "best interests of the child" standard) [hereinafter *Child Custody Relations*].

recommendations are continuously modified, expanded, and even narrowed as custody decisions continue to unfold.[99] Currently, the only set-in-stone rule evident in custody cases is that the court is the ultimate arbiter of what custody arrangement is in the child's best interests.[100] Courts, acting under the doctrine of *parens patriae*, are supposed to decide what is best for each child.[101] Judges, fully aware of the latitude they enjoy, know that it is ultimately up to them to say what is in the child's best interest and what is not.

The judicially created recommendations consist of a number of non-binding policies designed to guide judges in determining what would best promote the child's interests.[102] There are "no absolutes" in applying these recommendations; judges must make use of the recommended factors as they see fit.[103] These factors include, but are not limited to, the quality of the home environment, the ability of each parent to provide for the child's emotional and intellectual development, the financial status and ability of each parent to provide for the child, the relative fitness of the respective parents, the effect an award of custody might have on the child's relationship with the other parent, the length of time the present custody arrangement has been in effect, and the desires of the child.[104]

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[99] *See Custody and Visitation*, *supra* note 19 (explaining that "the caselaw criteria are not arbitrary and inflexible rules; they are matters to be considered, not matters to be blindly followed").

[100] *See, e.g.*, Vann v. Vann, 14 A.D.3d 710, 710–11, 789 N.Y.S.2d 261, 262 (2d Dep't 2005) (stating that "[c]ustody determinations are ordinarily a matter of discretion for the hearing court" and that the court's "paramount concern" is the best interests of the child) (citations omitted); Zafran v. Zafran, 306 A.D.2d 468, 469, 761 N.Y.S.2d 317, 319 (2d Dep't 2003) ("In child custody determinations, a court must decide what is in the best interest of the child, and what will best promote his or her welfare and happiness.").

[101] *See* Alan D. Scheinkman, Practice Commentaries, N.Y. DOM. REL. LAW § 70, at 7 (West, Westlaw through L.1988).

[102] *See* Eschbach v. Eschbach, 56 N.Y.2d 167, 171, 436 N.E.2d 1260, 1262, 451 N.Y.S.2d 658, 660 (1982) (confirming that the "best interests" factors are "policies designed not to bind the courts, but to guide them").

[103] Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 93, 432 N.E.2d 765, 767, 447 N.Y.S.2d 893, 895 (1982).

[104] *See Eschbach*, 56 N.Y.2d at 172–73, 436 N.E.2d at 1263, 451 N.Y.S.2d at 661–62; *see also* Mohen v. Mohen, 53 A.D.3d 471, 473, 862 N.Y.S.2d 75, 77–78 (2d Dep't 2008) (quoting Kaplan v. Kaplan, 21 A.D.3d 993, 994–95, 801 N.Y.S.2d 391, 393 (2d Dep't 2005)); Kaczor v. Kaczor, 12 A.D.3d 956, 958, 785 N.Y.S.2d 573, 575 (3d Dep't 2004) (quoting Smith v. Miller, 4 A.D.3d 697, 698, 772 N.Y.S.2d 742, 744 (3d Dep't 2004)); *Zafran*, 306 A.D.2d at 469, 761 N.Y.S.2d at 319.

Judges, who have been left to decide the extent to which the existence or absence of a particular "best interests" factor will affect their decision, can liberally apply these factors when determining custody. In *Nehra v. Uhlar*, the New York Court of Appeals, holding that a de facto change in custody was not a "sufficiently extraordinary [circumstance] to justify upsetting" a prior judgment of custody,[105] was "at pains" trying to make sense of the actual application of the different "best interests" considerations.[106] Although this case involved a unique set of facts in which the mother requested a change in custody after she had abducted the children from the custodial father and persisted to limit any contact between the father and his children for four-and-a-half years,[107] the court's decision to change the prior custody arrangement was still purportedly based on what would be in the best interests of the children.[108] The court made evident the leniency of actually applying the "best interests" factors. For every "best interests" factor that was mentioned, the court carved out some condition to it. Specifically, the court found that stability is important,[109] but the disruption of change is not necessarily determinative.[110] The desires of a child are to be considered, but these desires can be manipulated by the parents and may not necessarily be in the child's best interests.[111] If there is a prior custody arrangement, the court explained that "[p]riority, not as an absolute but as a weighty factor, should, in the absence of extraordinary circumstances, be accorded to the first" award of custody or the prior agreement of custody.[112] Further, the relative fitness of the parents and the length of time

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[105] 43 N.Y.2d 242, 250, 372 N.E.2d 4, 8, 401 N.Y.S.2d 168, 172 (1977).

[106] *Friederwitzer*, 55 N.Y.2d at 94, 432 N.E.2d at 767, 447 N.Y.S.2d at 895 (acknowledging the difficulty the Court of Appeals in *Nehra* was having trying to point out the factors that need to be considered and the weight or priority that should be attributed to each factor).

[107] *See Nehra*, 43 N.Y.2d at 246–47, 372 N.E.2d at 6, 401 N.Y.S.2d at 170 (1977).

[108] *See id.* at 246, 372 N.E.2d at 5, 401 N.Y.S.2d at 169.

[109] *See id.* at 250, 372 N.E.2d at 8, 401 N.Y.S.2d at 172 (explaining that in order to maintain a child's stability, "continual shifting of custody from one parent to another is to be avoided when possible").

[110] *Id.* at 248, 372 N.E.2d at 7, 401 N.Y.S.2d at 171 (reasoning that temporary disruption to a child's stability because of a change in custody is not determinative because all changes in custody are disruptive).

[111] *See id.* at 249, 372 N.E.2d at 7, 401 N.Y.S.2d at 171.

[112] *Id.* at 251, 372 N.E.2d at 9, 401 N.Y.S.2d at 173.

of the present custody arrangement may also be considered.[113] Evidently, the weight of each factor is decided on a case-by-case basis and determined by the presiding judge.

On appeal, the appellate court must consider the totality of the circumstances in deciding whether to affirm or reverse a trial court's determination of what is in the best interest of the child.[114] As a general rule, the existence or absence of any one factor is not determinative.[115] A trial court's determination will only be set aside if it lacks a sound and substantial basis.[116] Such a strict standard of review is justified by the hearing court's supposed ability to make the best determination of the child's best interests because it had the opportunity to assess the evidence, "the credibility of the witnesses and . . . the character, temperament, and sincerity of the parties."[117] Accordingly, appellate courts must place an undue emphasis on what a lower court determines is in the best interest of the child, effectively furnishing trial courts with much broader authority in custody matters.[118]

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[113] *See id.* at 250–51, 372 N.E.2d at 8, 401 N.Y.S.2d at 172–73.

[114] *See* Eschbach v. Eschbach, 56 N.Y.2d 167, 174, 436 N.E.2d 1260, 1264, 451 N.Y.S.2d 658, 662 (1982) (noting that on appeal a court must consider the totality of the circumstances rather than the existence or absence of a particular "best interests" factor).

[115] *See* Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 93–94, 432 N.E.2d 765, 767, 447 N.Y.S.2d 893, 895 (1982) (instructing that no one factor can be determinative of whether there should be a change in custody); *see also Eschbach*, 56 N.Y.2d at 173, 436 N.E.2d at 1263, 451 N.Y.S.2d at 661; Zafran v. Zafran, 306 A.D.2d 468, 469, 761 N.Y.S.2d 317, 319 (2d Dep't 2003).

[116] *See* John Robert P. v. Vito, 23 A.D.3d 659, 661, 804 N.Y.S.2d 802, 804 (2d Dep't 2005); Willis-Marsh v. Wilkerson, 22 A.D.3d 977, 978, 803 N.Y.S.2d 231, 233 (3d Dep't 2005); *Zafran*, 306 A.D.2d at 469, 761 N.Y.S.2d at 319 (quoting Vinciguerra v. Vinciguerra, 294 A.D.2d 565, 566, 743 N.Y.S.2d 139, 140 (2d Dep't 2002)).

[117] Gilmartin v. Abbas, 60 A.D.3d 1058, 1058, 877 N.Y.S.2d 347, 348 (2d Dep't 2009). *See also, e.g.*, Timosa v. Chase, 21 A.D.3d 1115, 1116, 803 N.Y.S.2d 575, 576 (2d Dep't 2005) (claiming that an accurate evaluation of the parties can best be made by the trial court which has direct access to the parties and the ability to supplement the information with whatever is necessary).

[118] *But cf.* Anson v. Anson, 20 A.D.3d 603, 604, 798 N.Y.S.2d 185, 187 (3d Dep't 2005) (claiming that in custody matters the Appellate Division's authority is just as broad as the trial court's); Miller v. Pipia, 297 A.D.2d 362, 364, 746 N.Y.S.2d 729, 731 (2d Dep't 2002) (quoting Rosiana C. v. Pierre S., 191 A.D.2d 432, 433, 594 N.Y.S.2d 316, 317 (2d Dep't 1993)).

III. HOW THE "BEST INTERESTS OF THE CHILD" RULE REALLY WORKS

The "best interests of the child" rule is a rule easily stated but much harder applied. A rule with *no absolutes* brings with it a considerable amount of indeterminacy. The Legislature's intent in imposing such a broad standard was so that custody could be determined according to the unique circumstances and parties in each individual case.[119] The Legislature may have hoped that this broad standard would be applied in a more particularized form, but New York's current "best interests of the child" rule has great potential to shy away from the kind of "individualized justice that the system purports to deliver."[120]

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[119] *See Friederwitzer*, 55 N.Y.2d at 93, 432 N.E.2d at 767, 447 N.Y.S.2d at 895; *see also* Glendon, *supra* note 20, at 1167 ("Family law . . . is characterized by more discretion than any other field of private law. This fact is typically explained by a perceived need to tailor legal resolutions to the unique circumstances of each individual and family."). However, contrary to the Legislature's implication, the unique circumstances of each individual case could still be catered to with a less arbitrary and indeterminate standard that relies on judges to discern how the "best interests of the child" should be decided. The "child's preference" factor, for example, has "the appropriate mix of fixed and discretionary rules." *Id.* at 1172. Courts have been instructed to consider the desires and preferences of each child before deciding custody. *See Eschbach*, 56 N.Y.2d at 173, 436 N.E.2d at 1263, 451 N.Y.S.2d at 661. But, like the other "best interests" factors, the child's preferences should not be considered determinative. *See* Reed v. Reed, 189 Misc.2d 734, 738, 734 N.Y.S.2d 806, 809 (Sup. Ct. Richmond Cnty. 2001). When weighing the child's preferences, "the court must consider the age and maturity of the child and the potential for influence having been exerted on the child." *Eschbach*, 56 N.Y.2d at 173, 436 N.E.2d at 1263–64, 451 N.Y.S.2d at 662; *see also* Cornell v. Cornell, 8 A.D.3d 718, 719, 778 N.Y.S.2d 193, 195 (3d Dep't 2004) (noting that the advanced age of a child tends to render greater weight to the child's reasoned wishes). The court should be conscious of the fact that the desires of children are capable of distortive manipulation by a parent. *See* Nehra v. Uhlar, 43 N.Y.2d 242, 249, 372 N.E.2d 4, 7, 401 N.Y.S.2d 168, 171 (1977). Even with these limited guidelines a judge can better tailor custody outcomes to individual situations while adhering to fixed rules of "best interests" considerations.

[120] Julie E. Artis, *Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine*, 38 L. & SOC'Y REV. 769, 769 (2004) (quoting David M. v. Margaret M., 385 S.E.2d 912, 919 (W. Va. 1989)) (expressing that no decision is subject to more personal biases than a decision of joint custody; the decision may hinge on the judge's personal experiences or the judge's feelings towards the parties involved in the dispute).

A. The Effects of an Indeterminate Standard on a Judge's Decision-Making Process

New York's "best interests" of the child rule has one fundamental flaw: It assumes that a judge could successfully exercise his or her discretion in determining the best interests of the child in the midst of trying to resolve how to apply the "best interests" factors. As a result of trying to both make sense of the current rule and understand the familial situation before them, judges' personal biases and value judgments could creep into custody decisions. Generally, a judge may incorporate personal inclinations in order to determine which of the recommended factors to consider or use his or her predispositions to resolve what weight to attribute to each recommended "best interests" factor. This happens even more in cases in which a judge must determine custody between two fit parents, making the application of the "best interests" factors even more difficult. However, regardless of whether both parents are found to be fit or not, these issues often have the same insidious result on a parent's fundamental rights.

With these highly discretionary and imprecise rules, parents are unable to ascertain or predict with any level of certainty their "legal entitlements" to the care, custody, and control of their children.[121] Parents have no way of knowing what they could do or refrain from doing that will bring them into conformity with what is expected under the "best interests" of the child rule. Moreover, parents are certainly not guaranteed that a judge's decision will actually reflect their legal entitlement to their fundamental parental rights.

1. Judges Choose How and What They Want To Consider

A judge's unbridled discretion in custody disputes, in tandem with the well-established rule that the "best interests" criteria are guides and not absolute rules, has resulted in judges considering some factors more than others, disregarding factors

[121] Marsha Garrison, *Reforming Divorce: What's Needed and What's Not*, 27 PACE L. REV. 921, 925 (2007) (arguing that when legal rules are highly discretionary and imprecise, they impair an individual's ability to determine his or her legal entitlements and reach mutual understanding about their entitlements). In essence, no one involved in the dispute can predict with certainty what "best interests" factors the judge will choose to consider or what weight the judge will attribute to each factor on any given day.

completely, or capriciously incorporating other considerations that are not part of the often-cited recommended factors. The extent to which New York's "best interests" standard allows a judge to exercise unrestrained discretion becomes evident after reading custody decisions and analyzing why a judge ruled one way over another. Because neither section 240 nor case law has established the amount of weight that should be allotted to each "best interests" factor, it is not uncommon practice for judges to remain fixated on one factor and seemingly disregard the other vital considerations.[122]

The Third Department specifically addressed this issue in *Cornell v. Cornell*.[123] In *Cornell*, the Third Department reversed the family fourt's improper alteration of an existing custody arrangement.[124] The family court, "[s]uggesting that the child's wishes—at the age of 15—would be dispositive," based its decision solely on the child's desire to live with his father.[125] The lower court neither considered any evidence of the mother's allegations that the father was unfit nor did it take into account any other "best interests" factors other than the child's preferences.

Similarly, in *Chebuske v. Burnhard-Vogt*, the Second Department found that a family court's decision resting solely on the recommendations of the father's expert witnesses lacked sound and substantial basis in the record.[126] The family court placed "undue emphasis" on the recommendations of the father's expert witnesses who did not evaluate anything other than the father's fitness to serve as a custodial parent.[127] Although in *Chebuske* the Second Department recognized the lower court's unjustified emphasis on the father's experts, too much deference is often paid to lower court decisions based on the theory that

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[122] *See, e.g.*, Rodriguez v. Guerra, 28 A.D.3d 775, 813 N.Y.S.2d 538 (2d Dep't 2006) (reversing a family court decision that was based on the father's work schedule and did not take into consideration the child's living situation with the father's parents, the separation of the child from her sisters, or the allegations of domestic violence); Miller v. Pipia, 297 A.D.2d 362, 364–65, 746 N.Y.S.2d 729, 731–32 (2d Dep't 2002) (noting that the lower court did not credit any weight to the court-appointed expert's evaluation of the parents, even though expert opinions are a factor that should be considered in making custody determinations).

[123] 8 A.D.3d 718, 778 N.Y.S.2d 193 (3d Dep't 2004).

[124] *Id.* at 719–20, 778 N.Y.S.2d at 195–96.

[125] *Id.* at 719, 778 N.Y.S.2d at 195.

[126] 284 A.D.2d 456, 457–58, 726 N.Y.S.2d 697, 699 (2d Dep't 2001).

[127] *Id.* at 458, 726 N.Y.S.2d at 699.

these courts could and will thoroughly evaluate the character of the parties and the individual circumstances of each case.[128] In reality, courts, like the family courts in *Cornell* and *Chebuske*, are allocating whatever weight the judge sees fit to each vital consideration and "improperly disregard[ing] the unequivocal conclusions" that should have been drawn if the cases were properly considered.[129]

The gaps in the "best interests" rule have also made custody decisions pliable to a trial judge's every inclination to take into account factors beyond the recommended "best interests" considerations, including a parent's race, gender, sexual orientation, and religion.[130] Custody decisions that consider a parent's race are an example of judges' wide-ranging ability to incorporate whatever factors they see fit in their decisions. Although not one of the often-cited factors, race has become a quasi-factor that could be considered in determining what is in the child's best interests.[131] Given the fact that judges resort to the "best interests" criteria developed "through . . . litigation of countless custody matters,"[132] judges have blindly adopted race as a factor without any regard to the constitutional issues that may come attached.

As a "general rule," New York courts have confirmed that a judge may consider race in a dispute between biological parents "for custody of an interracial child."[133] Although courts have stated that race is not a controlling factor that could outweigh all other considerations,[134] it is not clear how or to what extent a parent's race should be considered.[135] Judges who decide to take

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[128] *See supra* note 117 and accompanying text.

[129] *Chebuske*, 284 A.D.2d at 457, 726 N.Y.S.2d at 699.

[130] See *Child Custody Relations*, *supra* note 98, at 1338–45 for a discussion on how factors unrelated to a state's compelling interests, including race, religion, and parental sexual habits, may form the basis of custody awards.

[131] *See* Farmer v. Farmer, 109 Misc. 2d 137, 143–46, 439 N.Y.S.2d 584, 587–89 (Sup. Ct. Nassau Cnty. 1981). Under the equal protection doctrine, however, the explicit use of racial criteria is subject to the strictest of scrutiny requiring a compelling state objective. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (citing Korematsu v. United States, 323 U.S. 214, 216 (1944); McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart, J., concurring)).

[132] *Custody and Visitation*, *supra* note 19.

[133] *Farmer*, 109 Misc. 2d at 144–46, 439 N.Y.S.2d at 588–89.

[134] *See id.* at 145, 439 N.Y.S.2d at 588 (quoting Fountaine v. Fountaine, 133 N.E.2d 532, 534–35 (Ill. App. Ct. 1956)).

[135] *See* Matter of Astonn H., Infant, N.Y. L.J., Nov. 1, 1995, at 33, col. 4 (Family Ct. Kings Cnty.) (admitting that the court found "no cases that specifically address

a parent's race into account must draw speculative conclusions regarding interracial relationships and may award custody to one parent over the other not based on a "best interests" guideline but, rather, based on the way they perceive the situation to be.

A parent who has not necessarily done anything wrong in the past and would not be detrimental to the child's future development may be denied his or her fundamental right based on a judge's perception of a future interracial custodial relationship. When dealing with racial issues, however, there will not necessarily be specific past events that will aid in predicting which parent will better serve the child's best interests. Judges draw generalized conclusions on how a child's race will affect the child in a certain number of years from now, in fear that a child will not be able to identify with a parent of the opposite race,[136] or that a child will maintain one parent's racial identity over the other.[137] But, "[g]eneralized assertions based upon vague fears or even upon speculative probabilities about the consequences of racial integration do not meet the heavy burden of justification placed on the state when it employs a racial classification."[138] In fact, general assertions about a child's welfare based on any one of a judge's inclinations are not sufficient to justify infringing on any fundamental right.[139] Nonetheless, it does not appear as if the constitutional rights of parents are even remotely considered when a judge chooses to slip in race as a "best interests" consideration and decides custody on a prediction of the future rather than on a parent's fitness.

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the issue of race"; however, the court still considered race as one of the many factors in determining custody).

[136] *See, e.g.*, Davis v. Davis, 240 A.D.2d 928, 929, 658 N.Y.S.2d 548, 550 (3d Dep't 1997) (presuming that a child would not be denied his "biracial identity" by living with his white mother rather than his African-American father because the father would be entitled to "liberal visitation"); Olivier A. v. Christina A., 9 Misc. 3d 1104(A), 806 N.Y.S.2d 446 (Sup. Ct. Suffolk Cnty. 2005) (acknowledging that race must be considered in order to fulfill the child's need to maintain his "cultural heritage and identity").

[137] *See, e.g.*, *Farmer*, 109 Misc. 2d at 147, 439 N.Y.S.2d at 589–90 (considering and ultimately rejecting, the father's contention that, as the colored parent, he should be awarded custody because society will perceive the child to be black).

[138] *Child Custody Relations*, *supra* note 98, at 1341–42.

[139] See *supra* Part I.B. for a discussion on the level of justification required to infringe on a parent's fundamental right to the care, custody, and control of his or her child.

2. Judge's Use of Discretion When Neither Parent Is Found To Be Unfit

Personal biases and value judgments are most evident in decisions in which both parents are found to be fit parents yet the judge still chooses to award exclusive custody to one parent. When faced with more than one fit parent, "a prediction of which claimant would be most likely to provide what is best for the child is extremely difficult to make."[140] Courts will often inject their subjective judgments concerning the "best interests" factors in order to overcome this hurdle. But these are the circumstances where personal value judgments and biases should be the least evident. If a court has found both parents to be fit, then neither parent should be deprived of his or her custodial right, especially if not based on strict "best interests" considerations.

The King's County Supreme Court in *Finkelstein v. Finkelstein*, was faced with two fit parents during a custody dispute involving a child diagnosed with Attention Deficit Hyperactivity Disorder and Asperger's Syndrome.[141] The court acknowledged the fact that "[b]oth parties are fit parents" and "[e]ach demonstrates a loving, caring attitude towards [the child],"[142] yet still awarded sole custody to the mother. The court seemed to have accredited its determination completely on the child's stability.[143] While stability may be of paramount concern when considering the custody of a special needs child, this does not mean that other factors, such as each parent's ability to provide for the child's emotional and intellectual development, should be ignored. By granting sole custody to the mother, the court restricted the father's involvement in making decisions concerning the child's well-being and development. The father specifically argued that the boy was going to need his father "on a regular basis" in the future, especially when the circumstances

[140] Robinson, *supra* note 14, at 59.

[141] N.Y. L.J., May. 18, 1998, at 33, col. 4 (Sup. Ct. Kings County 1998).

[142] *Id.*

[143] *See id.* (focusing on the law guardian's recommendation that sole custody to the mother would better serve the child's stability).

became "more difficult."[144] The court, however, did not even address the beneficial role the father, a responsible parent aware of the care his son required,[145] could play in his child's life.

Similarly, in *Chase v. Matanda-Chase*, the Second Department precisely found that "neither parent [was] unfit and either would provide the child with a comfortable and loving home," but still affirmed the lower court's decision granting the father sole custody of the child.[146] The court also put complete emphasis on the child's stability, without considering any of the other recommended "best interests" factors.[147] Holding that it was not in the child's best interest to disrupt his five-year living arrangement with his father, the court took no consideration of how the custody arrangement had and would affect the child's relationship with the mother, the quality of the father's home environment, or even the ability of the father to provide for the child's emotional and intellectual development.[148] One would think that where the court predominately based its decision on the fact that the child was living with his father for five years, it would evaluate the quality of the father's home environment throughout those years. The judge, however, remained fixated on the child's stability and justified the decision entirely on this single consideration, without warranting the "fit" and "loving" mother the due consideration she was entitled to.

In both *Finkelstein* and *Chase*, the courts did not consider any other option other than sole custody,[149] regardless of the fact that neither parent was found to be unfit. The courts could have maintained stability by awarding joint legal custody with primary physical custody to one parent. Both fit parents would have decision-making authority, but the child's primary residence would be with one parent in order to preserve the child's stability. In spite of both parents' fitness, the courts mentioned no alternative to sole custody as if the non-custodial parent was unfit and a detriment to the child.

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[144] *Id.*

[145] *Id.* The court ignored the father's concerns about the child needing his father in the future and just proceeded to consider the animosity between the parents.

[146] 41 A.D.3d 475, 475, 837 N.Y.S.2d 319, 320–21 (2d Dep't 2007).

[147] *See id.* at 475–76, 837 N.Y.S.2d at 320–21.

[148] *See id.*

[149] *See id.*; Finkelstein v. Finkelstein, N.Y. L.J., May. 18, 1998, at 33, col. 4 (Sup. Ct. Kings County 1998).

The problem with taking away a fit parent's custodial right goes far beyond a judge's discretion to consider some factors and not others. Given the heightened level of scrutiny required in taking away a parent's fundamental right, a judge must find that joint custody would be harmful to the child in order to justify sole custody.[150] It is irrational that a court could find both that a parent is fit and that the same parent's involvement in the child's upbringing would be a detriment to the child to justify truncating his or her custodial right.[151] As noted by the Supreme Court in *Hodgson v. Minnesota*, where the Court declared unconstitutional a Minnesota statute that prohibited abortions to women under the age of eighteen until forty-eight hours after both of her parents were notified, a parent "who has demonstrated sufficient commitment to his or her child[] is thereafter entitled to raise the child[] free from undue state interference."[152] Anything contrary to that is certainly at odds with the Supreme Court's inveterate presumption that "parents act in their children's best interests."[153] When a court decides to take a fit parent's custodial right away, the court is assuming that any other finding the court makes is enough to rebut the Supreme Court's presumption that parents act in furtherance of their child's best interests. Moreover, courts are forgetting that a custody decision is not an "award" to one parent; it is a deprivation of a fundamental right to someone that was entitled to that right all along.

3. Lack of Relief on Appeal

The amount of deference appellate courts pay to lower court custody decisions only acts to increase the chances that a parent's fundamental right to the care, custody, and control of his

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[150] See *supra* Part I.B for a discussion about how the constitution mandates a finding that joint custody would be detrimental or harmful to the child before granting exclusive legal custody to one parent and taking away the other parent's right to engage in the upbringing of his or her child.

[151] In fact, the Supreme Court in *Stanley v. Illinois* recognized that "the State registers no gain towards its declared goals when it separates children from the custody of fit parents." 405 U.S. 645, 652 (1972).

[152] 497 U.S. 417, 447 (1990). Simply because the parents' decisions are not agreeable does not automatically transfer from the parent to the state the power to make decisions concerning the child. *See id.* at 484–85 (Kennedy, J., concurring in part and dissenting in part).

[153] *See* Troxel v. Granville, 530 U.S. 57, 58 (2000) (citing Parham v. J.R., 442 U.S. 584, 602 (1979)); *Parham*, 442 U.S. at 602.

or her child will be invalidly infringed upon. A trial court's custody determination will not be set aside unless it lacks a sound and substantial basis on the record.[154] Unlike other appellate standards, courts considering an appeal from a prior custody order must determine the substantiality of a lower court's decision without any objective scrutiny governing how custody decisions should have been decided in the first place. A trial judge, therefore, can allocate custody in whatever arrangement he or she sees fit and that arrangement will only be reversed if a parent has the ability to appeal, appeal is granted, and the appellate court, without concrete criteria to evaluate the lower court's decision, finds that the judge arranged custody without any substantial basis.

The presumption that only trial courts have the ability to adequately evaluate the circumstances and parties of a case is an extremely difficult hurdle to overcome on appeal. The court in *Chebuske v. Burnhard-Vogt* shed light on the extent to which a lower court must err for a decision to be overturned on appeal.[155] In *Chebuske*, the Second Department properly took issue with the fact that the family court completely disregarded the conclusions and recommendations of a court appointed forensic examiner, "the only disinterested party" in the case, and placed undue emphasis on the father's expert witness's unfounded recommendations when deciding to grant exclusive custody to the father.[156] Apparently, a lower court's complete disregard of conclusions and recommendations and its undue emphasis on the unfounded conclusions is the degree of error required for a custody decision to be overturned.[157] Appellate judges essentially must be reluctant to second-guess a trial court's custody decision

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[154] See *supra* Part II for a discussion about the amount of deference appellate courts should pay to trial court custody decisions.

[155] 284 A.D.2d 456, 726 N.Y.S.2d 697 (2d Dep't 2001).

[156] *Id.* at 457–58, 726 N.Y.S.2d at 699.

[157] An appellate court, generally, cannot reverse a lower court's custody decision unless the lower court has exercised its discretion based on "some wrong general principle or taken an inappropriate factor into account." Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 254 (1975).

unless something completely outrageous appears in the record; they must consider an appeal with the mindset that the lower court rightfully decided custody.[158]

Lower court judges, however, rely on case-by-case adjudication to give content to the "best interests" standard. Therefore, as illustrated by the courts' yielding adoption of race as a "best interests" consideration,[159] there are minimal justifications for appellate relief based on the fact that a trial judge exceeded his or her authority.[160] On appeal, a court is not even justified to reverse a custody decision on the grounds that any one factor was not considered.[161] The ill-defined "best interests" standard ultimately functions to protect custody decisions from being overturned on appeal. As a matter of fact, judges have even acknowledged this protection and have used it to justify custody decisions based on factors other than the child's best interests.[162]

B. The Effects of a Broken System on Determining What Is in the Best Interests of the Child

All the problems associated with the "best interests" rule—its intrinsic vagueness, its lack of definite considerations, and its susceptibility to personal biases—are further exacerbated by the

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[158] *See* Eschbach v. Eschbach, 56 N.Y.2d 167, 173, 436 N.E.2d 1260, 1264, 451 N.Y.S.2d 658, 662 (1982) (requiring that appellate courts be "reluctant to substitute their own evaluation of [the] subjective factors" for that of the trial court). "In matters of this character the findings of the nisi prius court must be accorded the greatest respect." *Id.* (internal quotation marks omitted) (citing *In re* Irene O., 38 N.Y.2d 776, 777, 345 N.E.2d 337, 337, 381 N.Y.S.2d 865, 865 (1975)).

[159] *See supra* Part III.A.1.

[160] *See Child Custody Relations*, *supra* note 98, at 1327–28 (suggesting that one of the limited justifications for intervention on the ground that the state exceeded its *parens patriae* power is "when custody is awarded on the basis of a factor that is suspect for special reasons—for example, the gender or race of the parent"); *see also* Mnookin, *supra* note 157, at 250–54 (suggesting that because the "best interests" standard depends on "person-oriented" rather than on "act-oriented" determinations, on predictions rather than past events, and on interdependent factors, appellate review is sharply limited).

[161] *See supra* note 115 and accompanying text.

[162] *See* Artis, *supra* note 120, at 791 (noting that only a few judges find "best interests" criteria useful, but that several judges use the criteria as a tool to justify their custody decisions). One judge inadvertently admitted to being able to find facts and make them fit with the law if he has to. *See id.* And, similarly, another judge contended that judges "can do just about anything [they] want to, and if the judge spends a little time writing [a custody decision], whatever decision [the judge] make[s] will be upheld on appeal." *Id.*

inadequacies of the New York courts that are responsible for resolving custody disputes. The troublesome systemic conditions surrounding custody proceedings are not a secret to either the public or the administrators;[163] the "players themselves acknowledge that the system often works badly or barely works at all."[164] This Section aims to elucidate the effects of New York's court system on determining what is in the best interests of the child. Specifically, this Section will address the shortcomings of both New York family and supreme courts, not as a recommendation for sweeping changes in the court systems, but rather to prove the realities of implementing such an unworkable custody standard.

The lack of sufficient resources in both the supreme courts and the family courts has a damaging effect on determining what is in the best interests of a child. These "regularly overcrowded" courts,[165] with limited court resources,[166] create a substantial obstacle for judges to efficiently and effectively determine the child's best interests. Custody decisions take a lot more time than required,[167] judges are often reassigned in the middle,[168] and "[t]he overlapping jurisdiction of these [two] courts often causes duplication and confusion, adding cost, delay and trauma to such proceedings."[169] As a result, judges cannot devote the necessary

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[163] *See* Joe Sexton, *Opening the Doors on Family Court's Secrets*, N.Y. TIMES, Sept. 13, 1997, at 1.

[164] *Id.*

[165] *Matrimonial Commission Report*, *supra* note 28, at 1019; *see also* Susan R. Larabee, *Providing Resources to Family Courts*, N.Y. L.J., Jan. 24, 2003, at 2 (noting that in 2002, Chief Judge Judith S. Kaye reports the state's family courts handled over 700,000 cases with fewer than 140 judges); Peggy Farber, *Family Court Fiasco*, GOTHAM GAZETTE, June 1, 2000, *available at* http://www.gothamgazette.com/article/children/20000601/2/110 ("[On] a typical day at Queens Family Court . . . over one hundred people [are] waiting in the second floor reception area for their cases to be called by one of five judges holding court on that floor that day."); Sexton, *supra* note 163 (describing one judge's Monday morning in Kings County Family Court, with the day's calendar holding fifty cases and requiring "for each case: city lawyers, child welfare caseworkers, parents and court-appointed lawyers").

[166] *See Matrimonial Commission Report*, *supra* note 28, at 1019–21 (including inadequate courtroom space, inappropriate physical facilities, insufficient resources to cope with the volume and seriousness of the caseloads involved, and limited assistance).

[167] *See, e.g.*, Chebuske v. Burnhard-Vogt, 284 A.D.2d 456, 457, 726 N.Y.S.2d 697, 698 (2d Dep't 2001) (acknowledging that the custody hearing was conducted over sixteen months).

[168] *See Matrimonial Commission Report*, *supra* note 28, at 1018.

[169] *Id.* at 1033.

amount of time to consider and analyze the "numerous and diverse" issues concerning custody disputes.[170] Judges rely on short cuts to accelerate the process and substitute for the insufficient resources they are provided with. And, if need be, judges—as the sole arbiters entrusted with full discretion to determine custody disputes—can even rely on their own subjective judgments to short-cut the decision-making process.

To make matters worse, under the current administration of custody disputes, judges are often not offered the proper training and education required to make them "knowledgeable and experienced in the area of law."[171] As noted by the Matrimonial Commission, the "timely, accurate and just disposition of [familial dispute] cases depends, to a great degree, on the knowledge, character, temperament, professional aptitude and experience of the judge before whom the matter is presented."[172] It is essential that a judge is "knowledgeable about statutory and case law" and that "he or she receive[s] a strong, basic education" in family law practice and the administration of a courtroom and case management.[173] While all judges already receive extensive and ongoing continuing education in both the supreme and family courts,[174] there is additional "highly specialized education and training" that a judge must receive.[175] Without this specialized training, judges who have unbridled discretion at their fingertips may lack the guidance and experience required to

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[170] *See id.* at 1019–21; *see also* Sexton, *supra* note 163 (quoting a senior Legal Aid lawyer in Manhattan who has reservations about the decisions family court judges make "based on what they see in the five seconds they look up"); John Sullivan, *Chief Judge Announces Plan To Streamline Family Court*, N.Y. TIMES, Feb. 25, 1998, at B7 (noting that in 1997, Kings County Family Court "cases receive[d] an average of slightly over four minutes before a judge on the first appearance, and little more than 11 minutes on subsequent appearances").

[171] *Matrimonial Commission Report*, *supra* note 28, at 1021. The Commission noted that while it may be desirable to assign judges who have knowledge and experience in the area of law, "the realities of judicial administration do not always make this possible." *Id.*

[172] *Id.*

[173] *Id.* at 1021–22.

[174] *See id.* at 1022.

[175] *Id.* The Commission has recommended that a new judge receive an expanded, four-week education program including a course in "substantive and procedural law" and a week spent integrating and transitioning into his or her respective district. *Id.* at 1023.

exercise that discretion in the child's best interests. This imposes a risk on parents who are trying to maintain custody of their children.

When cases are decided in an overcrowded and ill-equipped system by judges who may or may not have been properly trained, the only logical conclusion that follows is that these decisions do not always duly consider the facts of each individual case and the character and sincerity of the parties as purported by the boilerplate recitation of the "best interests" rule. Custody disputes are not provided with the "close monitoring and follow-up" they require.[176] The system operates to "undermine the [c]ourt's ability to fulfill its promise" and protect parents' fundamental rights.[177]

IV. JOINT CUSTODY: THE BEST SOLUTION

It is evident that there are many shortcomings in New York's "best interests of the child" rule. These issues range from the actual rule itself, to the system in charge of implementing the rule, to the circumstances under which a child's best interests must be decided. The state's role of determining what custody arrangement will best promote the child's interests is compromised by these issues and, as a result, so is the state's right to truncate a parent's fundamental right to the care, custody, and control of his or her child. It may seem as if the best solution to resolve the flaws of New York's "best interests of the child" rule would be to either create a clearer, more definitive standard, with absolute factors that must be considered, or to modify the workings of the courts responsible for determining custody; both solutions involve changes that certainly must be made. This Note, however, proposes a solution that goes beyond simply patching up some problems. It recommends that the best means of promoting both the welfare of the child and the protection of a parent's fundamental right is for the Legislature to adopt a presumption in favor of joint custody. Under a presumption of joint custody, a court would only be allowed to order sole custody if a joint custodial relationship would be detrimental to the child. A court would not be justified in

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[176] *See id.* at 1019.

[177] See Leah A. Hill, *Do You See What I See? Reflections on How Bias Infiltrates the New York City Family Court—The Case of the Court Ordered Investigation*, 40 COLUM. J.L. & SOC. PROBS. 527, 531 (2007).

granting sole custody on the grounds that the parents demonstrated a high level of acrimony during the custody dispute; rather, the real concern will be whether the parents are capable of putting aside their differences and working together.

A. The Presumption Defined

A presumption in favor of joint custody would be exactly that: Judges would have to presume that joint legal custody must be awarded to both parents unless there is a compelling reason why there should not be joint custody.[178] Absent a compelling justification, both parents would maintain their decision-making authority over issues concerning their child's upbringing. This presumption would be in line with the Supreme Court's long-standing presumption that parents act in the best interests of their children[179] and would adequately protect a child's best interests without unduly encroaching on a parent's fundamental right. It would coalesce New York's current rule that there is "no prima facie right to the custody of the child in either parent"[180] with the state's purpose under the doctrine of *parens patriae*[181] and, in effect, would operate to restrain the court from granting either parent the right to sole custody unless the state has a compelling justification to protect a child from a detriment or harm to the child's health and safety.

Absent a detriment or harm to a child, the state would not be justified in awarding sole custody to one parent. Any justification a state might have in stripping a parent of his or her custodial rights stems from the "role of the state as sovereign in child custody determinations, when acting on behalf of

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[178] Under this presumption, a court, recognizing that every family's circumstances are unique, will have to order a joint custody arrangement conducive to the particular familial situation and not pigeonhole all joint custody arrangements.

[179] *See supra* note 153 and accompanying text. The initial burden would continue to be on the state to disprove that a parent is not acting in the child's best interests. *See* Troxel v. Granville, 530 U.S. 57, 68–70 (2000). As the Court noted in *Troxel*, the weight should not be on the parent to disprove that a certain arrangement would not be in the best interests of his or her child. *See id.* at 69.

[180] N.Y. DOM. REL. LAW § 70 (West, Westlaw through L.1988).

[181] In *Santosky v. Kramer*, the Supreme Court, while discussing the state's interest in terminating a parent's custodial rights, explicitly stated that "while there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not severance, of natural familial bonds." 455 U.S. 745, 766–67 (1982).

the . . . interests of a child."[182] In light of the fundamental interest at stake, there are "fairly tight limits on the exercise of the parens patriae power."[183] A state, acting under the penumbra of *parens patriae*, is only allowed to limit this right when there is a compelling state interest. Specifically, where there may be evidence that a custodial arrangement will jeopardize the health or safety of the child, the doctrine of *parens patriae* may usurp a parent's childrearing right.[184]

Judges will have to be wary of factual evidence that indicates a potential harm to the child. Contrary to the courts' implication that the "best interests of the child" rule provides the most precision possible,[185] evidence of specific situations that would actually harm a child is usually "much easier for a court to identify and evaluate than those factors that would result in the best possible environment for a child, because the probable harmful effects may be much more readily apparent."[186] There are, for example, certain obvious symptoms that a judge could observe and easily identify indicating whether a child is being provided adequate medical care and attention, adequate food, shelter, and clothing, and adequate parental supervision.[187] Without an overt showing of potential harm, a judge's decision to truncate a parent's right to the care, custody, and control of his or her child is much more speculative. A biased weighing of "best interests" factors, that do not necessarily determine whether a parent is fit to be a custodial parent, is far from a compelling reason to override the joint custody presumption.

Requiring that there be a potential detriment or harm to the child in order to grant exclusive legal custody to one parent is not a concept so far-stretched. Many state legislatures have explicitly directed courts to favor joint custody.[188] The Florida

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[182] *See* Danice M. Kowalczyk, *Lizzie's Law: Healing the Scars of Domestic Murder—An Emerging National Model*, 64 BROOK. L. REV. 1241, 1243 n.18 (1998).

[183] *Child Custody Relations*, *supra* note 98, at 1319.

[184] *See* Kowalczyk, *supra* note 181, at 1260.

[185] *See In re* Adoption of J.S.R., 374 A.2d 860, 863 (D.C. 1977).

[186] Robinson, *supra* note 14, at 61.

[187] *Id.*

[188] *See, e.g.*, CAL. FAM. CODE § 3040 (West 1997) (mandating that an award to both parents be first in order of preference for custody decisions); CAL. FAM. CODE § 3080 (West 1993) (requiring that there is a presumption that joint custody is in the best interests of the child); CONN. GEN. STAT. ANN. § 46b-56a (West 2005) (stating that "[t]here shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child"); IDAHO CODE ANN. § 32-717B (West 1994);

Legislature, for example, has overtly designated a presumption in favor of joint custody unless there is a showing of some detriment to the child. The Florida statute orders "parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child."[189] Florida's statute has set a strict requirement of detriment before a court could find that joint custody is inappropriate.[190] The Florida courts have defined detriment to mean "circumstances that produce or are likely to produce lasting mental, physical or emotional harm."[191] Detriment is more than "trauma caused to a child by uprooting him from familiar surroundings"; it "contemplates a longer term adverse effect that transcends the normal adjustment period."[192]

Under Florida law a parent's right fails to evaporate merely because he or she has not been an ideal parent.[193] Considering the "best interest of the child . . . does not obviate the necessity of a specific finding that shared parental responsibility would be detrimental to the child."[194] A "best interests" finding is not equivalent to a finding that shared parental responsibility would be detrimental to the child. In *Grimaldi v. Grimaldi*, for example, a Florida District Court of Appeals in affirming a prior joint custody order held that finding that a mother was not capable of exercising parental responsibility due to an illness was not the same as finding that shared responsibility would be detrimental to the child.[195] Just because a trial court assumes that it is in the best interests of the child for one parent to have

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MISS. CODE ANN. § 93-5-24 (West 2003) (placing joint legal custody as first preference in custody decisions); MO. ANN. STAT. § 452.375 (West 2011); NEV. REV. STAT. ANN. § 125.490 (West 1981) (stating that there is a presumption that joint custody is in child's best interests); N.M. STAT. ANN. § 40-4-9.1 (West 1999) ("There shall be a presumption that joint custody is in the best interests of a child in an initial custody determination."); OR. REV. STAT. ANN. § 107.105 (West 2008).

189 FLA. STAT. ANN. § 61.13(2) (West 2010).

190 *See* Maslow v. Edwards, 886 So.2d 1027, 1028 (Fla. Dist. Ct. App. 2004).

191 *In re* Marriage of Matzen, 600 So.2d 487, 490 (Fla. Dist. Ct. App. 1992).

192 *Id.* (citations omitted).

193 *See id.* (citing Santosky v. Kramer, 455 U.S. 745, 753 (1982)).

194 *Maslow*, 886 So.2d at 1028.

195 721 So.2d 820, 821–22 (Fla. Dist. Ct. App. 1998).

primary custody, it still must make a specific finding that shared parental responsibility would be detrimental to the child before granting sole custody to one parent.[196]

Similar to the Florida statute, under the proposed joint custody presumption, the state would be the final arbiter of whether there is a compelling justification to grant sole or joint custody. The joint custody presumption should not be eliminated solely on the grounds that a parent is requesting sole custody.[197] Even if one or both parents are seeking sole custody, the court should still undertake the dispute with the presumption that joint custody should be granted. A state can, in no way, eliminate the burden of proving a compelling interest based solely on a parent's request.[198] This is especially true because parents are permitted to request sole custody without presenting any specific reasons for rejecting joint custody or any "special factors that might warrant the conclusion that joint custody is not in the best interests of the child."[199] Absent a burden on the state to prove a compelling justification, a state would effectively be able to take away a parent's fundamental right through a foregone conclusion that one parent will have their decision-making right truncated regardless of the state's justification for doing so. Therefore, regardless of what each parent claims, a court must always assume the responsibility of determining whether there are compelling reasons to do away with the presumption and award sole custody to one parent.

B. Acrimony Looked at from a Different Perspective

The acrimony between the parents would still be a vital consideration in deciding whether there may be a potential detriment to the child and, therefore, a sufficient reason to

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[196] *See Maslow*, 886 So.2d at 1028 (stating explicitly that "utilizing the best interest of the child standard does not obviate the necessity of a specific finding that shared parental responsibility would be detrimental to the child before awarding sole parental responsibility to a parent").

[197] Granted, if a parent persists with the current "all or nothing" approach of custody and would rather not have any custody over his or her child than to share joint custody with the other parent, a court acting under the joint custody presumption should not impose on that parent a joint custodial arrangement.

[198] *See* James W. Bozzomo, *Joint Legal Custody: A Parent's Constitutional Right in a Reorganized Family*, 31 HOFSTRA L. REV. 547, 559 (2002) (stating that when dealing with a fundamental right, any infringement on that right imposes on the state the burden to show that there is a compelling justification for doing so).

[199] *Id.* at 570.

supersede the presumption in favor of joint custody.[200] For joint legal custody to be successful, parents must be able to get along and communicate about issues regarding their child's welfare. Judges, however, would be neither permitted nor justified in blindly accepting the acrimony they see before them during a custody dispute to rationalize granting sole legal custody. Of real concern is not whether the parents' relationship appears to be so discordant at the time of litigation to award sole custody, but, rather, whether the parents are capable of putting aside their differences and working together to engage in joint decision-making with respect to their child's upbringing and prevent any foreseen detriment or harm to their child.[201]

The mere fact that parents are so acrimonious during a custody disputes does not mean that a cooperative joint custody arrangement is not feasible. The reason parents come to court to resolve contested custody issues may range amongst many different reasons. For instance, parents who have never been married may seek a judicial decree to resolve the problems they are having over an existing custodial arrangement,[202] "former spouses [may seek] to modify a prior child custody order,"[203] or spouses who have filed for divorce may contest custody as a tangential issue of the divorce.[204] Clearly, parents have some underlying issues between themselves before even entering the

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[200] Currently, "joint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in mature civilized fashion." Braiman v. Braiman, 44 N.Y.2d 584, 589–90, 378 N.E.2d 1019, 1021, 407 N.Y.S.2d 449, 451 (1978); *see also* Thompson v. Thompson, 267 A.D.2d 516, 518, 699 N.Y.S.2d 181, 184 (3d Dep't 1999); Trolf v. Trolf, 126 A.D.2d 544, 544, 510 N.Y.S.2d 666, 667 (2d Dep't 1987).

[201] *See Trolf*, 126 A.D.2d at 544, 510 N.Y.S.2d at 667 (rationalizing that a judge's real concern in deciding custody is how capable parents are of "cooperating in making decisions on matters relating to the care and welfare of the children"); *see, e.g.*, Somerville v. Somerville, 307 A.D.2d 481, 483, 761 N.Y.S.2d 747, 749 (3d Dep't 2003) (finding that although the record reflected the "parties' apparent disdain for one another," that does not necessarily establish that the parents were so severely embattled that they could not communicate in reasonable fashion for their child's benefit).

[202] *See* Rosenthal, *supra* note 12, at 131–32. The existing custodial arrangement could be a modification from a past judicial decree or one that the parents have implemented on their own, without judicial intervention, or from an actual legal agreement.

[203] *Id.*

[204] *See supra* note 27.

courtroom; however, the embittered relationships evident during custody disputes are circumstances to a great extent fueled by the "traditional emphasis on exclusive custody" to one parent.[205]

When considering whether to grant sole custody, a judge would need to account for the fact that the animosity evident in custody disputes is largely due to the "winner take all" mentality that has become embedded in New York custody disputes.[206] The current system pits one parent against the other and forces them to battle out issues of custody. A parent is put in the position, whether he or she truly believes it or not, to voice the other parent's every imperfection, in hopes of persuading the court and gaining an advantage in the litigation.[207] Parents have no incentive to admit to the other parent's strengths or the benefits he or she can provide to the child when they have no idea how that admission will be considered by the court. This "winner take all" frame of mind will possibly persist through a new joint custody presumption, ultimately making it appear as if the hostility between the parents is at an even higher level than it actually is.

The high level of acrimony during custody proceedings, however, may be temporary and may likely wane as time passes. Parents come to court and seek judicial intervention to solve their impasse in order to move forward in their lives.[208] It has been argued that "[t]he very fact that both parents want custody badly enough to litigate for it suggests that," when push comes to shove, they may be "willing to work to minimize their conflicts with each other in order to retain custody."[209] The apparent discord between the parents during litigation may offer little

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[205] Robinson, *supra* note 14, at 30.

[206] *Id.*; *see also* New York State Assembly, Memorandum in Support of Legislation, B. 4559, 232d Leg. (2009) (advocating for a presumption in favor of shared parenting of children in matrimonial proceedings because sole custody generates "an adversarial forum where one side defaults and the other, allowing a 'winner' and a 'loser' to be declared") [hereinafter MEMORANDUM IN SUPPORT OF LEGISLATION]; Bozzomo, *supra* note 198, at 578; Rosenthal, *supra* note 12, at 140 (arguing that the litigation process of custody disputes "exacerbates acrimony between parties").

[207] *See* Bozzomo, *supra* note 198, at 578 (stating that parents have an incentive to "introduce very personal and damaging evidence against the other parent" in order to convince the court that they should be awarded exclusive custody).

[208] *See id.* at 576 ("Often, the reason why couples seek judicial intervention is to solve the . . . problems so that they can move their lives along and end the conflict.").

[209] *Child Custody Relations*, *supra* note 98, at 1330.

indication of whether "both parties are fit and loving parents, possess a desire to share in the upbringing of their children and have demonstrated a willingness and ability to set aside their personal differences and work together for the good of their children."[210] Therefore, fleeting acrimony, even if extreme, is far from a sufficient reason to curtail a parent's fundamental right.

C. Still in the Best Interests of the Child

A presumption that absent a compelling justification a court should award joint custody to both parents would not only be in line with constitutional mandate, it would operate to preserve the best interests of the child. As explained, even under a presumption in favor of joint custody, if joint custody would prove to be detrimental to a child, sole custody should and will be granted. Without a potential detriment or harm, however, a joint custodial relationship will be in the best interests of the child.

Shared parenting is in a child's best interest where the relationship between the parents and the child is free from abuse, neglect, domestic violence, and other harmful circumstances.[211] Unlike sole custody, under joint custody both parents have a right to engage in the upbringing of the child and feel as significant in the child's life as the other "because there is presumably no grave disparity between [the parents] regarding their authority."[212] As a result, parents feel less as if they are in a constant battle to get the upper hand over the other parent's involvement in the child's upbringing. Rather, parents make decisions and undertake the caretaking responsibility jointly. Both parents play a significant role in their child's life and development.[213] Thus, "maximiz[ing] the child's physical and

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[210] Palmer v. Palmer, 223 A.D.2d 944, 945, 637 N.Y.S.2d 225, 226 (3d Dep't 1996).

[211] MEMORANDUM IN SUPPORT OF LEGISLATION, *supra* note 206, at 4559 ("Shared parenting, where both parents share as equally as possible in the legal responsibility, living experience, and physical care of the child, has been found to be in child's best interest . . . [w]here the relationship between the parent(s) and child(ren) is free from domestic violence, abuse, neglect and other harmful circumstances.").

[212] Jo-Ellen Paradise, *The Disparity Between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone's Problems?*, 72 ST. JOHN'S L. REV. 517, 567 (1998).

[213] *Id.* at 566.

emotional access to both parents in meaningful, day-to-day interaction, and help[ing] the child to see both parents as sources of love and security and as positive role models."[214]

Joint custody also works to maximize a child's stability. When one parent is assigned sole legal custody, the other parent is "reduced to a peripheral 'visitor' status" and, as a "standard," granted limited visitation.[215] A joint custodial arrangement, on the other hand, permits greater contact with both parents and eliminates the risk of damaging effects from a parent withdrawing from the child's life after the custody litigation.[216] Children recognize that they can turn to either parent for advice and regularly interact with both parents.[217] As the father in *Finkelstein* indicated, a child may be more inclined to consult with one parent about certain issues.[218] Mr. Finkelstein's son, for example, would benefit from consulting his father, a male, as the boy grows up and his life "get[s] more difficult."[219] A child's needs, however, are not limited to consulting a parent of the same sex; a child may feel a greater sense of comfort speaking and getting advice from a specific parent but may not have the option to do so in a sole custody arrangement. Joint custody, on the other hand, reduces the child's feelings of rejection and abandonment and "is conducive to the child's emotional stability."[220]

In the event that a situation does arise where a court-ordered joint custodial relationship turns out to be a detriment to the child's well-being, at that point a parent's fundamental right to the care, custody, and control of his or her child will have to yield to the child's interests. The court may be to blame for not properly considering any potential detriment to the child or the parents may be at fault for making decisions that turn out to be harmful to the child's well-being. Regardless of who is to blame,

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[214] Robinson, *supra* note 14, at 32.

[215] MEMORANDUM IN SUPPORT OF LEGISLATION, B. 4559, 232d Leg. (2009).

[216] *See* Robinson, *supra* note 14, at 33.

[217] Paradise, *supra* note 212, at 572–73.

[218] *See* Finkelstein v. Finkelstein, N.Y. L.J., May 18, 1998, at 33, col. 4 (Sup. Ct. Kings Cnty. 1998).

[219] *See id.*

[220] H. Jay Folberg & Marva Graham, *Joint Custody of Children Following Divorce*, 12 U.C. DAVIS L. REV. 523, 557 (1979). In fact, children tend to show a great desire to continue existing relationships with their parents. *See id.* A child's desire to continue having both parents in his or her life does not automatically disappear because the parents have decided to end their relationship.

if such a situation arises, the parents do have the option to request a modification from the court. In *Hugh L. v. Fhara L.*,[221] for instance, the father received a modification from a prior custody order that awarded the parents joint "legal decision-making responsibility."[222] The Bronx County Supreme Court noted the troubling traits of both parents but still found that joint decision-making responsibility would "advance the best interests of the child."[223] The lower court, acting under New York's "best interests of the child" rule, did not find any potential detriment to the boy's physical or mental health resulting from each parent's troubling traits. The First Department's rationale for granting a modification, on the other hand, was based on specific detriments that a joint custodial relationship posed on the child's well-being. The mother posed a risk of physical harm to the child by failing to cooperate with medical professionals,[224] opposing counseling for the child,[225] and obstructing the father's relationship with his son.[226] The father, conversely, had made progress in becoming a better parent and in addressing any shortcomings he may have had.[227] It was only the "passage of time" and the "development of a fuller record" that permitted the First Department to accurately assess the risk of joint custody.[228] But if at any time joint custody proves to be detrimental to the child's well-being, a modification could and should be granted.

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[221] 44 A.D.3d 192, 840 N.Y.S.2d 352 (1st Dep't 2007). Although this case involved incidents of domestic violence, which the father pleaded guilty to, *id.* at 194 n.1, 840 N.Y.S.2d at 353 n.1, the court's reasoning for granting a modification was not based on the domestic violence because there had been no recurrence of the domestic violence from the time of the initial custody order, and there was no evidence that the father had ever been abusive towards his son. *Id.* at 197, 840 N.Y.S.2d at 356.

[222] Hugh L. v. Fhara L., N.Y. L.J., June 1, 2000, at 29, col. 6 (Sup. Ct. Bronx Cnty. 2000).

[223] *Id.*

[224] *Hugh L.*, 44 A.D.3d at 197, 840 N.Y.S.2d at 356. The mother preferred her own diagnoses to those of medical professionals, and was careless about filling and dispensing her child's prescriptions. *See id.* at 197–98, 840 N.Y.S. at 356.

[225] *Id.* at 197, 840 N.Y.S.2d at 355 (pointing out that the mother refused to acknowledge her own deficiencies and accept that counseling would serve to benefit her child).

[226] *Id.* at 198, 840 N.Y.S.3d at 356.

[227] *Id.*

[228] *Id.*

The likely administrative and cost burdens that may be imposed on courts as a result of parents seeking a modification of a prior joint custody order are not sufficient reasons for New York not to adopt a joint custody presumption. Critics of joint custody argue that it may increase a court's burden because parents may have to return to court and request the court to modify custody orders when joint custody turns out to be unsuccessful.[229] True, if joint custody proves to be unsuccessful, a judge will have to hear one more case and decide one more request, but a joint custody presumption may actually serve to decrease the courts' overall burden. Parents, knowing that a court must presume that joint custody is in the best interests of the child when there is no evidence of a potential detriment to the child's well-being, may be less inclined to come to court and litigate custody. Parents will have little incentive to try and litigate for sole custody when a joint custodial relationship is feasible and will ultimately be in the child's best interests, in effect decreasing the number of custody cases the courts will need to hear. More importantly, a fundamental right cannot be infringed upon merely because it may be administratively more efficient and less costly to decide issues concerning that right another way.[230] A state is not justified in retaining a statutory scheme that unjustifiably deprives individuals of their fundamental rights in order to minimize costs and burdens.

CONCLUSION

A presumption in favor of joint custody must be adopted to adequately protect a parent's fundamental right to the care, custody, and control of his or her child. The United States Supreme Court has recognized a parent's right to retain custody of his or her child as fundamental in nature. The Court intended to protect the "the private realm of family life"[231] and to ensure that parent's are involved in the upbringing of their children.[232]

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[229] *See* Rosenthal, *supra* note 12, at 150 (noting that critics of joint custody argue that people may have to come back to court to file violations or requests to modify custody orders, which may "clog up the judicial system").

[230] *See, e.g.*, Reed v. Reed, 404 U.S. 71, 76–77 (1971) (holding that a state violated the Fourteenth Amendment when it adopted a statute that gave a mandatory preference to people of a certain sex, merely to eliminate hearings on the merits).

[231] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[232] Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923).

In line with the Fourteenth Amendment's Due Process Clause, a joint custody presumption would require the court to find that joint custody cannot be granted without a state's compelling interest to protect against a detriment or harm to the child's physical or mental well-being.

The role of custody courts must be more than weeding through an ill-defined "best interests" rule that does not necessarily protect a child's well-being. The courts, acting on behalf of the state, have a vital interest in ensuring that a child's relationship and bond with his or her parent is not aimlessly broken. This involves more than an arbitrary and systematically biased application of random, judicially created "best interests" factors. In order for courts to safeguard the best interests of the child and protect the rights of parents, the New York courts and Legislature must accept the long-overdue recognition that shared parenting is in a child's best interests. Moreover, both the Legislature and the courts need to recognize that the constitution mandates nothing short of a detrimental impact on the child's well-being in order to trump a parent's right to joint custody and shared parenting.